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Luck, Law, Culture and Trade: The Intractability of United States-Japan Trade Conflict

The tensions and conflicts between the United States and Japan arising from their bilateral economic relationship are neither new nor novel. Throughout the century, Japan's industrial trading partners—including the United States—criticized what they perceived to be unfair, mercantilist trade practices by Japanese exporters.1 Over the past decade as U.S. trade deficits have mounted and Japan's surplus has steadily increased, however, the strains between the two countries have become dangerously acute, with predictable consequences: not only has the trade relationship between the two countries become a major domestic political issue, it is now also one of the most studied topics of the postwar era.2

Except perhaps for firm-specific data, guarded out of proprietary concern for secrecy, most if not all of the basic facts are widely known. Few if any significant aspects of the trading relationship between the United States and Japan have escaped economic, political or legal analysis. Not that this deluge of commentary and data has produced consensus. Controversy persists on both sides of the Pacific over the most basic issues—the causes and consequences of Japan's postwar economic success and the apparent failure of the United States to respond effectively.

This debate has pitted Japan specialist against Japan specialist in the United States3 and intensified political division within both coun-

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1. See, e.g., Ishii, Wanted Fair Play, in CONTEMPORARY JAPAN 179, 180 (1934), describing European charges of "Japanese economic aggression."
tries. Writing in the mid-1980s, Stephen D. Cohen summarized the tensions:

The post-World War II reduction in global trade barriers and the corresponding rise in international economic interdependence brought the Japanese and U.S. industrial sectors into close contact. Although they were indisputably two of modern history's strongest economies, one achieved greater competitive success than the other. In international trade terms, the result was a serious bilateral trade imbalance whose economic significance was overwhelmed by a growing communications gap.

Unfortunately, the problem is not merely one of miscommunication or differences in perception between, in Cohen's words, "the image in Japan of the United States as bully and the image in the United States of Japan as selfish manipulator of unfair trade practices." Behind both the monthly trade figures and the public quarrel lie profound differences in the two societies' institutional and cultural environments, which influence both economic and political behavior. Pivotal are the differences in the shared values, attitudes and expectations toward law and the state—in other words, their legal cultures—that shape and concomitantly are shaped by the institutional arrangements for social ordering.

Underlying the economic and political issues that divide the United States and Japan are gaps in attitudes and expectations toward law and its uses as an instrument of social ordering and control. Intertwined into the social fabric of both nations are basic assumptions about the role of the state and the role of law as a means of regulating social order. These assumptions influence not only patterns of livelihood and social reality, they also delimit the perceptions of what instrumental means for political and economic policy are available or desirable in each society. My aim in this essay is to attempt to define these contrasts as they relate to trade and their contribution to the intractability of trade conflict between the two nations. Part One commences with an overview of Japan's postwar economic growth and describes the context of the trade problem, emphasizing the significance of Japan's protectionist policies and the pattern of the American response. Part Two offers an interpretive analysis of the two legal cultures and attempts to explain the interplay between law and trade. The concluding section contends that continued trade conflict is inevitable. Settlement is not politically possible in either country.

The argument in Part One, briefly stated, is that Japan's postwar economic performance was at least as much a consequence of fortuitous

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6. Id. at 2.
circumstances beyond Japan's control as the industrial policies of a talented and perceptive bureaucracy or the invisible hand of the free market. However, as Japan recovered and domestic consumption expanded, both the protectionist features of Japan's industrial policy and market forces stimulated vigorous firm rivalry among domestic enterprises, especially in industries in which there had been significant new entry. These events have in turn combined to foster the competitive strength of certain industries in international markets. By the mid-1970s the Japanese economy was thus characterized both by select, highly competitive industries, such as electronics and motor vehicle manufacturing and also by significantly less efficient industries dominated by firms and industries whose survival often depended upon consensual domestic trade restraints as well as protection from foreign competition.

Except in the case of cotton textiles, the United States hardly responded at all to Japan's trade practices or policies until the late 1960s. Even then, paradoxically the United States' official advocacy of liberal international trade policies and multilateral solutions to trade conflict impelled the United States to seek informal, unilateral restraints by Japan to curtail competition in U.S. markets rather than to engage in a sustained effort to gain access for U.S. producers to Japanese markets. This protectionist emphasis in turn tended to benefit Japan by fostering even greater efficiencies by the most effective Japanese rivals to U.S. firms as well as greater entrenchment by the least efficient sectors of the Japanese economy. The ultimate consequence was to postpone and thus to intensify future trade conflict.

Part Two turns to attitudes toward law, the state and consensual means of governance. Part Two contends that in the historical context of U.S.-Japan trade relations, the relative strength of private, consensual mechanisms for maintaining social order and for containing state power in Japan, in contrast to the weakness of social controls and corresponding reliance on law and state power in the United States, has exacerbated trade conflict. Not only do these differences impair effective governmental resolution, but they also preclude the moral claims of reciprocity.

This Article concludes that, along with the increased influence of the Japanese Diet and the U.S. Congress in formulating trade policy, these patterns of social ordering can be expected to sustain, if not greatly intensify, trade conflict between the two nations.

I. Japan in the Postwar Period
A. Economic Recovery and Growth

No single set of factors adequately explains Japan's economic recovery and growth as a global trading power. However instrumental the industrial policies of the developmental state or the forces of free markets

7. See, e.g., C. Johnson, supra note 3.
and firm rivalry, Japan's postwar economic performance owes much to a complex combination of fortuitous, exogenous circumstances and seemingly endemic cultural traits, such as high savings rates and hard work. In a word, Japan was lucky.

Not the least important of the factors beyond manipulative control that contributed to Japan's economic growth was a liberal postwar economic and political order designed and maintained by the United States. The postwar Pax Americana established a stable framework for the relatively unrestricted movement of capital and goods with a corollary guarantee of security in both the Atlantic and Pacific communities. Within the postwar system, Japan could count upon access across the Pacific to American markets, as well as worldwide, to vital raw materials without the costly necessity of maintaining a self-sufficient military establishment. For the first time in modern Japanese history, the state could fully devote its efforts and resources to create the social and economic infrastructure necessary for the expansion of productive capacity.

The United States was also responsible for internal legal, economic and political reforms that enabled Japan to respond effectively to its new international environment. As Takafusa Nakamura has observed:

The externally imposed occupation reforms greatly changed the fixed system of the prewar Japanese economy and ended by preparing a rich soil not only for "democratization" but also for economic growth. For example, the rise in both farmers' and workers' incomes and the expansion of consumption capacity as well as the dissolution and the elimination of excessive concentration, combined to produce the competitive conditions that were indispensable for this growth.

Nakamura could have added two critical reforms to his list. First, the demilitarization of Japan with constitutional prohibitions against a military establishment allowed Japan to withstand future domestic and international pressure to direct substantial resources to maintain external security. Second, the Allied Occupation initiated and left in place the legal framework for governmental regulation of foreign exchange, trade and investment. As detailed below these controls provided Japan's economic bureaucracies with the instruments of protectionism as well as the leverage for direction of domestic economic activity. No Japanese Diet had before or would since give Japanese officials so extensive an array of legal controls and powers.

Two other exogenous factors deserve mention. One was the Korean War. The increase in Japan's dollar reserves resulting from U.S. military procurement between 1950 and 1952 enabled Japan, at a critical juncture in its recovery, to more than double its imports of raw materials used to expand industrial production (and, one might add, its imports of foreign technology).

8. See, e.g., Patrick & Rosovsky, supra note 3.
10. Id. at 41-42.
Another was the discovery and development of new mineral resources within Japan's Pacific Basin periphery. Except for oil, by the late 1960s, nearly all of Japan's most critical needs for industrial raw materials could be met from sources within a few days of overseas transportation. From the great fir forests of Western Canada and the U.S. Pacific Northwest to Australia's cornucopia of mineral deposits, the abundant natural resources of the Pacific Basin fuelled (quite literally in the case of oil and coal) Japan's continued industrial expansion. The contribution of new mineral discoveries in Australia from 1955 to 1970 deserves special emphasis.

Most contemporary analyses of the Japanese economy seem to take Australia's vast mineral resources for granted. Virtually ignored is the fact that nearly all of Australia's major mineral resources other than gold, lead and zinc were not discovered until the late 1950s and 1960s. At the end of World War II, Australia was thought by most experts to have few if any major deposits of ore, except for lead and zinc. Only minor deposits of iron ore, copper, tin, and tungsten were known to exist. Australia had no known bauxite or nickel deposits, and any deposits of manganese and uranium were considered to be rare or trivial. Beginning with the discovery of bauxite at Weipa, between 1955 and 1973 Australian geologists had discovered by world standards very large deposits of iron ore and major deposits of copper, nickel, tin, manganese and uranium. Most of these newly discovered resources were located near the sea and thus accessible for efficient exploitation and transport. These discoveries coincided with Japan's full economic recovery in the early 1960s and were critical for the rapid expansion of its industrial capacity from the mid-1960s. With long-term supply contracts Japanese industry financed the development of these resources and gained in return an assured supply of vital resources at stable costs.

The significance of Australia to Japan's economic expansion is exemplified by the case of steel. Citing a 1983 study by Barnett and Schorsch comparing U.S. and Japanese costs for producing cold rolled sheet steel (used in automobiles, appliances and cans), Eads and Nelson note that between 1958 and 1980, "Japan turned a U.S. cost advantage of $14 per ton (12 percent), into a Japanese advantage of $588 per ton (31 percent)." They attribute this successful effort to improve Japanese competitiveness in part "to shrewd purchasing of raw materials, especially iron ore." However, they mostly credit Japanese labor productivity. "In 1958," they note, "Japanese steel makers used 36.65 man-hours of labor to make a ton of steel. By 1980 this had been reduced by


84 percent to 5.84 man-hours.” Ignored, however, is the fact that these productivity gains were largely offset by wage increases. Barnett and Schorsch show that, in terms of labor, the unit cost in dollars of cold rolled steel in the U.S. in 1958 was $43 per ton. By 1980 the U.S. cost had more than tripled to $135. This increase is attributed to an increase in the dollars per man-hour of labor from $3.75 in 1958 to $18.80 in 1980 in comparison to the man-hours per ton reduction of 11.58 in 1958 to 7.20 in 1980. In Japan, however, although the number of man-hours of labor to produce an equivalent quantity of steel was reduced much more as noted, Japanese labor wages per hour increased from $.58 in 1958 to $11.00 in 1980, more than six times the U.S. increase. As a result, relative labor costs per ton in Japan remained nearly the same—also tripling from $21 per ton in 1958 to $64 per ton in 1980. Productivity gains did not therefore translate directly into competitive price advantage for Japanese steelmakers (although, as noted below, these gains were important to the expansion of private savings and consumer markets).

The primary factor in the reduction of Japanese steelmakers' costs relative to their American competitors was instead Japan's access to less costly iron ore and stoking coal. Although the dollar cost for the Japanese of iron ore per ton of cold rolled steel doubled from $22 in 1958 to $46 in 1980, it quadrupled for American producers from $15 to $58 during the same period. Similarly, in the case of stoking coal, Japan's costs increased from $19 to $58 per ton of steel, but U.S. costs increased even more, from $11 to $45, a threefold increase for Japan as compared to a fourfold increase for the United States. The Japanese cost advantage gained between 1958 and 1980 can thus be explained almost entirely by access to relatively cheaper iron ore and coal, most of which was imported from the new Australian mines they helped to develop.

The postwar wage gains of Japanese steelworkers were not an isolated exception. Concomitant with the expansion of Japanese industry were steady increases in Japanese real earnings. In comparative terms, Japanese workers outpaced their American and West European counterparts by wide margins. Galenson and Odaka, for example, estimate that between 1962 and 1972, the average annual increase in real earnings in manufacturing in Japan was almost double that of West Germany and six times the U.S. average. Ikuo Kume goes even further to suggest that by 1974 wage gains had actually begun to discourage industrial investment.

Productivity increases and the concomitant rise in disposable income in Japan did play an important role. They produced a rapid expansion of savings and consumption. As summarized by Kosai and

14. Id.
Ogino, "The increased purchasing power of the masses expanded internal demand, and made mass production of consumer durables possible, thus supporting economic growth." \(^{17}\) The growth of domestic consumption capacity was in turn critical for continued industrial expansion, although one should add the growth of plant and equipment investment as well. \(^{18}\)

Until the mid-1970s, domestic consumption rather than exports thus provided the primary source of demand necessary for Japanese industrial growth. In the case of automobiles, for example, between 1957 and 1970, Japanese automobile production grew at an average rate of 58 percent per year. Although the percentage of exports also increased steadily each year, until 1965 Japanese automobile manufacturers exported less than 10 percent of their total production and did not begin to export more than a fifth of their production until 1970. \(^{19}\) The automobile industry was not exceptional. Until the mid-1970s exports accounted for only about 10 percent of Japanese GNP. Even as late as 1984, domestic consumption absorbed 80 percent of the cotton fabric, 66 percent of the crude steel, 65 percent of the machine tools, 78 percent of the transistors and decoders and over 40 percent of all automobiles produced in Japan. \(^{20}\)

Two and a half decades of continuously expanding consumption capacity does not, however, fully explain why Japan was able to maintain high rates of economic growth or to emerge as a trading power. Protectionism and firm rivalry also played key roles.

B. The Role of Protectionism

In broad outline, formal Japanese restrictions on foreign entry began in the twilight years of the Allied Occupation with the enactment of the Foreign Exchange and Foreign Trade Control Law in 1949 \(^{21}\) and the Foreign Investment Law in 1950. \(^{22}\) These two statutes, initiated and drafted by Occupation authorities, represented the first truly comprehensive legislative measures to regulate foreign trade and investment in modern Japanese history. \(^{23}\) The only comparable statutes were the significantly less restrictive foreign exchange controls enacted in the 1930s. \(^{24}\)

Both of these statutes were initially designed as temporary, emergency legislation, and Japanese officials were surprisingly reluctant at


\(^{18}\) T. Nakamura, supra note 9, at 49, 50.


\(^{20}\) T. Okuda, Japan's Industrial Economy 82 (International Society for Educational Information, Monograph No. 52) (1987).

\(^{21}\) Gaikoku kawase oyobi gaikoku boeki kanri hō (Law No. 228 1949).

\(^{22}\) Gaishi ni kansuru hōritsu (Law No. 163 1950).

\(^{23}\) See J. Cohen, Japan's Economy in War and Reconstruction (1949).

\(^{24}\) See, e.g., Gaikoku kawase kanri hō (Law No. 28 1938); see also Satō v. Japan, 16 Keishū 193 (Gr. Ct. Cass., 3d Crim. Dept, Dec. 3, 1936) (invalidating regulations issued under statute as ultra vires).
first to accept either. Only gradually did Japan's economic bureaucracies fully discover their utility as instruments of domestic and international economic policy. The years from 1945 to 1955 thus constituted the most open postwar period for foreign entry and participation in Japanese markets. Japan's relative needs for capital, U.S. dollar reserves, and foreign technology were never to be as great. But few foreign firms were interested. The postwar expansion of the American market had begun and, overseas, investment in Europe still seemed far more inviting than Japan. Some U.S. firms, notably IBM and Coca-Cola, were more farsighted, but otherwise, except for firms in the basic oil, chemical and metals industries, most U.S. enterprises spurned this window of opportunity.

Japan’s impulse toward protectionism reached its zenith in the period from 1955 to 1960 under the first Five Year Plan. Designed to free Japan from dependency on U.S.-military procurement orders and to overcome seemingly chronic balance of payments deficits, the objective of the plan was to develop Japan's self-sufficiency by promoting exports and restricting imports. As described by Komiya and Itoh:

On the one hand, exports were promoted by such policy measures as subsidies, provision of low-interest loans for promising export industries, and preferential tax treatment of income from exports and for exploration of new export markets. These measures were meant to lower costs for exporters and to give incentives to export. On the other hand, since imports would naturally increase along with economic growth, they had to be restrained as much as possible. Imports of raw materials and machinery essential for domestic production were given priority, whereas imports of consumption goods and goods that could be produced domestically had to be severely restricted under the disequilibrium system.

The means available were relatively simple. In addition to establishing tariffs and quotas, the Foreign Exchange and Foreign Trade Control Law provided for a system of approvals for allocation of foreign exchange and of licenses for imports and exports. This statute and the regulations issued thereunder were also used in conjunction with the Foreign Investment Law to restrict foreign enterprises from leapfrogging import barriers by setting up either branch offices or subsidiaries in Japan. Although between 1956 and 1963 foreign investors willing to forgo government guarantees for repatriation of profits could establish "yen-based companies" allowing investment of profits in Japan, even this avenue was closed in 1963. Ironically, Japan's entry into the Organization for Economic Cooperation and Development ("OECD") in 1964

brought even more stringent restrictions. Thus armed with broadly defined discretionary authority and an array of approval and licensing powers under these statutes, Japan's economic bureaucracies managed to erect a seemingly impenetrable barrier against outside competitors.

At home, however, governmental economic policies to induce concentration and restrain competition did not fare well. Fearful that unrestrained market rivalry would prevent Japanese producers from earning the capital necessary for research, development and expansion of productive capacity to levels that would assure effective economies of scale, officials in the Ministry of International Trade and Industry ("MITI") and other economic ministries attempted to use foreign exchange and foreign trade controls also to restrain domestic competition and promote greater concentration. MITI officials thus encouraged cartels and other collective means of reducing "excessive" competition and the risks of economic expansion and attempted to restrain entry and to induce greater concentration. Yet without more stringent licensing controls or coercive powers, MITI and Japan's other economic bureaucracies generally failed to achieve their primary objectives in nearly all "targeted" industries—integrated steel, automobiles, electronics, pharmaceuticals, and even retailing. The failure of governmental policies to restrict entry thus ensured that these industries remained fiercely competitive in their home markets.

Official policies designed to restrain competition did, however, have an impact. By reducing the risks of investment, these policies encouraged firms to expand their productive capacity and to increase their share of the market even in recessionary periods. The result was the notable expansion in investment of the mid-1960s and the consequent impetus toward expansion of exports as a result of overcapacity. Thus Japanese exports began to increase rapidly in the late 1960s.

Concomitant with the resulting increase in Japan's share of world markets, a marked shift occurred in the composition of Japan's exports away from textiles and light industry products to such higher value-

29. A caveat is necessary. Some U.S. and other foreign enterprises did manage to penetrate the barriers by tough bargaining. As exemplified by DuPont's participation in Japan's petrochemical industry in the late 1950s and Texas Instruments' entry in Japan's integrated circuits market, foreign firms could gain access by demanding entry in return for Japanese access to technology considered necessary for Japanese industrial expansion.
33. Id. at 99-100.
34. Komiya & Itoh, supra note 27, at 186.
added exports as steel, automobiles, and consumer electronics.\(^{35}\) It was not until after the first oil shock in 1973, however, that domestic markets could no longer absorb the lion's share of annual increases in Japanese production. Thus after 1975 exports become truly critical for Japan's continued economic growth with rising dependency on U.S. markets. From the mid-1970s Japanese exports of goods increased sharply, with nearly a 45 percent gain in dollar value between 1975 and 1977 alone.\(^{36}\) During this period the U.S. share of Japanese exports remained a relatively constant 23 to 25 percent, with a slight decrease in 1975.\(^{37}\) But between 1982 and 1986, the U.S. share increased from 26.2 percent to 38.5 percent.\(^{38}\)

As a consequence of protectionist barriers, arguably, Japanese manufacturers were overwhelmingly the beneficiaries of the postwar growth in Japanese consumer and industrial consumption. Japan's economic recovery produced new wealth that through consumption generated sufficient domestic demand to justify further industrial expansion, increasingly financed by the savings economic growth also created.\(^{39}\) However, when Japanese consumers bought new telephones, radios, watches, cameras, televisions and cars, they bought Japanese. Industrial producers did likewise. By the mid-1970s Japan had become the world's second largest consumer market, yet imported goods supplied only a tiny portion of that market. Although during the two decades between the early 1960s and the early 1980s Japanese exports of goods, services and income rose from about 11 percent of GNP,\(^{40}\) imports of manufactures remained constant at slightly below 3 percent.\(^{41}\)

In terms of the contribution of consumption capacity, the effectiveness of protectionist policies until the mid-1970s can therefore be considered a critical factor in promoting Japanese economic growth and international trade competitiveness. As Japan's consumption rose, the protectionist barriers meant that only Japanese producers benefited. Domestic consumer demand thus spurred new industrial expansion, new entry and even greater competitiveness. In turn, by the late 1960s Japan's leading producers of televisions, automobiles and other consumer goods as well as steel, machine tools and other industrial products had achieved the economies of scale, managerial skills and other advantages to enable them not only to dominate Japanese markets but also to compete effectively in foreign markets.\(^{42}\) (Such conclusions remain speculative, of course, since we do not know for certain what

\(^{35}\) Id.

\(^{36}\) T. Nakamura, supra note 9, at 238.


\(^{38}\) Id.

\(^{39}\) See T. Nakamura, supra note 9, at 51-52.

\(^{40}\) Komiya & Itoh, supra note 27, at 187 (Table 3).

\(^{41}\) Saxonhouse, Comparative Advantage, Structural Adaptation, and Japanese Performance, in 2 The Political Economy of Japan: The Changing International Context, supra note 4, at 231 (Table 5).

\(^{42}\) See, e.g., D. Henderson, supra note 26, at 243.
would have occurred had there been no protectionist barriers in the 1950s and 1960s, despite economists' models.\textsuperscript{43}

This line of reasoning is especially attractive, however, because it helps to explain why the removal of nearly all significant formal protectionist barriers by the early 1970s did not result in a corresponding increase in imports into Japan. As Saxonhouse reminds us,\textsuperscript{44} by the early 1970s, Japan had dismantled most formal barriers to manufactured goods. Throughout the 1980s Japan had lower tariffs and fewer quotas for manufactured products than the United States and the EEC, except for Austria, and than any other West European state. By the 1980s, however, Japan's domestic producers in key industries had not only established competitive dominance in their home markets but they had become fierce rivals internationally as well.

However accurate this argument may be for certain products and producers, such as televisions and automobiles, it does not explain the many instances in which Japanese producers, although not competitive abroad, still managed to dominate their domestic markets without the benefits of formal protectionist barriers after the early 1970s. The nature of the American response was a significant factor.

C. The United States Responds

The United States reacted to Japan's emergence as a competitive global trader with two contradictory approaches, driven by domestic political concerns.

The first approach was to induce Japan to join in the postwar multinational economic order grounded in free trade principles. As early as 1953, under American sponsorship, Japan began to participate informally in the General Agreement on Tariffs and Trade ("GATT"), becoming a contracting member in 1955. Not until the mid-1960s, however, did the United States begin to exert sustained pressure on Japan to abandon import trade and foreign investment restrictions. In 1964 Japan had become an Article 8 member of the International Monetary Fund, obligating it to refrain from imposing quantitative restrictions on imports for purposes of balance-of-payments equilibrium. Yet, as noted previously, Japan's immediate response was to intensify restrictions. Not until 1968 did the Japanese government begin to implement liberalization measures, and then only gradually over a five year period. The United States' efforts to open Japan through bilateral negotiations gradually increased in intensity as Japan's merchandise trade surpluses with the United States began to mount from the late 1960s. The rapid growth in Japan's trade surplus in manufactured goods in the late 1970s and 1980s, despite substantial reduction of trade and investment restric-

\textsuperscript{43} For an example of a contrary view, see Saxonhouse, \textit{supra} note 41.
\textsuperscript{44} \textit{Id.} at 231-32. \textit{See also} United States International Trade Commission, \textit{Foreign Industrial Targeting and Its Effects on U.S. Industries, Phase 1: Japan} 65-69 (1983).
tions, produced even more strident demands for reciprocity and positive action to facilitate U.S. access to Japanese markets. Even then, however, American efforts to persuade Japan to open its markets were mild in comparison with countervailing protectionist tendencies to provide relief for U.S. industries affected most by Japanese exports to the United States.

The conflict over Japanese cotton textiles exports established the dominant pattern of the U.S. response. U.S. officials, particularly in the State Department, were concerned primarily with the broader context of global barriers to trade and the United States' leadership in fostering a liberal international economic order. Fearful that the political influence of the U.S.-textile industry particularly in the Southeast might scuttle U.S. efforts to advance multilateral reductions of trade barriers, they attempted to quell industry complaints by paradoxically seeking Japanese export restraints. Preoccupied with Europe, U.S. policymakers paid only passing attention to Japan. Neither they nor American industry foresaw Japan's economic growth and the importance of its emerging domestic markets. Japan, they seemed to think, could be treated as a relatively insignificant exception.

For Japan, however, cotton textiles constituted throughout the 1950s the single largest export product. As late as 1960, textiles generally accounted in value for over 30 percent of all of Japan's exports with cotton fabric and apparel over 8 percent of the total. For purposes of comparison, export of iron and steel combined was slightly under 10 percent, ships and tankers about 7 percent and automobiles less than 2 percent.

In the early 1950s, U.S. cotton manufacturers had begun to complain bitterly of Japanese imports and to seek administrative and legislative action. Although, as a defensive U.S. State Department noted, in 1955 the annual rate of cotton textile imports from Japan amounted to only about one percent of U.S. domestic production and less than 20 percent of U.S. exports, for certain manufactured items such as blouses, the Japanese share of the U.S. market was climbing to considerably higher levels. As the threat of restrictive U.S. regulatory action increased, however, Japanese industry representatives proposed direct, private negotiations to settle the issue without bilateral government intervention and, in 1955, accepted a unilateral quota. The American side rejected these measures in favor of governmentally imposed legal restrictions. U.S. officials responded by secretly negotiating with the

46. Komiya & Itoh, supra note 27, at 186, 188 (Figure 1).
47. J. Destler & H. Sato, supra note 45, at 2; J. Lynch, supra note 45, at 76.
48. J. Lynch, supra note 45, at 89.
49. Id. at 104.
Japanese government and Japanese manufacturers and exporters for ostensibly unilateral, voluntary export restraints acceptable to the United States. This then became the prevailing pattern for nearly all trade disputes over Japanese exports to the United States: steel, color televisions, automobiles, machine tools, and integrated circuits.

In each case, American industry resorted to whatever legal means were available, using trade, antitrust and custom laws to curtail Japanese competition in U.S. markets. When existing law was thought inadequate, domestic industries lobbied for new legislation and more stringent administrative regulations. Forced to balance American strategic interests as well as U.S. commitments to the postwar liberal trade order against the inflexibility and potential damage of any new U.S. protectionist legislation, in almost every instance U.S. policymakers in the executive branch opted for unilateral consensual restraints by the Japanese.

Nevertheless, in the course of an unending series of trade conflicts, U.S. policy emphasis also shifted. By the 1970s and 1980s, voluntary export restraints by Japan ceased to be thought of as temporary, rear-guard measures. They had become instead the primary instrument of an increasingly defensive U.S. trade policy.

Staggering trade deficits with Japan, especially after 1985, produced new demands for positive Japanese action to open its markets. Neither continued removal of remaining formal barriers to foreign entry nor the dramatic reevaluations of the yen relative to the U.S. dollar in 1971 and 1985 seemed, as noted, to affect U.S. merchandise exports to Japan. The end result was even greater disarray among U.S. policymakers, with substantially greater congressional influence over U.S. trade policy, the advocacy of more extreme measures and the adoption of even more ad hoc solutions, as well as a deepening loss of confidence in the basic premises of postwar U.S. trade policy. Nor as evidenced by many of the articles in this volume, is any end to this process in sight. We can only anticipate further deterioration of our ability to deal with trade within any comprehensive policy objectives and a concomitant series of industry-specific approaches dictated by private sector interests with consequent likelihood of even greater incremental protectionist measures. Even demands for reciprocity and open Japanese markets have

54. See id. at 26-70.
55. For an insider's critique of current U.S. approaches to Japan, see id. For an example of the new challenges to prevailing views on free trade, see Strategic Trade Policy and the New International Economics (Krugman ed. 1946).
become subject to suspicion as disingenuous attempts to justify protectionist relief from Japanese imports in U.S. markets.56

II. Attitudes Toward Law, the State, and Consensual Means of Governance

A. Paradigms of Governance

Over the past four decades, U.S. officials and corporate managers alike have consistently parted company with their Japanese counterparts on more than just the substantive issues of trade policy. The two sides have approached the process of ordering trade relations with notable differences: American trade policy has been predominantly a matter of coercive legal regulation while the Japanese approach has been one of informal, consensual restriction.

As illustrated by the cotton textile disputes, U.S. industry representatives rejected overtures by Japanese producers to deal with the problem through private, negotiated agreement, preferring instead to seek legislative and administrative action. The U.S. side favored legal controls and resort to action by the state for protection, while the Japanese sought to avoid state participation through consensual means of resolution and adjustment.

This is not an isolated example. Rather, it reflects profound differences in how the two societies approach the question of social ordering, the role of law and the state. This is not to say that consensual ordering is unknown in the United States or that state control through law is alien to Japan. The point is simply that the two societies differ significantly in their preference and resort to these contrasting means of social control.

In the United States, law—and thereby state control—is the normal if not exclusive recourse for social ordering. Consensual approaches in contrast tend to be disfavored not only as a matter of societal preference but also as a legitimate alternative to control. For example, the objectives of collective private controls are condemned as collusive or conspiratorial, as in the case of price-fixing through governmental action. The legitimacy of the conduct thus tends to be defined less by its effects than its form. In other words, state action through courts, legislatures and administrative agencies is acceptable where private consensual action is disallowed. The consequence is to reinforce reliance on the state and to enhance the state's powers of coercion.

In Japan the tendency to avoid legal regulation and coercive state measures is equally evident. Legal ordering and controls are of course accepted but more often than not as a framework within which consensual ordering functions. Governmental protection is a last resort, to be

56. See, e.g., Cutts, What the Construction Wrangle is Really About, 4 PHP INTERSECT 8 (Sept. 1988), noting that despite U.S. demands for access in bidding for the new Kansai airport construction contracts, U.S. construction companies have not, in fact, seriously sought to participate. "They have been speaking with forked tongues to everyone." Id. at 14.
sought out of necessity and the failure of consensual means of maintaining or enforcing order. Such attitudes rest in large measure on a deeply imbedded but hardly anomalous conception of the persuasive authority of the state. As explained by Masao Maruyama:

Whereas in the West national power after the Reformation was based on formal, external sovereignty, the Japanese State never came to the point of drawing a distinction between the external and internal spheres and of recognizing that its authority was valid only for the former. . . . [T]he Japanese State, being a moral entity, monopolized the right to determine values.57

In other words, the conception of the modern state in Japan did not include intrinsic limits on the scope of its authority.

However inclusive the jurisdiction of those who govern, a myriad of well-developed, social-political arrangements reduced or constrained their coercive powers with concomitant reinforcement of social mechanisms for maintaining order and channeling behavior. These constraints included a denial of the powers of coercive command as an inherent aspect of authority. As Takie Sugiyama Lebra observes, "The image of divine King, absolute ruler, or despot who serves as the prime ruler in secular society"58 is alien to Japan. Whether a protective reaction or an incidental aspect of Japan's political culture, in Japan authority may be persuasive, but not so the power to control or coerce.

Given this prevailing separation of power from authority, postwar Japanese economic bureaucracies are best described as managers whose capacity to govern rests principally upon their ability to achieve consent. Their authority to govern, like that of the Meiji State, seems without limit or constraint. Yet, with the exception of residual Occupation legislation, they exercise few coercive legal powers. Thus they resort out of necessity to negotiated consent in both the formulation and the implementation of public policy, relying on an array of legal and extralegal sources of leverage in the bargains they must make. MITI and the other economic ministries may provide the situs for making policy but are not necessarily therefore its makers. Ministry officials participate and influence but they do not unilaterally decide or command.59

It is not necessary here to offer a full explanation for these contrasts.60 Suffice it to say that I believe they are closely related to histori-
cal patterns of governance and the means Japanese have adopted to preserve autonomy from intrusive rulers. The cultural and institutional context of postwar Japan thus reinforced preexisting patterns and thereby the legitimacy and viability of consensual ordering as an alternative to state control through legal regulation. As a result, not only have Japanese governmental authorities been forced to rely on negotiated consent as the primary means for implementing economic policies, but Japanese firms have also been able to make use of a myriad of consensual arrangements as a means to ensure their survival in the increasingly competitive Japanese markets.

The prevailing pattern of consensual ordering in contemporary Japan is evident in the complex network of long-term contractual relationships and persuasive reliance on relational contracting. As recently described by Laura Tyson and John Zysman:

> These networks are significant and varied. Distribution channels, as is widely noted, are arcane. Webs of suppliers linked to dominant companies abound. Firms depend on close and long term ties to a small number of suppliers rather than seeking the best price at any moment from a large set of bidders. These long term “business relationships” do not embody guarantees, but a set of virtual efforts to work through problems rather than walk away from them. They also imply privileged access to attempt new sales or new lines of cooperation, access built on trust that would be unavailable to outsiders.

One might add “whether native or foreign” because the impediments to new entry that these arrangements create apply equally well to both.

Illustrative of Japanese reliance on consensual ordering is the role of trade associations and cartels as instruments of protection and for negotiating the content and implementation of economic policy. Since the late 1930s economic policy in Japan has been implemented principally through collective organizations of the effected industries. Cartels and trade associations in Japan thus have distinctive governmental as well as economic and lobbying functions. The result often is to give industry a determinative voice as government and industry representatives repeatedly seek consensual solutions to both immediate- and long-term economic problems. Negotiated deals and bargained for solutions thus represented the dominant Japanese mode of economic policymaking and enforcement.

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61. See Yamamura & Vandenberg, supra note 51.


Protective legislative denials of coercive administrative power and similar informal political controls used to offset the extensive scope of state authority as well as business patterns of consensual ordering are both best understood as strategies for autonomy and survival. Only by denying government the means of coercion and outwardly adhering to the normative demands of the community is the individual in Japan often able to achieve security and a measure of freedom from control by others. As such these relationships are all the more resistant to change.

The dynamics of these social patterns thus tend to be one-directional. They are more easily reinforced than dislodged. To challenge their continuation, therefore, is to threaten an established order and the economic survival of its participants.

B. Voluntary Export Restraints: Ceding the Advantage to Japan

In the confrontation between the United States and Japan over trade, the protectionist emphasis of the American response ultimately ensured that Japanese patterns of social ordering would prevail and with it, the participation of affected Japanese industries in the outcome and a hardening of protective consensual restraints against new entry. Consequently, no solution that would significantly impair the interests of Japanese industry could realistically be expected. Moreover, successful foreign competition in Japanese markets became even less likely.

As the Voluntary Export Restraint (“VER”) increasingly became the standard device for resolving trade disputes, the Japanese government officials increasingly played the mediating role between the United States and the affected Japanese industry. Their intervention was required by the United States to initiate the restraint but they were required by the affected Japanese firms to offset or at least mitigate any substantial disadvantage. The Japanese industry in question thus ensured its autonomy in the bargain. No measure that seriously threatened survival would be tolerated and it could effectively press for any advantages to be gained.

The VER was also advantageous for the Japanese in that it functioned essentially as an authorized cartel. It gave therefore the participating firms a legitimized vehicle for cooperation (or collusion) for purposes that might not have otherwise been permitted, including exclusion of new entrants. It even had advantageous impact in the United States. For example, fearing that a Supreme Court decision in the *Zenith-NAUE* case subjecting Japanese TV manufacturers to American antitrust proscription might jeopardize the VER negotiated for automobiles, the United States intervened on behalf of the Japanese

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64. For comparative insight into the relationship of strong societies, weak states and “strategies of survival,” see J. MIDGAL, STRONG SOCIETIES AND WEAK STATES (1988).
65. See Yamamura & Vandenberg, supra note 51.
defendants. Indeed, the interests of American producers and the Japanese rivals that had already established themselves in the U.S. market may have coincided in that both gained from greater price stability and restrictions on output.

The VER also had advantages for the economic bureaucracies that monitored compliance. As mediators between U.S. government authorities and the instrumental actors in the private sector on both sides of the Pacific, they became even more indispensable and gained additional leverage against all sides.

The resort to the VER by American officials also illustrates the disadvantages inherent in resort to legal controls. U.S. officials had few options; any unilateral action by U.S. authorities carried political and legal risks. Economic interests had to be weighed against security interests. Measures taken against one Japanese industry would create precedents for use against others. Any action would produce political controversy and criticism that this action was inconsistent with U.S. free trade principles. If existing statutory or regulatory controls were inadequate, an attempt to seek new legislation and regulations would risk a Pandora's box of unwanted restrictions with global implications. And, as illustrated by the steel VER agreement in 1972, informal action by the United States was open to judicial challenge as *ultra vires.*

American authorities were thus caught in the midst of a complex set of conflicting interests and concerns. Better by far, therefore, to rely on informal Japanese restraints than on any U.S. action.

American reliance on export restraints by the Japanese have proved in the long run, however, to be detrimental to U.S.-interests. As a short-lived, quick fix, the VER postponed that much longer the realization that greater reciprocity in access to Japanese markets was the only viable alternative to broad closure of U.S. markets with devastating risks to world trade and the global economy. As temporary relief, the VER also tended to obscure the weakness of state power in Japan. Japanese government officials appeared to deliver on their promises and seemed from afar to be in commanding control. Hidden from American view, however, was the intensity of the bargaining and the concessions the government had to make.

In the interim provided by VERs, bureaucratic leverage in Japan grew progressively weaker as the private sector prospered and became more entrenched domestically and internationally. Moreover, in the end, the United States also lost the moral claim for reciprocity.

C. Reciprocity Versus National Treatment

American demands for reciprocity in Japan have little moral appeal as "fair" in Japan. To the United States' insistence that U.S. enterprises be

given the same access to markets in Japan that Japanese enterprises have in the United States, Japanese can quite as fairly cry "foul." Because Japanese firms themselves face equally severe restrictions in access to capital, distribution networks and other prerequisites for new entry in their home markets as foreign entrants, to ensure reciprocity rather than equal or national treatment requires special favors for U.S. firms. With equal claim to fairness, the Japanese respond by offering national treatment. Take, for example, the legal profession.  

In the United States most threshold restrictions against admission of foreign nationals to the practice of law have been removed. Supreme Court decisions have eliminated citizenship and raised doubts about state residency requirements. Several states, especially California and New York, have gone further by easing educational requirements. As a result, several hundred Japanese nationals have been admitted to practice in the United States, many of whom have failed to pass the national test necessary for qualification to practice law in Japan.

To become a lawyer in Japan, with the minor exception of university professors, one must pass a national examination (shihō shiken) for admission to the Legal Research and Training Institute (ShihōKenshū Sho), designed originally to train judges and public procurators. Each year less than 500 applicants pass the examination, currently only about 2 percent of all applicants. In contrast, the lowest passing rate for any state law examination in the United States is California's near 40 percent with the national average above 60 percent. National treatment thus significantly advantages Japanese. Japanese nationals have greater access to the market for legal services in the United States than U.S. nationals have in Japan. Reciprocity, on the other hand, would require that Japan prefer U.S. citizens in admission to practice over equally qualified Japanese. In short, reciprocity would require the Japanese to discriminate against their own nationals.

Even aside from the issue of entry barriers, the more fundamental questions of market risk and profitability remain. Even if there were no barriers of any sort to entry, it is not at all certain that many U.S. firms would choose to enter Japan. The cutthroat rivalry of most Japanese

72. Education requirements have been eased to permit foreign law faculty graduates to take bar examinations with only a graduate law degree from an ABA approved law school, usually a one year LL.M. degree program, in Alaska, Arizona, California, Connecticut, Kansas, Michigan, Montana, New York, North Carolina, Puerto Rico, and Virginia. AMERICAN BAR ASSOCIATION, A COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 22-23 (1988).
markets and the attendant commercial risks for any new entrant are not inviting for outside enterprises. In addition, few U.S. firms are attracted by the profit margins of many sectors of the Japanese economy in which they might become strong rivals. Thus many U.S. manufacturers now write Japan off. For them the only option left is protectionist restriction of Japanese competition at home.

Conclusion: Is Continuous Trade Conflict Inevitable?

Culture is not immutable. Institutional reform does change expectations and values as people reorder their lives and the self-organizing mechanisms of any society adjust. Radical cultural change, however, seldom occurs solely from within. Rather, as the history of modern Japan demonstrates so well, external forces commonly provide the catalyst for internal reform. But even then, change is far more likely to follow patterns legitimated by preexisting attitudes and values. Even war, defeat and the Allied Occupation of Japan with all of its institutional reforms did not transform Japanese patterns of social ordering.

The economic organization of postwar Japan is an unlikely candidate for exception. The consensual mechanisms that have ensured at least stability, if not survival, as well as a significant degree of autonomy within the managerial state have only hardened as Japan has emerged as a global economic power. With that emergence the political and economic leverage enjoyed by the United States has diminished accordingly.

Yet without unwanted changes in the most basic patterns of social and political organization as well as fundamental values and attitudes in either Japan or the United States or both, there is little hope of lasting equilibrium in bilateral trade without continuing tension and conflict.

The best Japanese manufacturers can only be expected to continue to produce goods that effectively rival the products of their U.S. competitors in price and quality in U.S. markets and to continue as well to have the home advantage. Their success in turn can also be expected to continue to provoke protectionist reactions with demands for new legislative and regulatory measures to constrain Japanese competition.

U.S. domestic resistance to protectionism must also be anticipated with the most likely compromise being renewed public pressure for some means to "level the playing field" and to ensure reciprocity in access to Japanese markets. The Japanese cannot be expected to accommodate these demands.

The inability or reluctance of Japanese authorities to satisfy these demands—most likely perceived in the United States as intransigence—is almost certain in turn to incite more hostility and conflict—perhaps placated temporarily by well-publicized but largely cosmetic market-

76. This rather obvious point can be understood as an inevitable advantage Japanese firms have in their home market. To exist, they must remain despite low profits. Foreign firms need the attraction of higher profitability.
opening pronouncements and schemes plus negotiated VER agreements with the most visible of Japan's successful industries to restrain exports often to their advantage. In other words, we should expect more of the same.

The political dynamics on both sides of the Pacific also point to continuation of conflict. In both Japan and the United States a marked increase is evident in legislative intervention and the influence of legislators with special interest concerns. This trend makes all the more difficult any attempt at resolution of trade issues through bureaucratic, government-to-government negotiation.

A different scenario is possible but difficult to predict. Consensual ordering in Japan leaves its lesser communities, including the firm, a much wider margin for autonomous action than is generally understood. The capacity of the Japanese for survival—plus perhaps their apparent propensity for good luck—may result in new arrangements. The patterns of Japanese investment in the United States from Montana cattle ranches to Florida citrus groves suggests another sort of resolution, one involving greater economic integration of firms and markets. Perhaps, one day, we shall discover that the label "made in Japan" no longer has meaning. Until that time comes, however, the past suggests that the United States-Japanese trade conflict is indeed intractable.
