

Symposium: The U.S.-Japanese Trade Relationship: An Interdisciplinary Approach to the 1990's: Introduction

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Introduction

The first trade dispute between Japan and the United States occurred 133 years ago when Townsend Harris demanded that Japan open trade to the United States. His goal was to make Japan as open to American commerce as was England; the Japanese response was that their society did not move quickly and that change would take time. As Professor First reminds us (p. 512), Japan is still not as open to American goods and services as is England, and change still takes time in Japan. One thing has changed, however; the Japanese are now willing to sell their products to us.

It is sometimes difficult to keep in mind that a great deal has gone on between our two countries since 1856 besides trade disputes. In the last decade particularly, our discourse on Japan has focused almost exclusively on the statistics of our economic relationship. As Professor Pempel argues persuasively (p. 439), the monthly anxiety about the latest bilateral trade figures masks a much more complex reality in U.S.-Japanese relations. Obsession with the deficit is disturbing, however, not only because it distorts reality, but also because it has become a symbol of American concern and confusion over our loss of economic and technological leadership in the world.

The emergence of Japan has had a disproportionate effect on the American psyche because we cannot explain it in terms of our Western conceptions of social and economic institutions. First, we attributed Japan's trade successes to our virtue and their cheating—our openness and their protectionism. As Japan has progressively reduced formal trade barriers over the last fifteen years, however, our relative position has deteriorated ever more rapidly. Next, we argued that Japanese industrial policy was the culprit—the Ministry of International Trade and Industry (“MITI”) was too good at picking winners and subsidizing them and that was unfair to the rest of the world. But, again, MITI's power and influence over the leading sectors of the Japanese economy has declined during the same period when Japanese companies have grown to dominate world markets. Finally, we decided, the problem was an overvalued dollar. We fell back on our most sacred of laws, the law of supply and demand, and drastically reduced the value of the dollar. The result was to accelerate our replacement by Japan as the world's financial leader and to impoverish American banks and companies rela-

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tive to their Japanese competitors. The bilateral trade deficit, as we all know by now, grew despite the laws of economics. Not only have we lost global power, but economists and politicians cannot explain why or tell us how we can prevent further loss.

In this context of intellectual and psychological insecurity, even tremendous successes beget doubt rather than reassurance. Japan has never threatened America's military and diplomatic preeminence, and our tacit division of labor has left our superpower image intact despite our economic defeats. Ironically, that image is now threatened by what may be America's greatest diplomatic success of the postwar period, the Gorbachev era in East-West relations and the potential decline of the Soviet Union as a military threat. If, as we all must hope, our military prowess becomes progressively less important in the face of a disappearing enemy, the definition of superpower will change as the major determinant of diplomatic influence shifts from military to economic and technological power. As former Under Secretary of State Allen Wallis points out (p. 381), "[t]he most essential ingredients of foreign policy today are economic," and national security is already being redefined to include an economic dimension.

In the midst of these developments, a symposium narrowly focused on legal aspects of U.S.-Japan trade would cast little light on the fundamental questions that make our trade relationship so central to Americans today. While a discussion of, for example, the characterization of administrative guidance under American antitrust laws or the place of "Super 301" within American trade law can be important, it remains a conversation within a conceptual framework of decreasing coherence and with dwindling relevance to the major developments that will determine the nature of U.S.-Japan relations in the 1990s. For these reasons, I am particularly grateful to the editors of the *Cornell International Law Journal* for stressing an interdisciplinary approach to U.S.-Japan trade for this special issue and for inviting such a diverse and stimulating group to speak on the fundamental structures of our bilateral relationship as well as the pressing issues that too often preoccupy our daily attention.

I. Legal Culture and Trade History

It is only in an interdisciplinary context can we understand the significance of the shifts in American rhetoric on trade that have accompanied our continuing deficits with Japan. Initially we moved from "free" trade to "fair" trade and the goal was "a level playing field" for American companies. While often used to mask narrowly protectionist interests, the analogy to an athletic contest is important. It demonstrates our assumptions that trade is governed by a set of common rules and that results are less important than the way the game is played. Even as whole domestic industries disappeared in the face of Japanese competition, we maintained that the only legitimate issue was whether the Japanese were "cheating." Of course, we defined what constituted cheating

and we were willing to change the rules to protect powerful political interests when necessary, but the persistence of the game rhetoric even as we continued to lose shows the importance of the role of culture, in this case legal culture, in defining and defending our national interests.

More recently, however, our rhetoric has changed. Former Secretaries of State Henry A. Kissinger and Cyrus R. Vance have advocated "managed trade" with Japan¹ and the Advisory Committee for Trade Policy and Negotiations, a body of private sector advisors to United States Trade Representative Carla A. Hills, has called for a shift to a "results oriented" trade strategy with Japan. Explicit in both approaches is the political determination of what the U.S.-Japan trade relationship should be and the use of negotiations to achieve that result. Under "managed trade" attention would be on the overall trade balance; under "results oriented negotiations" the attention would be on particular market shares in given industries, but the two approaches are identical in their rejection of the game analogy and in their assumption that common rules do not exist. As the Advisory Committee report put it:

Recognition that Japan does not behave like the United States, that it has different national interests, and the government-business cooperation in devising policies deliberately detrimental to American corporations is an accepted part of Japanese policy must be a starting point for thinking about appropriate counter-strategies.²

Understanding the meaning of this rhetorical shift requires an appreciation for the different cultures and histories within which Japanese and Americans have developed their attitudes toward society and "fairness" in economic and trade competition. Nowhere is the importance of culture and history better presented than in Professor Robert Smith's paper in this issue (p. 425). Nor have I read a more succinct statement of what is at stake in the current debate over "free" versus "managed" trade and "process" versus "results" oriented negotiations:

Given the two countries' very different assumptions about a wide range of issues—legal, economic, political, cultural—how shall we arrive at an understanding? Barring the way is a cultural factor, unique to neither, that renders it extremely difficult to establish agreement on whose rules to adopt and in what measure.³

Smith's "cultural factor" is simply ethnocentrism—"our natural tendency to label as intrinsically superior those rules that happen to appeal to us"—but its very naturalness often prevents us from recognizing the cultural causes and consequences for our bilateral relationship. Smith reminds us that what is at stake is not just who is economically ahead but also who "is to call the shots, make the adjustments, and establish the rules" of our relationship (p. 427).

1. Kissinger and Vance, *Bipartisan Objectives for American Foreign Policy*, 66 *FOR. AFFAIRS* 899, 913 (Summer 1988).

2. Cited in *N.Y. Times*, Feb. 17, 1989, at A1, col. 6.

3. Smith, *Culture as Explanation: Neither All Nor Nothing*, *infra* at 427.

The postwar history of our trade relationship gives substance to Smith's anthropological analysis. Paper after paper, encompassing the diplomatic view (Wallis, p. 385) (Yachi, p. 390), the U.S. congressional view (Mastel, p. 520) (Wolf p. 493), the U.S. executive view (Fukushima, p. 455), and the legal academic view (Haley, p. 413) (First, p. 512), demonstrates the tension between the constant reiteration of free trade philosophy and the repeated government intervention on both sides of the last twenty years. Beginning with the conflict over Japanese cotton textiles and culminating in the explicit market management of the semiconductor agreement, the U.S. response to Japanese competition has combined a paradoxical commitment to the postwar liberal trade order with consistent, if at times ineffective, government intervention in its operation. It is a process by which, in Professor First's phrase, the international community "drift[s] toward quota capitalism" and away from market competition (p. 515).

While the urge to intervene can be explained by domestic politics—the "tyranny of minorities" that Secretary Wallis points out characterizes both governments (p. 387)—Professor John O. Haley has given us an added level of understanding in his discussion of our two distinctive legal cultures. According to Haley, social order is maintained in Japan by a "prevailing pattern of consensual ordering" (p. 418) that is distinct from legal ordering and state control. In the economic sphere, consensual ordering has led to a "complex network of long-term contractual relationships and persuasive reliance on relational contracting" that contributes to corporate survival in an otherwise highly competitive environment (p. 418). The economic ministries provide the situs for participating in policymaking but do not unilaterally determine it. Instead, policy is determined and implemented by negotiation among trade associations and cartels and government. Japanese economic policy, therefore, consists of "[n]egotiated deals and bargained for solutions" (p. 418) rather than either legal ordering dictated by administrative power or market ordering through unlimited free competition.

If Haley is correct in this description of the formation and implementation of economic policy in Japan—and I believe he is—the process implies a vision of economic interaction and social order that contrasts sharply with the neoclassical world view that dominates American economic thinking and the rule of law ideal that dominates American legal culture. It means, in other words, that "fair" trade may signify quite different things to Japanese and American business persons and negotiators. It may also mean that the rhetorical shift from "free" to "fair" to "managed" trade has been a shift towards Japanese visions of domestic economic ordering, and that the history of our bilateral trade relationship may be interpreted as a shift from the free trade ideals and rhetoric of GATT to the "consensual agreements" of domestic Japanese economic and social policy. Greg Mastel puts the case for explicit recogni-

tion of a bilaterally managed economic relationship strongly,⁴ and congressional pressure may force both governments to emphasize bilateral concerns at the expense of multilateral negotiations and the GATT in the future.

II. Structural Realities and Political Leadership

As yet, however, this shift has neither been recognized nor endorsed by the American government, and the Japanese government has recently put additional emphasis on free trade principles in its international rhetoric, although the rhetoric of "consensual arrangements" remains strong in discussion of domestic matters. The economic analyses of Wallis and First remind us of both the benefits of free competition and the strength of market forces, and many would argue that "managed trade" or "consensual agreements" in a capitalist context can never defy market forces in the long term. Indeed, the advocacy by former Ambassador Mike Mansfield, among others, of a free trade agreement ("FTA") between Japan and the United States indicates the strength of the belief that more, rather than less, free competition is the answer to trade friction (Fukushima, p. 458).

Nonetheless, most of the authors in this symposium argue that structural impediments render market solutions to the outstanding trade issues virtually impossible in at least the short run, implying that some level of continued government intervention is inevitable. In his analysis of the motivations and problems of a free trade agreement, Glen Fukushima of the Office of the United State Trade Representative identifies "a second level of barriers best characterized as corporate, institutional, or organizational . . . These structural features make it difficult for any newcomer to enter the market . . ." (Fukushima, p. 462). In his opinion, these factors would make an FTA ineffective and lead only to further American frustration (p. 461).

Fukushima's analysis is echoed by that of Shotaro Yachi, Economic Counselor of the Embassy of Japan, who also sees an FTA as premature at best (p. 397). He identifies the same phenomena as "intractibles" (although not "unchangeables") in the short run and argues that they must remain outside the immediate scope of trade negotiations. Professor Pempel recognizes structural problems on the American side of the analysis but agrees that "[s]uch broad structural traits of both Japan and the United States must be mutually recognized and accepted as relatively inherent parts of each country's history and tradition" (p. 451).

If these diverse voices are correct in their common interpretation, the future of the U.S.-Japan economic relationship will depend on the political will to make difficult choices not only in the conventional sense of further market opening measures in Japan and continued resistance to retaliatory measures in the U.S., but also in devising new approaches

4. Mr Mastel's position is outlined in his remarks during the Roundtable Discussion, *infra* at 520. See also Baucus, *A New Trade Strategy: The Case for Bilateral Agreements*, 22 Cornell Int'l L.J. 1, 12 (1989).

to the structural obstacles that we now face. Much of the adjustment burden will fall on the U.S. in terms of the macroeconomic issues of budget reduction, savings and investment levels, etc. But Pempel argues that macroeconomic adjustments must also be accompanied by attitudinal and structural changes, including greater sensitivity to international economic developments and more systematic concern with long term markets by American government as well as business.

How the U.S. government will interpret these challenges and what strategies it will adopt to meet them is extremely difficult to predict. The free trade perspective of the Department of State, as represented by Secretary Wallis's paper, contrasts sharply with the view of at least some members of Congress, as represented by both Mastel and Wolf, not only in terms of the nature of the problem, but even in whether there is a problem at all. Even among those who recognize serious problems and the need for action, the possibility of a unified approach to Japan seems unlikely. Mastel's call for a sweeping economic agreement between the United States and Japan⁵—what others have called a "G-2" dual hegemony replacing an outdated *pax Americana* and forestalling a premature *pax Japonica*—contrasts sharply with the striking variety of disputes and potential disputes delineated in Wolf's congressional agenda for Japan. Professor Calder's description of the conflicting interests of sectors and regions of American society vis à vis Japan amply demonstrates that necessary coordination goes well beyond the contrasting views of different branches of the executive or power struggles between Congress and the President (p. 477). The very complexity of the relationship, of course, is one strong argument for a comprehensive approach to Japan, but a recognition of the need provides neither the needed political will nor the necessary institutional framework for the compromises that might make a comprehensive Japan policy possible.

Two certainties seem to emerge from the symposium discussion of the U.S.-Japan trade relationship. First, the frictions in the relationship have reached intolerable levels and yet, further tolerance will be necessary. As Yachi puts it, there are simply no "quick fixes" for a very uncomfortable situation, and muddling through—what he calls "cultural magnanimity" (p. 397)—may be the only choice. The alternative may be cultural war and the destruction of a relationship that has brought unprecedented prosperity to both countries. Second, the stakes are higher now than they have been in previous instances of "intolerable" friction. The universal recognition of America's decline relative to Japan and the decline of the Soviet military threat will require both nations to redefine their self-images. The United States must learn to share its power, and Japan must learn to assume responsibilities commensurate with its wealth. Neither task will be easy, but the survival of the international trading system that has produced the Japanese "miracle" depends on their success.

5. See *supra* note 4.