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An Agricultural Law Research Article

Doing Business with the Japanese: Selected Legal Aspects for Iowans

by

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DOING BUSINESS WITH THE JAPANESE: SELECTED LEGAL ASPECTS FOR IOWANS

I. INTRODUCTION

The small business in Iowa should not be afraid to export. Today three out of five successful exporters have one hundred employees or less.[1] Iowa farmers and businessmen *are* becoming increasingly aware of the rising potential in export sales at a time when about sixteen percent of the total farm income of the United States comes from exports.[2] When Yutaka Tachibana, head of a delegation from the Japan Trade Center, Chicago, visited Des Moines in February of 1971 he stated that "Japan is the [United States'] largest single export market" and emphasized the importance of Iowa as the leading state in agricultural exports to Japan.[3] Iowa sells over $80 million worth of goods to Japan annually and ranks ninth among all states.[4] All the more reason then to look at Japan, the number one purchaser of United States agricultural products. She buys well over a billion dollar's worth annually.[5] This Note is an examination of the legal aspects of selling Iowa products[6] to Japan and is for the most part a look at applicable Japanese law, with some treatment also given to Japanese foreign investment laws which would apply to Iowa businesses or individuals interested in investing in Japan.[7] United States and Japanese tax laws regarding foreign investment are not covered, since their complexity does not permit adequate coverage here.

The route of Iowa products to Japan is varied and difficult. One of the realities of business in Japan is the presence of Japanese trading companies.

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1 Address by Thomas Kleppe, Administrator, Small Business Administration, 35th Mid-America World Trade Conference, Chicago, Mar. 2, 1972.

2 MID-AMERICA INTERNATIONAL AGRI-TRADE COUNCIL (MIATCO), EXPORT HANDBOOK "i" (1970).

3 4 MIDWEST TRADE BULL., May, 1971, at 2.

4 JAPAN TRADE CENTER, COMMERCIAL OPPORTUNITIES IN JAPAN (Dec., 1971).

5 Upchurch, *Competitive Position of U.S. Agriculture*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 1 PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 833, 837 (1971). Japan is greatly dependent on raw materials and food supplies. In general, this is a plus for Iowa exporters.

6 Following is a partial list of Iowa agricultural products exported to Japan: soybeans; beef (including live cattle); pork (including live swine); corn and other feed grains; dairy products; animal fats, oils, and greases; hides and skins; meat products; poultry; and honey.

7 The following are a few of the numerous sources of information available which an Iowa firm wanting to do business in or with Japan can contact: Marketing Division, Iowa Dep't of Agriculture; Mid-America International Agri-Trade Council, 300 W. Washington, Chicago, Ill. 60606; Foreign Agricultural Service, U.S. Dep't of Agriculture; Japan Trade Center, 232 N. Michigan Ave., Chicago, Ill. 60601 (which is the Midwest representative of the Japan External Trade Org.); United States-Japan Trade Council, Inc., 1000 Connecticut Ave., Washington, D.C. 20036 (which consists of over 700 American firms interested in fostering trade with Japan); and the U.S. Dep't of Commerce, Bureau of International Commerce, Federal Building, 210 Walnut, Des Moines, Iowa 50309. There are also local banks with international departments which can provide assistance.

They control most of the processing and distribution thus making it difficult to penetrate the Japanese market, which is best described as an oligopoly. The government assigns quotas to the trading companies, and one cannot import unless he does so through a trading company, *i.e.*, in conjunction with one.[8] Thus an exporter must usually sell to a trading firm which may in turn sell to a wholesaler. In the case of feed grains, the farmer usually sells them to a grain elevator which in turn sells to a Japanese trading company. Iowa does not have a large number of processing plants that export to Japan as yet. Those processed foods which do enter Japan do not reach the consumer until after they go through a myriad of other middlemen.[9] This of course places the Iowa product at a disadvantage in its competition with others on the Japanese market since it adds a great deal to the consumer price. It is, in effect, a kind of non-tariff barrier. And further, before a food processor can enter Japan and set up operations, he must have a Japanese partner.

II. Exporting to Japan

A. *Licensing, Freight Forwarders, Special Laws*

Generally it is not necessary to have a license for exporting from the United States if the goods being exported are agricultural products.[10] An exporter may wish to seek the services of a freight forwarder, which can provide information as to ocean and air freight rates, insurance premiums, cartage or pier delivery charges, etc. When products are ready for export they are usually consigned to the freight forwarder that the exporter designates unless the buyer asks for another. In any case the exporter should inform the freight forwarder as to shipping instructions, type of draft if a letter of credit is not being used, and whether the total shipping expenses are to be added to the invoices, *i.e.*, that the shipment will or will not be C.I.F. (cost, insurance, and freight). The forwarder then ships the goods for the firm.[11] Before the process of exporting is actually begun a firm should first check with the Japanese government or trade representative about the possibility of special Japanese laws applying to his particular product. Some products for example must be modified before they can be sold in Japan.[12] It would also be wise to secure the protection of a patent if applicable, under Japanese law. A firm should ascertain which

[8] Interview with Jules S. Renaud, Foreign Agricultural Service, U.S. Dep't of Agriculture, in Chicago, Feb. 14, 1972.

[9] Interview with Lyle D. Kreps, President, Agriculture Market Research, Inc., and former Director, Marketing Division, Iowa Dep't of Agriculture, in Des Moines, Feb. 10, 1972; Minyard, *Sharp Old-New Contrasts Highlight Japan's Food Picture*, Foreign Agriculture, Sept. 25, 1967, at 8. For a description of the complex Japanese distribution system *see* Wall Street Journal, Mar. 2, 1972, at 1, col. 1 (Midwest ed.).

[10] Mid-America International Agri-Trade Council (MIATCO), Export Handbook, 28 (1970). Those seeking information about United States export control regulations should contact the field office of the U.S. Dep't of Commerce, Bureau of International Commerce, Federal Building, 210 Walnut, Des Moines, Iowa 50309.

[11] *Id.* at 7-8.

[12] *Id.* at 36.

import regulations regarding labeling are required as well. For example, labels for food products must give the name, ingredients, quantity, manufacturer or import date, storage instructions, and name of importer.[13] Under the Japanese Measurement Law all imported goods and accompanying documents must show weights and measurements using the metric system.[14] And since July 1, 1970, all imports have been required to carry labels in the Japanese language. There are also certain plant and animal quarantine regulations established by the Ministry of Agriculture and Forestry that should be checked before exporting.[15]

B. *Financing and Insurance*

The exporter can obtain financing from such government agencies as the Export-Import Bank of the United States (Eximbank) or the International Finance Corporation (IFC), although in actuality the IFC has never extended help for exports to Japan even though it could theoretically do so. Eximbank will provide funds for exporting or for financing projects in Japan, but only if a firm has difficulty obtaining credit from private sources.[16] Usually loans from Eximbank are for large bulk shipments, and the ordinary businessman should try instead to handle his sales to Japan as he does his sales domestically, *i.e.*, by financing them in the same way.[17] Generally Eximbank does not lend funds on a direct basis but will instead make loans to commercial banks or guaranty loans made by them.[18]

Funds for private projects are available from the International Bank for Reconstruction and Development (World Bank), but loans must be guaranteed by a member government (Japan and the United States are both members).[19] Further, direct loans are now rare, usually involve large sums (5 to 10 million dollars), are long-term (ten years or more), and seldom finance more than 50% of a project.[20] Other than these sources, the exporter should check with the

[13] BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:14. More detailed information regarding specific products can be obtained from the Far East Division, Bureau of International Commerce, U.S. Dep't of Commerce, Washington, D.C. 20230.

[14] *Id.* at 94:13.

[15] *Id.* at 94:15. Japan prohibits imports of plant material except through certain specified ports.

[16] The Bank cannot under Section 2(a) of the Bank Act compete with private capital. If however the Bank does decide to make a loan it can be an amount anywhere from hundreds to millions of dollars. J. LOOMIS, INTERNATIONAL FINANCE: OFFICIAL AGENCIES AND U.S. BUSINESS, BNA OPERATIONS MANUAL 10 (1970) [hereinafter cited as LOOMIS].

[17] Interview with Wolfgang A. Grundei, Executive Director of MIATCO, Inc., in Chicago, Feb. 14, 1972 [hereinafter cited Grundei].

[18] LOOMIS 20, 27. Eximbank has special regulations regarding financing of cattle exports, which it will supply upon request. One of these is that they be high-quality breeding stock. *Id.* at 33.

[19] *Id.* at 171-74.

[20] *Id.* Often the World Bank will loan funds to a member country for development projects which that country desires to carry out. Of all projects conducted by public borrowers from the Bank, one third of the Bank loans therefore have been for agricultural and industrial projects. Loans for procurement are made on a world-wide basis with the U.S. often being the leading country for supplying procurement materials. Some $79

Foreign Agricultural Service (FAS) concerning agricultural products[21] and with the Department of Commerce regarding industrial items such as farm implements. They can provide information as to programs of assistance available. What can be done for an exporter all depends on the product being exported.[22] The Small Business Administration should be consulted also for possible aid and guidance.

Insurance is available from the Foreign Credit Insurance Association (FCIA) which operates in cooperation with Eximbank. An exporter can obtain insurance against credit and political risks which can occur in the shipping of goods. (Once he obtains such insurance, most commercial banks will be willing to finance sales up to as much as 90% of the value of the exported goods).[23] The FCIA even has a special policy for small businesses which do not export more than $200,000 in goods a year. This is aimed particularly at those businesses just getting started in exporting.[24] Insurance is also available from individual private sources of course.

Too often the small businessman is afraid to approach these institutions because he feels they exist only for large corporations and that the procedures involved in obtaining assistance are too complex.[25] While this attitude is somewhat justified in terms of what has occurred in the past, the small businessman in Iowa should be persistent in trying to obtain financing from them if he cannot do so from commercial sources.

III. IMPORTING

A. *Import Control*

Import and exchange controls are established and administered by the Ministry of International Trade and Industry (MITI), the Ministry of Finance (MOF), and the Bank of Japan (BOJ) which acts as an agent of the Japanese government.[26] All import control is based on the Foreign Exchange and Foreign Trade Control Law (Law No. 228, Dec. 1, 1949). Related to this is the Import Trade Control Order (Cabinet Order No. 414, Dec. 29, 1949) which sets out conditions and requirements regarding imports. Both

million in loans was distributed in Japan in 1969. After the Japanese government obtains a loan, it is required by the Bank to procure materials at the best price possible. Thus, it is to the advantage of Iowa firms to find out about these so as to be able to bid for the right to supply procurement materials. Probably the best way to do so is to inquire with the Japanese government about planned future projects. *Id.* at 169, 176-79.

21 The FAS promotes American foods in Japan. It also provides advisory and technical services, and public relations for individual companies that have banded together such as at foreign trade fairs, but it does not make loans for projects. Grundei.

22 Grundei.

23 MID-AMERICA INTERNATIONAL AGRI-TRADE COUNCIL (MIATCO), EXPORT HANDBOOK 5 (1970). *See* LOOMIS 37.

24 LOOMIS 43.

25 Address by Jack H. Scott, Key International, 35th Mid-America World Trade Conference, Chicago, Mar. 2, 1972.

26 Foreign Exchange and Foreign Trade Control Law (Law No. 228) arts. 53, 54 (Dec. 1, 1949).

of these are revised by periodical cabinet orders which are in effect amendments of the law. The Foreign Exchange and Foreign Trade Control Law originally established a budget system for allocating foreign exchange. However, that has since been abolished. Also, the law requires that all types of foreign transactions must be approved by Cabinet Orders, such as the Control of Foreign Exchange Law (Cabinet Order No. 203, June 27, 1950), the Export Trade Control Order (Cabinet Order No. 378, Dec. 1, 1949), and the Import Trade Control Order (Cabinet Order No. 414, Dec. 29, 1949).

The customs system per se is based mainly on two laws: the Customs Law and the Customs Tariff Law.[27] The Customs Law provides for the levying and collecting of duties and importing and exporting procedures. It involves the determination of what items are subject to duties, duty-papers, entry-exit procedures, and grievance procedures.[28] The Customs Tariff Law deals with enforcement of customs rates, valuation, duty reduction or exemption, and regulation of the tariff quota system.[29] Under this law customs rates are usually based on quantity or value of the items being imported. Also important is the Provisional Customs Law which imposes a tax in cases where special items are imported.[30] Customs clearance is usually performed by a customs broker who acts as a shipper's agent and pays the applicable duties in yen.[31] He is governed by the Customs Broker Law.[32]

Besides the customs regulations there are four import systems: (1) the Import Quota (IQ) System, (2) the Automatic Import Quota (AIQ) System, (3) the Automatic Approval (AA) System, and (4) the Special Foreign Exchange Allocation System.[33] The MITI establishes quotas for certain items, meaning only so much of each listed item can be imported so that once a quota is filled for an item no further importation is allowed. All items for which there is a quota are said to be "restricted" or not yet "liberalized" and must be imported under the IQ System. This system centers around an Import Quota list, which contains those import items not yet liberalized as to the quantity which can be imported.[34] Before such items can be imported an importer must apply to the MITI for an import quota allocation certificate.[35] If the MITI approves his application it will give him the certificate which may in some cases be subject to certain conditions. Once he has this certificate he is then entitled to an import license which will be given to him by any authorized foreign exchange bank upon presentation of the certificate. Under the AIQ System an

27 JAPAN CHAMBER OF COMMERCE AND INDUSTRY, STANDARD TRADE INDEX S-62 (1969-70).

28 *Id.* For example, under the Customs Law bonded freight must be placed in bonded areas after unloading.

29 *Id.*

30 *Id.* at S-64.

31 *Id.* at S-62.

32 BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:3.

33 BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:14.

34 Based on Import Trade Control Order (Cabinet Order No. 414) art. 3, para. 1 (Dec. 29, 1949).

35 *Id.* at art. 9, para. 1.

importer must also obtain an import quota allocation certificate, but in this case it is usually given automatically to him by MITI and without restrictions.[36] This certificate is usually valid for four months.[37] The purpose of the AIQ System is to keep a watch on the movement of certain liberalized items which may be of concern to domestic industry.[38] If an item is on the AA list, then all an importer needs is an import license from an authorized foreign exchange bank. All items on that ~~list are free from quantitative restrictions~~ and no ~~application need be made to MITI (unless the importer intends to~~ make payment other than in the customary manner). The bank will issue a license once it determines that the goods meet the requirements of the Cabinet Order Concerning Import Trade Control.[39] Under the fourth system governing imports, the Special Foreign Exchange Allocation System, a Japanese buyer asks the MITI for a special allocation of foreign exchange. If he obtains it, he then is given a foreign exchange allocation certificate which is valid for about one month. This he gives to an authorized bank as in the other systems which provides him with an import permit.[40] All items for which payment is to be made in foreign exchange are imported under the IQ, AIQ, and AA Systems. For those not requiring foreign exchange, importation must have MITI approval including a valid import license. Certain imports are not subject to licensing at all, such as samples and specimens and imports by the Japanese Government.[41] All commercial imports that are authorized for importation will appear in "Import Announcements" made by the government.[42]

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[36] BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:5.

[37] Ohara, *Legal Aspects of Japan's Foreign Trade*, 1 J. WORLD TRADE L. 1, 8 (1967).

[38] JAPAN CHAMBER OF COMMERCE AND INDUSTRY, STANDARD TRADE INDEX S-55 (1969-70). Currently there are no items on this list. See table below at p. 619.

[39] Import Trade Control Order (Cabinet Order No. 414, Dec. 29, 1949) provides as follows:

> Article 3. The Minister of International Trade and Industry shall stipulate and publish items of goods which are required to receive import allocation . . .
>
> Article 4. A person desiring to import goods shall obtain approval therefor by submitting an import license form to an Authorized Foreign Exchange Bank . . . in accordance with the procedures as provided for by Ministry of International Trade and Industry Ordinance, excepting the case where he has obtained the approval under the provisions of Article 8 paragraph 1.
>
> 2. Upon receipt of the import license form as mentioned in preceding paragraph, the bank shall give the approval by issuance of import license, provided that the proposed import of goods falls under each of the following items:
>
> (1) The proposed import of goods is within the scope of matters published under the provisions of the paragraph 1 of the preceding Article.
>
> Article 8. Any person desiring to import goods shall apply to the Ministry of International Trade and Industry for approval of import in any of the following cases where goods are to be imported:
>
> (1) Without requiring settlement of the whole value;
>
> (1)-2 To be settled with means of payment expressed in the Japanese currency . . .
>
> (2) Under processing deal contracts.

See also BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:2; BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 95:5; Ohara, *Legal Aspects of Japan's Foreign Trade*, 1 J. WORLD TRADE L. 1, 8 (1967).

[40] BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:1.

[41] Cabinet Order No. 341 (Dec. 25, 1968).

[42] BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:1. Also authorized but not appearing in the Announcements are essential operating or maintenance

For importation

Various documents are required for customs clearance. Among these are an import license (five copies); an import declaration (three copies); a commercial invoice (three copies); a packing list; a certificate of origin (two copies), needed only if the goods receive favorable duty treatment because of Japan's concessions under the General Agreement on Tariffs and Trade (GATT); and a bill of lading (one signed original).[43] All commercial imports require an import license if the value of the goods is $200 or more.[44] It must be approved by MITI in the following situations: (1) if the quota allocation set out in the budget has been filled, (2) any time the importer intends to make payment in a non-customary manner (discussed below), (3) for particular sales, not involving the quota allocation budget, and (4) where foreign exchange is not involved in the import transaction.[45] Import licenses are usually granted without much trouble for such items as foodstuffs, basic raw materials, and certain machinery and equipment.[46] They are valid for six months from the date of issue. Import licenses are however often allocated to Japanese trading firms on the basis of their share of past imports of a particular commodity.[47]

No special requirements exist as to the form of a commercial invoice. The shipper must include two copies of the invoice on his letterhead and sign both. It must contain the following as well: mark, number, name, description, quantity, and value of the goods (including freight, insurance, and shipping costs); both gross and net weights; the place and date when the invoice was prepared; destination; consignee; and the terms of the contract explaining how the value of the goods was determined.[48] Shipments by mail do not require a commercial invoice but are of course still subject to customs.[49] Under GATT Japan has made certain duty concessions with respect to specific goods. A certificate of origin is required only when such goods are being imported. Printed forms are available.

As for the bill of lading, the normal procedure is to provide three signed originals which are usually transferred through the banking system. The consignee is sent two unsigned copies. What the bill of lading contains is customarily set out by the consignee in the letter of credit.[50]

In addition to these documents a disinfection certificate is required for such items as specified plants, seeds, animals, meat, hoofs, horns, skin, poultry, and

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materials necessary to domestic production of foreign investment industry, those not requiring payment, and those which are being imported for processing but which will be exported. *Id.*

43 BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:15.

44 *Id.* at 94:4.

45 BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:3.

46 *Id.* at 270:1.

47 U.S. Agricultural Attache Staff, Tokyo, Agricultural Production and Trade Situation and U.S. Agricultural Market Development Activities in Japan, April 1, 1968.

48 BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:7.

49 *Id.*

50 *Id.* Usually included are the ship's name, the name of the shipping line, the name of the consignee(s), markings on the packages, the number of packages, a description of the goods, and their weight. In air shipments a waybill is used instead. *Id.*

eggs.[51] The purpose of the certificate is to insure that such items do not contain infectious diseases, and the document is simply an inspection certificate.[52] And lastly, certification of imports for which payment is to be made must be obtained. This amounts to registering items with a designated bank.[53]

During the importing process itself a shipper may have complaints about actions taken by customs. If so, he can submit a complaint either to the customs superintendent or the Finance Minister.[54] This grievance procedure is provided for under both the Customs Law and the Administrative Grievances Law. Complaint must be made within one month from the time of the action complained of. The Finance Minister refers all complaints to a customs grievance committee.

Also, the importer should beware of violating the Japanese antidumping law, in Article 9 of the Customs Tariff Law. Japan subscribes to the International Antidumping Code, which she ratified in 1968. One of the actions the government is likely to take in such cases is to levy an additional duty on the goods being imported equal to the difference between the fair price and the dumping price.[55]

B. *Tariffs and Duties*

Most new firms desiring to export are likely to be concerned primarily with what the duty or tariff for their particular product is. Unfortunately this approach produces an incomplete answer to how competitive one's product will be on the Japanese market. While duties obviously do have an effect on the ultimate price at which an imported product will sell, there are a number of additional factors which can influence its price. It is advisable for an exporter to first locate someone in the market whom he wishes to *service*, (not just ship to).[56] Such a firm may already handle products identical or similar to his and can provide information about the competitiveness of the product. The primary objective then is to bring the buyer and supplier together. Duties are only one part of the so-called "landed costs"[57] of getting a product on the Japanese market. Determination of what the actual duty will be is difficult in the United States anyway, particularly due to the variable levy system used by the Japanese.[58]

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51 *Id.*

52 *Id.* For more detailed information an importer can check with the Plant Quarantine Division *or* the Animal Health Division, Agricultural Research Service, U.S. Dept. of Agriculture, Federal Center Building, Hyattsville, Maryland 20782.

53 BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:1.

54 JAPAN CHAMBER OF COMMERCE AND INDUSTRY, STANDARD TRADE INDEX S-63, S-64 (1969-70).

55 BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:4. Dumping is where the goods are "dumped" on a foreign market at a price below that which could be considered their fair market value in the country from which they are being exported.

56 Grundei. Here a service-minded approach is more desirable.

57 Freight, insurance, etc.

58 The variable levy is a method of local protection. Customs officials can vary the levy at their option according to the time and the particular product.

It is nevertheless helpful to have some knowledge of how the tariff system works and what has been done in the past. The system itself is administered by the Ministry of Finance through the Bureau of Commerce.[59] Tariffs are determined by assessed value, by quantity, or both, and "[a]lternative duties are imposed on items on selective [*sic*] basis on either the value or quantity."[60] It should be noted that assessed value means C.I.F. value, except for air shipments where the value of transportation is calculated on another basis. The C.I.F. value of the imported goods in American dollars is computed and then converted to yen value based on the exchange rate at the time of clearance through customs.[61] The Japanese state that "[t]he general principle used for revising the tariff rates is that there should be no tariff or a low tariff on raw materials, the rates rising in proportion to the degree of processing involved in the production."[62] Before Japan began the Kennedy Round (the Sixth Round of GATT tariff negotiations) reductions in 1968, the tariffs on about one half of the 2,500 listed items stood at 15 to 20%.[63] Afterwards the Japanese reduced tariffs on soybeans, animal feeds, tallow, and lard among others. On April 1, 1971, when Japan made the last of the reductions agreed to under the Kennedy Round, the tariffs on nearly 1,900 items had been reduced by 50%.[64] These last reductions were nine months ahead of schedule.

Under the present system there are basically two kinds of duties, specific and ad valorem. Specific duties are those levied at a set rate, such as the duty for certain commodities which is assessed at a set rate according to the quantity imported. However, the customs officer may at his discretion apply in conjunction with the specific rate an ad valorem rate, thus being able to apply which ever is higher in his judgment.[65] The second category, ad valorem duties, is the one under which most import items are assessed. Specifically, value is determined by the price the items would be if they were sold wholesale in the ordinary course of trade in the United States at the time of exportation, *plus* freight, insurance, and incidental expenses of shipment.[66] In addition to these, Japan as a member of GATT, grants a "deferent tariff" or tariff concessions to certain other importing member nations, including the United States. Japan has agreed not to levy tariff rates higher than those set by GATT, and when the rates of the Customs Tariff Law or Provisional Tariff Law are higher than the concessions tariff rates, the latter will be the ones which are levied.[67] It should be noted also that an importer will be granted

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59 BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:3.

60 JAPAN CHAMBER OF COMMERCE AND INDUSTRY, STANDARD TRADE INDEX S-66 (1969-70). Again, a variable levy system.

61 BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:3.

62 JAPAN CHAMBER OF COMMERCE AND INDUSTRY, STANDARD TRADE INDEX S-66 (1969-70).

63 BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:3.

64 *Id.*

65 *Id.* at 94:4.

66 *Id.* There is no duty for samples and advertising matter which have no commercial value. If they do have commercial value they can still be imported free of duty if exported within one year. *Id.* at 94:13.

67 JAPAN CHAMBER OF COMMERCE AND INDUSTRY, STANDARD TRADE INDEX S-67 (1969-70).

a duty reduction under either the Customs Tariff Law or the Provisional Tariff Law in certain cases.[68] For example, if the goods have been damaged or have deteriorated in quality a reduced rate may be allowed. Also, there can be a reduction or complete exemption from duties when barley, wheat, and pork are deemed to be unavoidably overpriced for import due to a poor harvest or natural disaster.[69] Reduction and exemption are also given for corn and soybeans when used for the manufacture of mixed feed.[70]

The following tables give some indication of what has occurred as well as what the tariff structure looks like.

UNILATERAL TARIFF REDUCTIONS[71]

Date of Tariff Reduction	*No. of Items*
April 1, 1969	423
April 1, 1970	111
April 1, 1971	124
April 1, 1972	172

TARIFF ON AGRICULTURAL PRODUCTS[72]

Percentage of sub-items in the tariff dutiable at above 20% ad valorem	31
Percentage above 30% ad valorem	14
Percentage above 50% ad valorem	3
(Out of a total of 535 sub-items)	

SELECTED TARIFF RATES[73]

Rate as of Jan. 31, 1972		*New Rate by April 1, 1972*
soybeans	2.4 yen/kg	0
soybean meal	5 yen/kg	0
beef tallow	2.5%	0
mutton tallow	2.5%	0
oils (including soybean and corn germ)	28 yen/kg	25

68 *Id.* at S-65, S-66.

69 *Id.*

70 *Id.*

71 Comparative Data of Economy Between U.S. and Japan, 1972 (obtained from the Japan Trade Center, Chicago).

72 *Id.*

73 FAS statistics, obtained from interview with Jules S. Renaud, Foreign Agricultural Service, U.S. Dept. of Agriculture, in Chicago, Feb. 14, 1972. As of this writing tariffs are also set to be reduced for wine, whiskey, beer, and refined vegetable oils by April, 1972. It is possible to find out in advance of shipment what the duty is for a particular item by contacting the Foreign Agricultural Service in Washington, D.C., or by writing to either the Agricultural Attache, Tokyo, Japan or the Customs Bureau, Ministry of Finance, 1, 3-chome, Kasumigaseki, Chiyoda-ku, Tokyo, Japan. When writing to the latter, it is advisable to send samples, photographs, specifications, and descriptions of the items to be imported. *See generally* BNA INT'L TRADE REP., EXPORT SHIPPING MANUAL 94:4.

C. *Liberalization of Import Restrictions*

Japan has been liberalizing import restrictions since 1955 when she joined GATT, although the pace has been a slow one until recently. In 1964, before the Kennedy Round, she liberalized import restrictions on several items in order to meet requirements for membership in the International Monetary Fund (IMF) and the Organization for Economic Cooperation and Development (OECD). In effect what Japan did was to replace the foreign exchange allocation system (a kind of budget for foreign exchange) with quantitative import quotas, bringing about the eventual liberalization of such items as sorghums, corn, soybeans, tallow, and hides and skins—and some of these were only partially liberalized.[74] But it was not until after Japan gained the so-called "Article VIII Status" under the IMF in 1964 that she abolished the foreign exchange allocation system.[75] By 1966 Japan had reached an import liberalization rate of 93.2% with 159 items still unliberalized (thirty-nine of which are not subject to liberalization under GATT).[76] In 1970 all import deposit requirements were abolished,[77] preferential discount margins for export bills were reduced, and the amount of yen funds available to commercial banks for import financing was increased.[78]

Following is a list of those items which have been liberalized, which means they have been removed from the Import Quota list. Only recent liberalizations of products of interest to Iowa business are given; the numbers given in parentheses are the Brussels Tariff Nomenclature (BTN) classifications for each import: live animals of the bovine species, excluding buffaloes, (01.02); live swine (01.03); meat and offals of pigs, excluding tongue and internal organs (02.01 and 02.06); unrendered pig fat (02.05); sausage, ham, and bacon (02.06-2), and here special inspection requirements are set by the Japanese government and include inspection of United States plants exporting such meat; pork (02.01) is thus only partially liberalized; fresh apples (08.06); grain sorghums (10.07); potato flour, meal, and flakes (11.05); gluten flour (11.09); soybean oil (15.07); vegetable oils (15.07); sausages (16.01); cookies, biscuits, and crackers (19.08); sweet corn, canned only (ex 21.07)[79]

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[74] *See* Long, *One Hundred Years of Japanese Agricultural Trade,* FOREIGN AGRICULTURE, Sept. 25, 1967, at 5.

[75] JAPAN CHAMBER OF COMMERCE AND INDUSTRY, STANDARD TRADE INDEX S-54 (1969-70).

[76] Ohara, *Legal Aspects of Japan's Foreign Trade,* 1 J. WORLD TRADE L. 1, 7 (1967).

[77] In the past, before an import license was issued it was necessary to make a deposit equal to a given percentage of the value of the imported goods. The percentage varied with the type of import and was refunded once the items were actually imported. The percentage for raw materials was from one to two percent, for example. The amount was then lowered to a uniform one percent for all imported goods still subject to the deposit requirement. Subsequent changes were made, and then after indefinitely suspending the one percent rate Japan finally eliminated the deposit requirement altogether in May, 1970. BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:13.

[78] COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, REPORT TO THE PRESIDENT 220 (1971).

[79] "ex" indicates only partial liberalization.

all types of whisky (22.09); and oil cake and other residues from extractions of soybeans (23.04).[80] The following items no longer have import restrictions on them either: nitrogenous fertilizers, double superphosphate of lime, composite and complex fertilizers, tractors and chassis for tractors of a track-laying type and parts.[81]

Any Iowa business that wishes to import technology to Japan may do so without license provided it does not involve aircraft, weapons, ammunition, atomic energy, space explorations, computers, and petro-chemicals. These items are still subject to licensing. However, any technologies not among them may be imported once an application to do so is approved by the Bank of Japan (approval takes about one month).[82] If the royalty payments of the technology do not amount to more than $50,000 then approval is automatic, even for those technologies just listed which would have to be licensed otherwise.[83]

Those items still on the IQ list include the following: sterilized or frozen milk and cream (ex 04.01); milk and cream, preserved or concentrated, excluding sugared condensed wholemilk, sugared condensed skimmed, skimmed milk powder, wholemilk powder, buttermilk powder, and whey powder (ex 04.02); processed cheese (04.04-1); other cheese (excluding natural) and curd (ex 04.04-2); wheat flour (11.01-1); barley flour, and flour of other grain sorghums (ex 11.01-2); groats and meal of wheat and rice (*e.g.*, rolled, flaked, polished, etc.) except husked, glazed, polished or broken rice excluding germs thereof (ex 11.02-1); groats and meal of barley and other grain sorghums (ex 11.02-2); other prepared or preserved meat and offals of bovine or pigs, and other preparations chiefly consisting of meat and offals of bovine animals (ex 16.02-3); compound feeds (certain restrictions apply) excluding those of more than 70 yen/kg in C.I.F. value (ex 23.07-2); bovine cattle leather and equine leather (41.02) except that under BTN 41.06, 41.07, or 41.08; and sheep and lambs skin leather, dyed, colored, stamped, or embossed (41.03-1).[84]

The tables below show the process of liberalization.

PAST AND PRESENT LIBERALIZATION[85]

Date	*No. of Items on IQ List*
Oct., 1969	118
Jan., 1971	80
June, 1971	60
Oct., 1971	40
Apr., 1972	34

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80 BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:8-19; 4 MIDWEST TRADE BULL., May, 1971.

81 BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:6.

82 *Id.* at 7-8.

83 *Id.*

84 JAPAN TRADE CENTER, COMMERCIAL OPPORTUNITIES IN JAPAN (Dec., 1971).

85 Comparative Data of Economy Between U.S. and Japan, 1972 (obtained from the Japan Trade Center, Chicago).

AIQ LIST REDUCTIONS[86]

Date	No. of Items on List
Jan., 1969	253
Oct., 1969	120
Jan., 1971	73
June, 1971	47
July, 1971	37
Oct., 1971	11
Jan., 1972	0

ITEMS SUBJECT TO COMPLETE GOVERNMENTAL CONTROL, *I.E.* STATE TRADING[87]

ex. 04.02	milk and cream, preserved or concentrated
04.13	butter
10.01	wheat
10.03	barley

Why do agricultural products constitute the majority of items still not liberalized after the final stage of liberalization? Japan claims this is because her agricultural production has been declining with the decrease in the population of those connected with such production. Hence the reason for restraints, claims the Japanese Ambassador to the United States, H. E. N. Ushiba.[88] Nevertheless, he points out that "[o]ur importation of farm products from this country [the United States], more than $1 billion worth last year, is increasing steadily. Our agricultural policy has less protectionistic effect than has the common agricultural policy of the EEC . . . ."[89] Contrast this statement with the following one by former Secretary of Agriculture Clifford M. Hardin that "we should . . . press the Japanese to eliminate more rapidly their import quotas—which are unjustifiable."[90] Whether the rate of liberalization has been rapid enough is a matter of debate, but the fact is that quotas place a drag on the free enterprise system by limiting the supply from which the consumer can choose while at the same time aiding domestic producers.[91] To cite one example, a survey conducted by the Japan External Trade Organization in March, 1971, revealed that the price of 3.5 ounces of beef was 41 cents in New York and 82 cents in Tokyo. This difference was partly the result of Japanese import restrictions aimed at protecting Japan's domestic beef indus-

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86 *Id.*

87 JAPAN TRADE CENTER, COMMERCIAL OPPORTUNITIES IN JAPAN (Dec., 1971). Only a partial list is given.

88 Ushiba, *Changing Priorities in Japanese Economic Policies*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 2 PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 99, 101 (1971).

89 *Id.*

90 Hardin, *Needed—A Market-Oriented Agricultural Trading World*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 1 PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 793, 801 (1971).

91 *See* Baldwin, *Nontariff Distortions of International Trade*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 1 PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 641, 644 (1971).

try which has a low production.[92]

D. *Methods of Payment for Imports*

There are five standard methods of payment for which approval by MITI is not necessary: (1) payment between the time the goods or shipping documents are received and four months after clearance through customs; (2) payment before either the goods or documents are received in Japan (this is allowed only if the value of the imports is not over 1,800,000 yen); (3) advance payment for up to half of the value of imported machinery (payment here cannot exceed 1,800,000 yen); (4) advance payment for books, periodicals, and live animals; and (5) divided payments, which occur in most C.I.F. transactions. In this last case the customer pays 90% of the total cost within four months after clearance through customs, and he then pays the rest within six months after clearance.[93] Once the goods have been imported the customer may make payment in any of a number of specified currencies.[94] It has however been the practice of the Bank of Japan not to allow importers to pay for goods from the United States by using local currency, *i.e.*, Japanese yen. Rather, they have been required to pay in dollars.[95]

IV. Capital Investments in Japan

A. *The Law Generally*[96]

A Japanese survey in 1965 demonstrated that the primary reason why the Japanese seek American investment is the desire for "know-how". The second most given reason was the desire for capital from the United States, which is not surprising.[97] They prefer loans instead of equity investments, and they

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[92] Des Moines Sunday Register, Dec. 26, 1971, § F, at 2, col. 5.

[93] Ministerial Ordinance Concerning Standard Method of Settlement (Ministry of Finance Ordinance No. 62), Schedule 2 (Standard Method of Settlement for Import) (Oct. 31, 1962).

[94] Ministerial Ordinance Concerning Designation of Currency (Ministry of Finance Order No. 101) art. 1, para. 1 (Dec. 1, 1949); BNA Int'l Trade Rep., Foreign Import and Exchange Controls 270:17; BNA Int'l Trade Rep., Export Shipping Manual 94:5.

[95] This is because of the wording of the Cabinet Order Concerning Import Trade Control (Cabinet Order No. 414) art. 8 (Dec. 29, 1949) which states that "[a]ny person desiring to import goods shall apply to the Minister of International Trade and Industry for approval of import . . . where goods . . . to be imported . . . [are] [t]o be settled with means of payment expressed in the Japanese currency. . . ."

[96] Iowans wishing to invest in Japan should contact the Commercial Office of the United States Embassy in Tokyo. Its primary purpose is to help those wanting to do business in Japan. They can obtain direct assistance and advice from the Embassy and Consulates in Kobe/Osaka, Nagoya, Fukuoka, Sapporo, and Naha. They will also receive indirect help from the United States Department of State, Department of Commerce, Department of the Treasury, etc. in Washington. The embassy and consulates can provide information on the following: economic trends; financing; insurance; Japanese customs operations; Japanese regulations applicable to trademarks and patents; procedures used in trade disputes; aid in establishing business contacts; and particular firms as well as their agents in Japan. Schodt, *U.S. Embassy Services for the American Businessman*, 3 J. Am. Chamber Comm. in Japan, No. 12 (Dec. 5, 1966).

[97] *Gaishi Donkyu Nenkan* (Tokyo Zaidan Hojin Shoko-kai-kan, 1965) 286-306 (1965).

would rather accept technical assistance programs and licensing arrangements on a short-term basis.[98] The official Japanese policy on foreign investment is stated in the Law Concerning Foreign Investment:

> The purpose of this law is to create a sound basis for foreign investment in Japan, by limiting the induction of foreign investment to that which will contribute to the self-support and sound development of the Japanese economy and to the improvement of the international balance of payments, by providing for remittances arising from foreign investment, and by providing for adequate protection for such investments.[99]

The reader can draw his own conclusions about the protective nature of those words.

Looking at other sources of law that bear directly on capital investment in Japan, there is first of all an FCN treaty between the United States and Japan which became effective in 1953 and which provides that United States nationals may engage in business activities and make investments in Japan, and vice versa.[100] Under the treaty the United States is to treat Japan as a most-favored nation. Each country reserves the right to limit the degree of foreign involvement in certain restricted industries, to wit: public utilities, ship-building, air and water transport, banking (depository or fiduciary functions), and exploitation of land or natural resources. If United States nationals and companies lease immovable property (land, buildings, etc.) they are to be given national treatment; and if they purchase, lease, etc. movable property (tangible and intangible), they are to be given most-favored-nation and national treatment.[101] No property of United States nationals or companies may be expropriated in Japan unless it is for a public purpose and just and effective compensation is given in return.[102] And further, under the treaty Japan may restrict the inflow of American capital only for the purpose of preventing her "monetary reserves from falling to a very low level or to effect a moderate increase in very low monetary reserves."[103]

All foreign capital is regulated at the time of entry. The Foreign Exchange and Foreign Trade Control Law deals generally with the entire area of foreign exchange and foreign trade, including capital transactions.[104] The Law Concerning Foreign Investment, enacted in 1950, is related to the Foreign Exchange and Foreign Trade Control Law and allows remittance of the princi-

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98 Zinkand, *Foreign Business in Japan*, 5 J. AM. CHAMBER COMM. IN JAPAN, No. 2 (Feb. 5, 1968).

99 Law Concerning Foreign Investment (Law No. 163) ch. 1, art. 1 (May 10, 1950).

100 Treaty of Friendship, Commerce, and Navigation with Japan, Apr. 2, 1953, art. 1, para. 1, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863.

101 *Id.* at art. IX, para. 1, 2. The law regarding the purchase of property and proprietary interests is found in the Cabinet Order Concerning the Acquisition of Properties and/or Rights by Foreign Nationals (Cabinet Order No. 51, March 15, 1949).

102 Treaty of Friendship, Commerce, and Navigation with Japan, Apr. 2, 1953, art. VI, para. 3, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863.

103 *Id.* art. XII, para. 2.

104 INTERNATIONAL FINANCE BUREAU, MINISTRY OF FINANCE, MANUAL OF FOREIGN INVESTMENT IN JAPAN 1-2 (1971).

pal and "fruits" (interest, dividends, profits) of an investment.[105] If the investment is to be a long-term one (those redeemable after one year or more) an investor must obtain validation or government approval under the Law Concerning Foreign Investment. Those who will receive investment capital in cases of short-term investments must secure a license under the Foreign Exchange and Foreign Trade Control Law.[106] There are also special laws applying to particular businesses under which an investor may be required to obtain governmental approval before he can begin business activities.[107] To obtain validation under the Law Concerning Foreign Investment an investor should make application to the Minister of Finance and the minister having authority over the particular type of investment.[108] Forms for this are available from the Bank of Japan and its offices, and application is made through it. The Japanese have tried to streamline this procedure with changes as recent as November, 1971. The ministers will usually consult with the Foreign Investment Council before making a decision whether to validate.

B. *Types of Investment*

Under Japanese law, a "foreign investor" is any non-resident person or organization established under the laws of a foreign country; branch offices, branch factories, etc. in Japan of firms established under the laws of foreign countries; resident non-Japanese nationals; overseas residents with both Japanese and foreign nationality, *i.e.* dual nationality; and Japanese corporations with shares or interests wholly owned by nonresidents, by corporations established under the laws of foreign countries, or by residents not having Japanese nationality, *and* any Japanese corporations the management of which is in reality controlled by any of these.[109] There are various kinds of investment, but

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[105] *Id.*
[106] *Id.*
[107] *Id.* at 11.
[108] *Id.* at 4.
[109] *Id.* at 1. The definition of "foreign investor" is found in the two laws which follow.

Law Concerning Foreign Investment (Law No. 163) art. 3, para. 1 (May 10, 1950):
(1) "Foreign investors" shall mean.

a. "Exchange non residents" (excluding juridical persons) . . . .

b. Any juridical person (corporate body, enterprise) established under foreign law, or having its seat or place of administration in foreign countries, except those designated by the Minister of Finance.

c. Any juridical person (corporate body, enterprise), the stock or proprietary interest of which is wholly owned, directly or indirectly, by a person or persons as specified in either item a. or b. above.

d. Any juridical person (corporate body, enterprise), which is in fact controlled by a person or persons as specified in either item a. or b. above.

e. In addition to those as specified in any one of the items a. through d. inclusive, any person as mentioned in Article 2 paragraph 1 of the Cabinet Order Concerning the Acquisition of Properties and/or Rights by Foreign Nationals (Cabinet Order No. 51 of 1949).

Cabinet Order Concerning the Acquisition of Properties and/or Rights by Foreign Nationals (Cabinet Order No. 51) art. 2, para. 1 (March 15, 1949):

Article 2. A "Foreign National" for the purpose of this Order is defined as any person who comes under any one of the sub-paragraphs as stipulated hereunder:

basically these fall into the two categories of direct and indirect investment. The first case includes corporations, their subsidiaries and branch offices, and joint business ventures. Under the indirect form of investment, a foreign investor can acquire shares in a non-direct manner, such as corporate debentures, beneficiary certificates, and government bonds. He can also extend loans or enter into licensing agreements.[110] In addition to these, there are agency agreements generally. These are governed by both the civil and commercial codes of Japan, but the parties are allowed to agree on their own terms in such arrangements.[111]

The most important form of direct investment in Japan today is the joint venture.[112] The Japanese call it a partnership instead, since it fits all the requirements for a partnership under Japanese law[113] and thus is legally a partnership. It is often used in the same situation as a licensing agreement would be used; however, the joint venture can be employed when a firm wishes to do business for an unlimited length of time whereas licensing agreements are usually limited in duration.[114] The disadvantage of a joint venture is that it must be validated or formally approved by the government of Japan. How quickly the government does this depends on how desirable the American product or technology is to the Japanese.[115] Also, it is much easier to obtain approval of licensing agreements between an American and Japanese firm than approval of joint ventures.[116] The Japanese are particularly reluctant to allow a foreign national to have more than 50% interest or control in a company.

An Iowa firm may wish to establish a branch office (and do business under its own name in Japan) in order to avoid the more difficult process of obtaining validation for a subsidiary.[117] Branch offices can also aid in boosting

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(1) Any person without Japanese nationality;
(2) Any person who has any nationality in addition to Japanese nationality, except any such person who has a residence in the place where this Cabinet Order is effective;
(3) Any juridical person established under foreign law, or any juridical person with its head or main office outside Japan or any other similar organization, except those designated by the competent Minister;
(4) Any juridical person or organization, the stocks or shares of which are wholly owned, directly or indirectly, by a person as specified in any one of the sub-paragraphs (1) through (3) above;
(5) Any juridical person or organization, the management of which is virtually controlled by a person or persons as specified in any one of the sub-paragraphs (1) through (3) above.

[110] International Finance Bureau, Ministry of Finance, Manual of Foreign Investment in Japan 5 (1971).

[111] BNA Int'l Trade Rep., Foreign Import and Exchange Controls 270:8.

[112] *See* Douglas, *Legal Aspects of Doing Business in Japan*, 6 Am. Bus. L.J. 679, 683 (1968).

[113] *Id.* at 684; Henderson, *Contract Problems in U.S.-Japanese Joint Ventures*, 39 Wash. L. Rev. 479, 485-86 (1964).

[114] Zinkand, *Foreign Business in Japan*, 5 J. Am. Chamber Comm. in Japan, No. 2 (Feb. 5, 1968).

[115] *Id.*

[116] *Id.*

[117] *See* Gruber, *Establishing a Branch Office in Japan*, 4 J. Am. Chamber Comm. in Japan, No. 5 (May 5, 1967).

direct sales or purchases, can oversee licensing agreements, and can participate in joint ventures by representing a firm. In situations where a product being exported is experiencing heavy competition from a similar item on the Japanese market, a licensing agreement is advisable. A branch office also constitutes a minimal investment.[118] Under Article 479 of the Japanese Commercial Code a company will have to appoint a legal representative in Japan and establish an office if its branch intends to engage in continuous commercial transactions. A foreign corporation must also register its branch office in the Commercial Registry before it can conduct continuous commercial transactions. Under the Cabinet Order Concerning Control of Foreign Exchange,[119] a branch office must file an Establishment Report with the Minister of Finance and the Minister of International Trade and Industry through the Bank of Japan. The report must contain information on the business planned, the program to be carried out, and how the branch office is to be financed. If a firm plans to bring in its own operating funds, or use its own property rights (*e.g.*, trademarks or know-how) it must first secure a license to do so. However, no license will be granted until the Establishment Report has been accepted. In at least four situations the Bank of Japan will usually allow a reasonable amount of foreign funds to be introduced into Japan for branch operations: (1) for liaison activities, (2) service activities, (3) marketing activities, and (4) purchasing activities. It takes about two or three months for such approval. Once a branch has registered it may begin business. Branch offices may engage in profit-making activities but not manufacturing unless they first obtain approval of the Japanese government. Neither can they engage in any restricted businesses, such as banking and insurance, unless approval of the ministry having authority over the particular restricted activity is obtained. As for acquiring real property, the Ministry of Finance distinguishes between those purchases which are strictly for office space or residence and those going beyond this. In the latter case, a branch will be viewed as an "exchange non-resident," and its purchase of realty will then be subject to licensing.

C. *Foreign Investment Liberalization*

Until 1963 governmental approval or "validation" was required for all foreign investments unless they were made on what was known as a "yen-basis".[120] This meant that an investor had two options. He could invest in a form validated by the government; or, not being able to obtain validation, he could invest on a yen basis and receive investment returns in yen instead of

118 *See* Zinkand, *Foreign Business in Japan,* 5 J. AM. CHAMBER COMM. IN JAPAN, No. 2 (Feb. 5, 1968).

119 Cabinet Order Concerning Control of Foreign Exchange (Cabinet Order No. 203) art. 27, para. 3 (June 27, 1950), *implemented by* Ministerial Ordinance Concerning Report of Branch, Factory and Other Office in Japan of Exchange Non-Resident (Ministry of Finance and Ministry of International Trade and Industry Ordinance No. 1, July 1, 1963).

120 *See* INTERNATIONAL FINANCE BUREAU, MINISTRY OF FINANCE, MANUAL OF FOREIGN INVESTMENT IN JAPAN 12 (1971).

foreign exchange.[121]

Then, on July 1, 1963, the government abolished the yen base system. From that date all investment required validation except acquisition of shares in non-restricted industry by resident foreign investors.[122] They were more or less unlimited in the amount they could acquire. The one exception was in the area of restricted businesses, such as public utilities and banking. (There was also the limitation that the profits from any non-validated subsidiary corporation formed by a foreign investor could not be remitted to the United States; but the dividends paid to stockholders could be remitted since under Japanese law they were profits of shareholders).

However, on July 1, 1967, the Foreign Investment Law of Japan was amended by the Cabinet Order Concerning Exceptions to Standards of Validation (Order No. 163).[123] This had the effect of restricting still further acquisitions of shares in corporations in Japan by branch offices, subsidiaries of foreign corporations, and foreign nationals residing in Japan.[124] This new Order limited the amount that could be acquired without validation and affected even resident foreign investors. A foreign investor's acquisition of proprietary interests or shares in Japanese firms without validation was established at "up to but not including 7 percent." Now after recent liberalizations, the amount of investment allowed an individual foreign investor has been raised from 7% to "not more than 10 percent" per investor.[125] The ceiling on total foreign investment in any given existing business is "up to but not including 25 percent" for non-restricted industries (before September 1, 1970, it was 20%) and "up to 15 percent" for restricted industries such as banks, public utilities, transportation, and broadcasting.[126]

Further, the government now claims that most direct investments will be validated provided they are not considered harmful to the national economy.[127] In attempting to establish guidelines, the government has placed all industry into two broad groups, by official definition. These are Class I and Class II industries. A Class I industry is one which the Japanese government will automatically approve if it is a new business with a foreign participation not exceeding 50%.[128] Class II industries are those in which foreign participation

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[121] BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:5.

[122] INTERNATIONAL FINANCE BUREAU, MINISTRY OF FINANCE, MANUAL OF FOREIGN INVESTMENT IN JAPAN 13 (1971).

[123] *See also* With Regard to Liberalization of Domestic Direct Investment, Etc. (Cabinet Council decision of Aug. 25, 1970) which discusses government policy and Class I and Class II industry investments.

[124] Gruber, *Significant Changes Affecting the Acquisition of Shares in Japanese Companies*, 4 J. AM. CHAMBER OF COMM. IN JAPAN, No. 10 (Oct. 5, 1967).

[125] JAPAN TRADE CENTER, COMMERCIAL OPPORTUNITIES IN JAPAN (Dec., 1971).

[126] INTERNATIONAL FINANCE BUREAU, MINISTRY OF FINANCE, MANUAL OF FOREIGN INVESTMENT IN JAPAN 2-3 (1971).

[127] *Id.* at 4.

[128] Class I industries are those in which direct investment will be automatically approved if: (1) the business is a new one, (2) no more than 50% of the equity stock is held by foreign investors, (3) at least 50% of the total stock is held by Japanese investors already in the same kind of business, and at least 33 1/3% is held by one

of 100% is automatically allowed.[129] Note that all Class I and Class II industries must be *new* enterprises. The extent of liberalization is shown below.

CAPITAL LIBERALIZATION (ROUNDS ONE THROUGH FOUR)[130]

DATE	CLASS II	CLASS I
1. July 1, 1967	17	33
2. March 1, 1969	44	160
3. Sept. 1, 1970	77	447
4. Aug. 1, 1971	228	All other industry sectors except seven still subject to case-by-case screening

According to the government 94% of all industries (excepting the seven non-liberalized sectors mentioned below) have been opened up to 50 to 100% foreign ownership.[131] Of those industries that have been liberalized to allow 100% direct foreign investment, about the only ones that seem to be of interest to Iowans are the spices manufacturing industry and the single-substance forage manufacturing industry (excluding protein feed and microbial source).[132] An overall examination after the fourth round of liberalization reveals there are still industry sectors which require approval before foreign investment can be up to 50%. Many of the industries in these sectors are agricultural ones. Direct investment will still be allowed but only at the discretion of the Japanese government. Among those seven industrial sectors still subject to case-by-case screening are the following: primary industry related to agriculture; leather and leather products manufacture; all retail trade businesses having more than eleven stores.[133]

To summarize then, validation or approval is automatically granted in the

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such Japanese investor, (4) there are no contributions in kind by Japanese investors (except real estate), (5) there will be neither immediate transfer of business to the new firm from existing ones nor combination of the new firm with them, (6) the proportion of Japanese members on the board of directors does not fall below the proportion of Japanese-owned shares in the corporation, (7) the industry will not have a harmful effect on Japanese industries, and (8) the Japanese Commercial Code is followed. INTERNATIONAL FINANCE BUREAU, MINISTRY OF FINANCE, MANUAL OF FOREIGN INVESTMENT IN JAPAN 37 (1971).

[129] Direct investment in Class II industries is automatically approved if: (1) it is a new enterprise, (2) there are no contributions in kind to the equity by Japanese investors other than real estate, (3) the business will not receive any transfer of business from or combine with an already existing company, and (4) the industry has no detrimental effect on other Japanese industries. *Id.* at 38. Examples of Class II industries: *food and beverage* (sausages; soy sauce; liquor, excluding whisky; animal oils and fats; corn flakes; oatmeal manufacturing; spices; single-substance forage), *paper* (office paper products), *rubber* (bicycle tires and tubes), *service* (restaurants; travel agencies; hotels and inns). JAPAN TRADE CENTER, COMMERCIAL OPPORTUNITIES IN JAPAN (Dec., 1971).

[130] Comparative Data of Economy Between U.S. and Japan, 1972 (obtained from the Japan Trade Center, Chicago). This table applies to direct and portfolio investments.

[131] JAPAN TRADE CENTER, COMMERCIAL OPPORTUNITIES IN JAPAN (Dec., 1971).

[132] For a complete list *see* BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:9.

[133] *Id.* at 270:19. These are not to be confused with the "restricted industries" such as banking and public utilities.

following cases: (1) where the shares that a foreign investor holds amount to less than 10% of the total number of shares, and where the total number of foreign investors in that industry is less than 25%, except for restricted industries, where the ratio is 15% or less; (2) all Class II industries, of which there are now 228; and (3) all Class I industries in which investment will be 50% or less.[134] Approval is not automatic in the following cases: (1) all Classs I industries where the investment will exceed 50%; (2) the seven industrial sectors subject to case-by-case screening; and (3) all existing enterprises, except when the percentage guidelines set out for automatic approval are followed.[135]

The Japanese Ambassador to the United States, Mr. Ushiba, has stated, "I . . . wish to stress that we do not regard the fourth round as the last one. It is our intention to promote liberalization by continuing to free more industrial sectors for foreign participation up to 50% and also by increasing the number of such sectors in which foreign ownership will be approved up to 100%."[136] Unfortunately no advanced country has more restrictions on capital investment than Japan.[137] Compare Mr. Ushiba's words with the statement by the Presidential Commission on International Trade and Investment Policy in its report to the President that "[w]ith regard to foreign direct investment in Japan, the Commission believes that the present pace of effective liberalization of restraints on the entry of foreign firms into Japan is too slow."[138] And Mr. Philip H. Trezise, Assistant Secretary of State for Economic Affairs, has commented that "despite the urgings of the internationalists in the business community, the Japanese Government continues to be extremely reluctant to compromise national control over the economy by freely admitting foreign investors."[139] What has irritated many American businessmen is that the new liberalizations deal almost exclusively with new ventures only, while more or less ignoring those already existing.

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134 International Finance Bureau, Ministry of Finance, Manual of Foreign Investment in Japan 7-9 (1971). Note that there is a ceiling for investments granted automatic approval. It was recently raised from $300,000 to $1 million. Trezise, *U.S.-Japan Economic Relations*, in United States International Economic Policy in an Interdependent World, 2 Papers Submitted to the Commission on International Trade and Investment Policy 183, 191 (1971).

135 International Finance Bureau, Ministry of Finance, Manual of Foreign Investment in Japan 7-9 (1971).

136 Ushiba, *Changing Priorities of Japanese Economic Policies*, in United States International Economic Policy in an Interdependent World, 2 Papers Submitted to the Commission on International Trade and Investment Policy 99, 102 (1971).

137 *See* Trezise, *U.S.-Japan Economic Relations*, in United States International Economic Policy in an Interdependent World, 2 Papers Submitted to the Commission on International Trade and Investment Policy 183, 190 (1971).

138 Commission on International Trade and Investment Policy, United States International Economic Policy in an Interdependent World, Report to the President 225 (1971).

139 Trezise, *U.S.-Japan Economic Relations*, in United States International Economic Policy in an Interdependent World, 2 Papers Submitted to the Commission on International Trade and Investment Policy 183, 191 (1971).

D. *Remittance of Investment Profits*

Article VIII of the International Monetary Fund prohibits members from imposing restrictions on payments or transfers regarding international transactions. Before Japan became a member in April, 1964, she required that under the yen-based or non-validated system of foreign investment a company was not to remit any of the principal or income to the United States. This was changed after Japan became a member of the IMF, so that now such income and principal may be remitted without limitation.[140] Under the old system the investor had two options as mentioned above—either validated or yen-based investment. Under the first of these, he was always allowed to remit profits to the United States, but not under the second. On July 1, 1963, the second option, the yen-based form of investment, was terminated.

The new system, after recent changes, allows investment earnings from yen-based investments to be remitted as earned.[141] Still later regulations have allowed liquidation proceeds of yen-basis stocks to be freely remitted as well. The significance of the new system is that there will no longer be a difference in the treatment of foreign yen-based investments and formally validated investments.[142] Authorization of remittances in the case of yen-based investments must be obtained from the Bank of Japan, but this is promised to be almost automatic. Application should be made to the BOJ.[143] As for branch offices, they too may remit in foreign currency all profits with BOJ permission (which is automatic upon establishment of the facts of each case).[144]

V. NEGOTIATING CONTRACTS WITH THE JAPANESE

In drafting contracts Americans like to get everything down in black and white. The Japanese on the other hand usually wish only to set down the basics leaving details open for later "adjustment".[145] The American usually has a profit motive while the Japanese seeks advancement of his organization or company, with profits considered a side effect. This difference in approach and attitude often leads to frustration on the part of the American. Added to

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140 Ministerial Ordinance Concerning Procedure of Remittance in Accordance with the Law Concerning Foreign Investment (Ministry of Finance and Ministry of International Trade and Industry Ordinance No. 2, Nov. 16, 1950); Law Concerning Foreign Investment (Law No. 163) ch. III (May 10, 1950).

141 BNA INT'L TRADE REP., FOREIGN IMPORT AND EXCHANGE CONTROLS 270:5-6.

142 *Id.* at 270:9.

143 *Id.* Generally speaking yen in non-resident bank accounts can now be freely remitted in foreign currency, *i.e.*, dollars in this case. Americans residing in Japan can upon application to the BOJ, remit their income to the United States. *Id.* Also, as of April 1, 1972, non-residents will be allowed to open convertible free yen accounts (which allow free conversion of yen to foreign currencies). INTERNATIONAL LETTER, No. 54 (Feb. 25, 1972).

144 INTERNATIONAL FINANCE BUREAU, MINISTRY OF FINANCE, MANUAL OF FOREIGN INVESTMENT IN JAPAN 12 (1971).

145 *See* Burridge, *Negotiating Contracts in Japan*, 4 J. AM. CHAMBER COMM. IN JAPAN, No. 12 (Dec. 5, 1967); Douglas, *Legal Aspects of Doing Business in Japan*, 6 AM. BUS. L.J. 679, 681 (1968); Henderson, *Contract Problems in U.S.-Japanese Joint Ventures*, 39 WASH. L. REV. 479, 510 (1964).

this is the problem of the Japanese language, which is not as precise as English and therefore more susceptible to varied interpretation. (And professional translation services in Japan are not of much value either). Since it is very difficult to have an English language contract translated precisely into Japanese, it is advisable to draft it in Japanese to begin with while conducting negotiations in that language if possible.[146] And since a Japanese party will not wish to be tied down to specifics in a contract, an American who plans to require strict adherence to its provisions should also provide that some diversion from its terms be allowed the Japanese if unforeseen hardships should arise.[147] An investor may execute a contract only to have the Japanese party later indicate that he wants to change some of the conditions or rescind it altogether. Under the Japanese Civil Code rescission or nonperformance is illegal except where the parties agree to do so or where there has been a change of circumstances. In using the latter as a defense, the following elements must be established: (1) the change of circumstances was substantial; (2) and was unforeseen; (3) there was an absence of fault by the parties; and (4) enforcement of the contract would result in a violation of good faith between the parties.[148] A clause providing for liquidated damages in the event of nonperformance or default would avoid going to court.[149] Also, any Iowa firm negotiating a contract with a Japanese business should make sure the Japanese fully understand all provisions in order to avoid a subsequent demand for changes.[150] The Japanese are reluctant to go to court and regard it as a place of last resort. They prefer to rely on compromise and conciliation for settlement of differences, and this is why they do not draft contracts with an eye toward the possible necessity of court enforcement. While this is changing, an Iowa businessman should likewise try to avoid using the Japanese judicial system for enforcement of contracts if only because the courts are heavily crowded and the time required for final judgment is often lengthy.[151]

VI. Other Considerations

A. *Effect of Japanese Trade Agreements*

There has been a decline in the agricultural labor force in Japan, and as a result she has attempted to compensate for this by promoting increased technology in farming in order to boost efficiency and yield.[152] Even if she succeeds, Japan will continue to go beyond her own borders for agricultural products. The problem which we face is increasing competition from other nations

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146 Burridge, *supra* note 145.
147 *Id.*
148 Iquichi v. Ikeqami, 8 Minshu 448 (Sup. Ct. 1954).
149 Douglas, *Legal Aspects of Doing Business in Japan*, 6 Am. Bus. L.J. 679, 682, 684 (1968).
150 *Id.*
151 *Id.*
152 U.S. Agricultural Attache Staff, Tokyo, Agricultural Production and Trade Situation and U.S. Agricultural Market Development Activities in Japan 3, April 1, 1968.

which are beginning to export agricultural products to Japan. What is more, in a number of cases these nations have been actively encouraged to do so by Japan.[153] She has bilateral trade agreements with at least forty-five nations, the majority of which involve exporting agricultural products or raw materials to Japan.[154] They do not specify quantities, but these are instead worked out on an annual basis. It is therefore significant for the Iowa businessman or farmer that Japan may seek some agricultural products elsewhere in the future if United States-Japanese trade relations are injured. Witness the fact that Japan now trades with Communist China with whom she has had unofficial agreements involving large imports of corn and soybeans.[155] Japan is also a member of the Organization for Economic Cooperation and Development (OECD), the General Agreement on Tariffs and Trade (GATT), and the Columbo Plan. She contributes heavily to the Asian Development Bank. The point is that Japan is very agressively promoting agricultural trade and development in South East Asia, and her objective is to expand the markets for her manufactured goods and increase the sources from which she can obtain agricultural products.[156] As for wheat, Iowans must compete with the Canadians and Australians, both of which have trade agreements with Japan.[157] Thailand exports a great deal of corn and grain sorghum to Japan, and the two countries are known to have trade agreements.[158] In 1966 Japan and Thailand agreed on a five year trade arrangement under which the Japanese would purchase all the grain sorghum Thailand could supply.[159] All this does not mean Iowa exports to Japan are in danger. Not by any means, for the Japanese will likely increase their imports from the United States as well.[160] United States policy can of course have a real effect on Iowa exports to Japan should that policy run counter to the interests of Japanese exporters of manufactured products to the United States.[161] As long as this does not occur there is little doubt farm exports to Japan will grow.

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153 *See* D. CHRISLER, ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, PREFERENTIAL TRADE ARRANGEMENTS OF FOREIGN COUNTRIES (FOREIGN AGRICULTURAL ECONOMIC REPORT NO. 41) 3 (1968).

154 U.S. Agricultural Attache Staff, Tokyo, Agricultural Production and Trade Situation and U.S. Agricultural Market Development Activities in Japan 6, April 1, 1968.

155 *Id.*

156 *Id.* at 7.

157 D. CHRISLER, ECONOMIC RESEARCH SERVICE, U.S. DEP'T OF AGRICULTURE, PREFERENTIAL TRADE ARRANGEMENTS OF FOREIGN COUNTRIES (FOREIGN AGRICULTURAL ECONOMIC REPORT NO. 41) 17 (1968).

158 *Id.* at 15.

159 *Id.* The Thai's produce well over a million tons of corn a year, and most of it goes to Japan. *Id.*

160 Along with a rise in the income of Japanese workers has come a change in diet. As a result the Japanese are not only consuming more food but are also buying more poultry, eggs, pork, and beef. Des Moines Sunday Register, July 18, 1971, § F, at 1, col. 6.

161 *See* Sorenson & Hathaway, *The Competitive Position of U.S. Agriculture*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 1 PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 811, 821 (1971). For example, whenever the United States passes quota legislation to restrict imports of certain items, those countries exporting such items may under GATT institute retaliatory measures. Japan could do so by limiting American farm exports. *See* U.S.-JAPAN AGRICULTURAL TRADE NEWSLETTER, Fall 1967, at 1.

B. *Impact of Transportation Rates*

Today most grain is shipped from Iowa in bulk via piggyback trailers. New developments however have made it possible to ship grain in sealed containers and an effort is being made to have the ICC lower freight rates for containerized items and remove restrictions against the use of containers for bulk loading. The Trans-Continental Freight Bureau, which researches rates and then sends its findings and recommendations to the ICC for approval, has made such a proposal regarding containerized shipment of soybeans. Such action would of course be fought by dockworkers (the new system does not use them in loading containers on board ships) and truckers (since shipment would be via rail instead). But the real impact of lowering the transportation rates within the United States would be to eventually reduce the price at which our products are sold in Japan. For example, one of the problems soybean exporters have is the high cost of transporting their product from land-locked northwest Iowa (where the majority of Iowa soybeans are grown) to the West Coast or river ports.

The President's Commission on International Trade and Investment Policy has stated that "[g]overnment transportation policies, regulatory agency rules, and private arrangements can have significant impact on exports . . . . Worthy of possible government encouragement is the development of bulk cargo facilities to handle the new super-cargo ships."[162] In sum, improved transportation rates would help boost all exports by making shipment to coastal areas easier and less costly. As Mr. Harold Scott, Deputy Assistant Secretary of Commerce and Director of the Bureau of International Commerce has put it, "The patchwork transportation policy of the United States has left exporters with antiquated, confusing rate schedules and documentation requirements— as well as with discriminatory rates that make it up to twice as costly to ship from the United States to a foreign destination as vice-versa."[163]

VII. Conclusion

Former Secretary of Agriculture Clifford Hardin has stated that "the paramount problem facing U.S. agricultural trade is obtaining market access on a reasonable basis."[164] This summarizes well the current situation with regard

162 Commission on International Trade and Investment Policy, United States International Economic Policy in an Interdependent World, Report to the President 120-21 (1971).

163 Scott, *Export Expansion for the Seventies . . . and Beyond*, in United States International Economic Policy in an Interdependent World, 1 Papers Submitted to the Commission on International Trade and Investment Policy 549, 560 (1971). *See also* Goldy, *Export Expansion: Can the United States Improve Its Trade Balance?*, in United States International Economic Policy in an Interdependent World, 1 Papers Submitted to the Commission on International Trade and Investment Policy 563, 567 (1971).

164 Hardin, *Needed—A Market-Oriented Agricultural Trading World*, in United States International Economic Policy in an Interdependent World, 1 Papers Submitted to the Commission on International Trade and Investment Policy 793, 802 (1971).

to Japan, where investment in the agricultural sector of the economy is so limited. Iowans cannot for example invest in hog raising and thereby raise Japan's need for imported feed grains and protein supplements.[165] The reasons why Japan has imposed such strict governmental controls on foreign investment in the past include a distrust of Western Civilization, a desire to preserve the Japanese way of life, a fear of the "superior power" of foreign capital, viz. that of the United States,[166] and a belief that foreign investors would not accept Japanese practices such as governmental guidance of industry.[167] In the latter case businesses usually confer closely with the government, often seeking advice and guidance. It is an arrangement of government-business cooperation which allows the Japanese government to exert influence over business.[168] While the Japanese still believe in the free enterprise system, there can be little doubt that business is greatly influenced by governmental agencies such as the Ministry of Finance, the Ministry of International Trade and Industry, and the Bank of Japan.[169]

And finally, although there has been an increasing degree of liberalization of import restrictions, the process is a somewhat deceptive one. This is due to the fact that while on the one hand the Japanese have been extensively publicizing liberalization and removal of import quotas, on the other, they have simply been replacing them with tariffs or increased duties. Many would still question then whether trade and investment barriers are really being reduced. The facts indicate that in general they are. This trend can be expected to continue as a result of the agreement in February of this year between the United States and Japan to begin negotiations (along with countries of the European Economic Community) in 1973 on the expansion and liberalization of international trade.

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165 Upchurch, *Competitive Position of U.S. Agriculture*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 1 PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 833, 849 (1971).

166 This fear is expressed throughout With Regard to Liberalization of Domestic Direct Investment, Etc. (Cabinet Council decision of Aug. 25, 1970). See this decision generally for a discussion of government policy regarding new liberalization.

167 COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY, UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, REPORT TO THE PRESIDENT 221 (1971).

168 Mr. Philip Trezise, Assistant Secretary of State for Economic Affairs has described it as follows: "In the trade field, numerous joint government-business associations are the conduits through which signals are passed from protection-minded firms to government and from government to prospective importers. Concentration of most import transactions in the hands of a relatively small number of large trading firms enhances the effectiveness of the system." The system is not that well organized, however, and not all import transactions go to government-favored firms, he points out. Trezise, *U.S.-Japan Economic Relations*, in UNITED STATES INTERNATIONAL ECONOMIC POLICY IN AN INTERDEPENDENT WORLD, 2 PAPERS SUBMITTED TO THE COMMISSION ON INTERNATIONAL TRADE AND INVESTMENT POLICY 183, 186-87 (1971).

169 Zinkand, *Foreign Business in Japan*, 5 J. AM. CHAMBER COMM. IN JAPAN, No. 2 (Feb. 5, 1968).