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Recommended Citation

David Cohen & Karen Martin, Western Ideology, Japanese Product Safety Regulation and International Trade, 19 U. Brit. Colum. L. Rev. 315 (1985), <http://digitalcommons.pace.edu/lawfaculty/441/>.

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WESTERN IDEOLOGY, JAPANESE PRODUCT SAFETY REGULATION AND INTERNATIONAL TRADE

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I. INTRODUCTION

In the forty years since the end of the Second World War, Japan has emerged from its post-war position of near economic devastation to become one of Canada's, and indeed one of North America's, leading trade partners.¹ Although Canada was the world's seventh largest exporter to Japan in 1981 (fourth if oil exporting countries are excluded),² the high political profile of United States-Japan trade relations has tended to shadow the importance of Canada-Japan trade. Since 1973 Japan has been Canada's second largest export market, trailing only the United States.³ The traditional composition of the exports and imports of both Japan and Canada is

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I wish to thank Professor Malcolm Smith, of the Faculty of Law, University of British Columbia, Professor Masako Kamiya, Hokkaido University and Professors Sakurada and Kojo also of Hokkaido University for their comments on earlier drafts of this paper. I also owe an enormous debt to several students who assisted me in preliminary research on this topic. In particular I would like to thank Douglas Boulton and Gordon Matei for their time and effort.

This article could not have been produced without the assistance of the Max Bell Foundation and through it, the establishment of the Japanese Law Program under the directorship of Professor Malcolm Smith at the Faculty of Law, University of British Columbia.

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¹ In 1981, Japan had exports to North America totalling \$42.3 billion (U.S.) and imports from North America totalling almost \$30 billion (U.S.): 30:1, 1981 YEARBOOK OF INTERNATIONAL TRADE STATISTICS (1982), at 537.

² *Id.*, at 197.

³ *Supra*, note 1.

reflected in the trade figures: an overwhelming percentage of Canada's exports to Japan falls within the category of raw materials, and a corresponding percentage of Japan's exports to Canada are manufactured goods.⁴

Canada has maintained a consistent trade surplus with Japan since 1973, in contrast to its trade balances with the United States and the European Economic Community.⁵ This may explain Canada's relative reticence in the wake of international (largely American) criticism of Japanese trade policies.⁶ The United States' deficit with Japan has resulted in considerable trade friction between the two countries, and has led to charges by American businessmen and government officials that the Japanese market is unfairly and unnecessarily closed to foreign importers.⁷ In April of 1983, a former Japanese ambassador to the United States commented that he had "never seen the mood on Capitol Hill as ugly as it is now toward the Japanese".⁸

Hostility toward Japanese trade policy is not, however, confined to the United States. Recently, both France and Canada instituted systematic customs slowdowns as protectionist measures directed respectively against Japanese videotape recorders and automobiles.⁹

⁴ In 1981 fully manufactured goods constituted 4% of Canadian exports to Japan, while they represented 95.5% of Japanese exports to Canada: *Statistics Canada*. For a comprehensive analysis, see CANADA'S EXPORT DEVELOPMENT PLAN FOR JAPAN (Department of External Affairs Publication) (1982), at 218-19. See also Government of Canada, Industry, Trade, and Commerce Publication, *MARKETS FOR CANADIAN EXPORTERS: JAPAN* (1979), at 21.

In recent years, Canada has experienced moderate success in increasing its exports of semi-processed and fully manufactured goods to Japan: *Canadian Goods Find Japanese Market*, *THE GLOBE AND MAIL*, 7 May 1984, at B8.

⁵ *Supra*, note 1.

⁶ But see *infra*, note 9 and accompanying text for an example of measures taken by the Canadian government to protest Japanese trade policy.

⁷ See Subcommittee on Trade, 95th Cong., 2d Sess., *TASK FORCE REPORT ON UNITED STATES-JAPAN TRADE* (1979); and 96th Cong., 2d Sess. (1980) [hereinafter cited as *TASK FORCE REPORT* (1979) and *TASK FORCE REPORT* (1980)]; American Chamber of Commerce in Japan, *United States-Japan Trade White Paper* (1979) 26 *JAPAN Q.* 491; S. Ohara, *Each Side Should Make Cool Assessment of its Position Before Blaming the Other*, *THE JAPAN ECONOMIC JOURNAL*, 1 May 1984, at 24.

⁸ Nobuhiko Ushiba is quoted in L. Morrow, *All the Hazards and Threats of Success*, *TIME*, 1 Aug. 1983, at 22.

⁹ *Id.*; *Tighter Customs Inspections Slow Flow of Japanese Cars*, *THE GLOBE AND MAIL*, 2 June 1982, at B6, col. 1; *Flow of Japanese Cars at Idling Speed*, *THE FINANCIAL POST*, 5 June 1982, at 4, col. 4. See also *EC makes Harsh Demands on Japan to Boost Imports*, *THE JAPAN ECONOMIC JOURNAL*, 20 Oct. 1981, at 1.

While Canada's role in influencing the Japanese to open their market to foreign manufactured goods has been less visible, the Canadian government, Canadian private enterprise, and private trade organizations have been quietly negotiating with their Japanese counterparts. The result has been significant positive developments in Canada-Japan trade relations in the recent past.¹⁰

Although it is too early to measure the effects, the Japanese have been responsive to Western complaints about non-tariff barriers, as evidenced by recent unilateral trade liberalization measures. Moreover, several statements in defence of Japanese trade policies ought to be made. First, the notion of a closed Japanese market may be outdated in light of the recent reduction of trade barriers. Second, many of the difficulties encountered by foreign firms attempting to penetrate the Japanese market are attributable to a misunderstanding of Japanese culture and a failure to undertake adequate market research or product modification.¹¹ Finally, certain non-tariff barriers, especially those relating to product safety regulation, are based on an existing balance of legal and social institutions in Japan which is designed to respond to risks to health and safety associated with consumer product use. Modification of the trade barriers, without substantial reform of Japanese domestic products liability laws and the establishment of a sophisticated products liability litigation system, would be unrealistic. Equally unrealistic would be Western demands for the adoption of Western legal culture. Trade policies cannot be nicely divorced from the Japanese domestic legal environment, nor from the society and culture which that environment reflects.

¹⁰ For example, in 1981 the Canadian Standards Association (CSA) was the first organization of its kind to enter an agreement authorizing it to test and certify, outside of Japan, a limited range of electrical products destined for the Japanese market. See Canadian Standards Association, *ANNUAL REPORT* (1981), at 20.

While American business was involved in protracted negotiations with the Japanese in an attempt to force abandonment of the "buy Japanese" procurement policy by Nippon Telephone & Telegraph Public Corporation (NTT), a group of Canadian firms was successful in breaking into the telecommunications supply network of NTT. See *Canadian Firms Penetrating Japanese Telecommunications*, *THE GLOBE AND MAIL*, 22 April 1983, at B14, col. 1.

At the same time, protectionist attitudes have not disappeared, and in fact may be developing increased support: *Trade Group Urges Lower Import Limits*, *THE GLOBE AND MAIL*, 1 Oct. 1983, at B3, col. 1.

¹¹ For a defence of the Japanese position, see R. Sinha, *Western Outcry Against Japanese Import Restriction Does Not Have Much Justification*, *THE JAPAN ECONOMIC JOURNAL*, 1 June 1982, at 20; A. Soejima, *American Complaints are Often Based on Outdated Image*, *THE JAPAN ECONOMIC JOURNAL*, 19 Jan. 1982, at 20.

For the purposes of this paper, the barriers to an open Japanese market will be divided into two categories: Direct Official Barriers, and Non-Tariff Barriers (NTBs).¹² The first category consists of positive restraints on imports such as tariffs and quotas. In response to Western criticism the Japanese government has, since the early 1960s, undertaken measures to dismantle gradually the aggressive protectionist wall which may have been necessary to revive the Japanese economy after the Second World War.¹³ In fact, in terms of quotas and tariffs, many observers presently consider Japan to be less "protectionist" than many North American and European countries.¹⁴ Despite these trade liberalization measures Western complaints have not ceased, largely because of the continued presence of barriers contained in the second category, namely, those of a non-tariff nature.

Non-tariff trade barriers, like the more obvious tariff and quota restrictions, are barriers "that have the effect of restricting or modifying the volume, composition, and direction of international trade".¹⁵ NTBs have customarily been segregated into two categories, those which are the reflection of governmental regulatory measures: and those which result from private practices. Examples of governmental regulatory measures include government procurement

¹² For a detailed analysis of these two categories see K. Abbott and C. Tottman, *"Black Ships" and Balance Sheets: The Japanese Market and U.S. Japan Relations* (1981) 3 NW. J. INT'L LAW & BUS. 103, at 116 *et seq.*

¹³ The war was responsible for 2.8 million deaths and the destruction of 40% of the nation's capital stock: ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS (H. Patrick, H. Rosovsky eds. 1976), at 9. With the dissolution of the Empire, over six million people returned home to an economy whose industrial production stood at 20% of the 1934-36 average. See R. Sinha, JAPAN'S OPTIONS FOR THE 1980S (1982), at 1-2.

¹⁴ During the Tokyo Round of the Multilateral Trade Negotiations, Japanese tariff reductions of almost 60% were agreed upon, and apparently are being complied with conscientiously. For example, since early 1982 Japanese tariffs have been cut on over 323 items, and quotas have been eliminated on over 134 items. The average Japanese tariff on mining and manufacturing products is 3% compared with the 4% American average and the 5% EEC average. By the end of the implementation of the GATT Tokyo Round reductions in 1987, Japan's average tariff levels will be lower than U.S. tariff levels on comparable industrial products. REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP (prepared for the President of the United States and the Prime Minister of Japan) (1981), at 57.

¹⁵ C. Prestieau and J. Henry, NON-TARIFF TRADE BARRIERS AS A PROBLEM IN INTERNATIONAL DEVELOPMENT (1972), at 55. A Japanese description of the Japanese import system in 1978 reveals an extraordinarily complex array of rules, guidelines and administration procedures. See Jetro, JAPAN'S IMPORT SYSTEM (1978), at 4-9.

policies,¹⁶ customs practices,¹⁷ "administrative guidance",¹⁸ and product standards and certification requirements. While quantitative measurement of the impact of non-tariff barriers is notoriously difficult, it has been estimated that over one-half of the non-tariff barriers in Japan are related to health and safety standards and regulations.¹⁹

The non-tariff barriers presented by private practices are traditionally distinguished from direct official barriers and governmental regulatory measures in that they represent trade obstacles inherent in the Japanese language and culture. After the opening of Japan to the West, foreigners quickly discovered that the Japanese have their own ways of doing things. Japanese language and culture present barriers not only to foreign businessmen, but to any foreigner who attempts to deal with the Japanese. St. Francis Xavier, a Jesuit missionary who travelled to Japan in the early sixteenth century, eventually concluded that the Japanese language had been formed by the Devil itself in order to frustrate God's Providence.²⁰ In addition to the obvious language barrier, foreigners are faced with the complex problems of understanding the Japanese decision-making process,²¹ the hierarchy of human relationships,²² and complex prod-

¹⁶ In the past, Japanese quasi-governmental agencies such as NTT and the Japan National Railway, allegedly acting contrary to the MTN Government Procurement Code, were unwilling to open their supply system to foreign manufacturers. For the American experience in attempting to break into this market, see TASK FORCE REPORT (1980), *supra*, note 7, at 25-29. See also *supra*, note 14, at 63; J. Jackson, J. Louis, and M. Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing Economic Rules* (1982) 81 MICH. L. REV. 267, at 327.

¹⁷ *Supra*, note 14, at 61.

¹⁸ Administrative guidance (*gyosei shido*) refers to administrative actions designed to influence private conduct. Since the legal authority granted to Japanese governmental agencies is usually framed in broad terms, the agencies often have the discretion to determine the procedures by which the legal objectives will be obtained. This enables the agency to make recommendations or even demands which, if not followed, may result in delays and other costs for the private citizen. See Y. Narita, *Administrative Guidance* (1968) 2 LAW IN JAPAN 45; R. Lury, *Japanese Administrative Practice: The Discretionary Role of the Japanese Government Official* (1976) 31 BUS. LAW 210. See also *Foreign Firms are Irked Over Needless Procedures*, THE JAPAN ECONOMIC JOURNAL, 1 Dec. 1982, at 1; *supra*, note 14, at 61-62.

¹⁹ Sinha, *supra*, note 13, at 73.

²⁰ For a sampling of problems foreigners have with the Japanese language, see F. Gibney, JAPAN: THE FRAGILE SUPERPOWER (1975), at 144-62; B. De-Mente, THE JAPANESE WAY OF DOING BUSINESS (1981), at 101-15.

²¹ See C. Nakane, JAPANESE SOCIETY (1970), at 141-48.

²² *Id.*, at 23-86; K. Yamamura, *Behind the "Made in Japan" Label*, in POLITICS AND ECONOMICS IN CONTEMPORARY JAPAN (M. Hyōe, J. Hirschmeier eds. 1979), at 134-35.

uct distribution systems,²³ to name but a few of the more obscure non-tariff barriers.

This paper proposes to deal with domestic consumer protection laws and standards regulation, which have their roots in both categories. While most trade analysts differentiate between cultural and standards barriers,²⁴ we hope to demonstrate that culture and social custom are not nicely distinguishable from law. Design standards, testing and certification requirements, positive substance lists and other recognized non-tariff barriers are as much a reflection of culture²⁵ as are buyer-supplier customary norms and consumer preferences for goods produced in Japan.²⁶ Although many product standards are explicitly set by government, either directly or through subsidiary administrative agencies, this paper will illustrate that it will be a far more intractable process to adapt these standards to meet the demands of Japan's Western trading partners than it was to modify existing tariff and quota structures. These non-tariff barriers are deeply rooted in the Japanese culture and psyche, are not obviously motivated by protectionist objects, are often unarticulated and non-specific in their effect, and are not subject to reform through traditional international trade liberalization agreements.

In this paper the substantive and procedural aspects of products liability law and the standards systems in place in Japan will be outlined in order to show how they differ from the analogous products liability regime and standards systems in Canada. Although foreign manufacturers frequently avoid insurance, product design,

²³ For example, the Japanese distribution system is characterized by a large number of small retailers and wholesalers, resulting in limited inventory space and frequent deliveries. This may result in a competitive advantage to domestic manufacturers. M. Yoshino, *THE JAPANESE MARKETING SYSTEM: ADAPTATION AND INNOVATION* (1971).

As well, the relationship of Japanese distributors to their suppliers is such that they will not generally carry competitive products, making it extremely difficult for foreign suppliers to penetrate established distribution networks. See generally *Trade Barriers Come In Creative Packages*, *INDUSTRY WEEK*, Vol. 213, No. 1, at 27; *United States-Japan Trade White Paper*, *supra*, note 7; I. Hideto, *Anticompetitive Practices in the Distribution of Goods and Services in Japan: The Problem of Distribution Keiretsu* (1983) *J. OF JAPANESE STUD.* 319; Sinha, *supra*, note 13, at 87-89.

The complex distribution system in Japan compares unfavourably with the systems of Britain, West Germany and the United States when assessed in terms of the number of times goods are exchanged before reaching the ultimate consumer. *Japan: A Survey*, *THE ECONOMIST*, 9 July 1983, at 13.

²⁴ *TASK FORCE REPORT* (1980), *supra*, note 7, at 30, 35.

²⁵ *Id.*, at 30, 31, 63.

²⁶ This was a comment which frequently turned up in the responses to the authors' questionnaire. See *infra*, note 27. This may manifest itself in a well-articulated preference for Japanese products.

and litigation costs related to products liability risks, Canadian manufacturers exporting to Japan must comply with a wide range of standards and certification regulations. We conclude that product safety regulation in Japan, manifested both in product standards and in products liability law, is a reflection of Japanese history, culture, religion, and structural and institutional constraints on litigation, and that it is unrealistic, if not arrogant, for the West to dismiss summarily these standards as being merely protectionist barriers, or to demand their modification in accordance with our regulatory philosophies.

In an attempt to obtain data describing the experience of Canadian manufacturers exporting to Japan, a survey was carried out of 139 firms chosen from a number of Japan-Canada export association membership directories. Of the 139 firms selected, 8 responded by indicating that they had no experience with the Japanese market, and 14 firms could not be located. Of the remaining 117 firms, 35 completed an extensive questionnaire relating to products liability risks, insurance, Japanese standards barriers, the Japanese regulatory process, and cultural and linguistic barriers. The nature of the responses and the limited population prevent us from evaluating the data on a statistical or quantitative basis.²⁷ Nevertheless, the responses do reveal several characteristics of the Japanese market which permit a preliminary evaluation of the impact of Japanese product safety regulation on Canadian manufacturers.

II. PRODUCT SAFETY REGULATION AND INTERNATIONAL TRADE

The development of product safety regulation as a distinct body of law can be attributed to the recent increased intrusion of governmental and judicial bodies into private market relationships with the objective of rectifying perceived market dysfunctions. A concern on the part of governments with the vulnerability of the average con-

²⁷ The sample of Canadian firms consisted largely of companies that have at one time exported to Japan, for the purely practical reason that a list of names of such firms could be compiled. The efforts of companies which have considered exporting to Japan but decided against it precisely because of standards trade barriers are generally unrecorded. By canvassing the experiences of firms which were successful in breaking into the Japanese market, there is a significant danger of *underestimating* the trade effects of consumer protection law. The most drastic effect of trade barriers will have been experienced by those manufacturers who were barred from exporting to Japan, and who for the most part are excluded from the survey.

sumer confronted with an increasingly complex marketplace²⁸ has prompted extensive market regulation. The courts have responded through judicial compensation awards in products liability suits, as well as judicial regulation of the consumer contract transacting process and the substantive terms of consumer contracts.

These judicial and governmental actions which function ostensibly to provide compensation to injured consumers, to deter deceptive trade practices, to provide insurance against product safety risks, and to facilitate the development of efficient markets in consumer goods, may also have intentional or inadvertent distorting effects on international trade. Product movement across national boundaries may be affected by any or some of the following regulatory and judicial measures:

- (1) overt or covert discriminatory standards;²⁹
- (2) inconsistent and diverse standards among countries;³⁰
- (3) standards which are not the most cost effective to achieve legitimate national objectives;
- (4) certification and approval procedures;³¹
- (5) import inspection procedures and administrative practices;³²
- (6) country of origin marketing;³³
- (7) advertising regulation;³⁴
- (8) packaging and labelling regulation;³⁵

²⁸ Economic Council of Canada, *REFORMING REGULATION* (1981), at 3.

²⁹ The most common are standards which are apparently non-discriminatory but which are met more easily by domestic industries. P. Sweeney, *Technical Analysis Of The Technical Barriers To Trade Agreement* (1980) 12 *LAW AND POLICY IN INT. BUS.* 179, at 183.

³⁰ Inconsistent standards increase information, design and manufacturing costs, and may close the market to non-conforming products. See J. Groetzinger, *The New GATT Code and the International Harmonization of Product Standards* (1975) 8 *CORNELL INT'L L.J.* 168.

³¹ P. Oliver, *FREE MOVEMENT OF GOODS IN THE E.E.C.* (1982), at 89.

³² *Id.*, at 92.

³³ *Id.*, at 106-09. See *Re Restrictions on Importation of Souvenirs: E.C. Commission v. Ireland* (1982) 33 *COM. MKT. L. REP.* 706.

³⁴ See E.C. Directive 70/50, Art. 2(3)(m). In *Re Advertising of Alcoholic Beverages: E.C. Commission v. France* (1981) 31 *COM. MKT. L. REP.* 743, at 758, the European Court of Justice held that an advertising regulation was equivalent to a quantitative restriction on imports as it had the effect of restricting the volume of imports as a result of its impact on marketing prospects.

³⁵ See E.C. Directive 70/50, Art. 2(3)(j), and *Frietje* (1981) 32 *COM. MKT. L. REP.* 722. Canada has been accused of using language labelling requirements as a non-tariff barrier. *Import Issues Torture Ottawa*, *FINANCIAL POST*, 14 May 1983, 1, col. 1.

- (9) the use of design rather than performance standards;
- (10) uncertainty and information search costs regarding domestic law;³⁶
- (11) voluntary standards which are used collusively by national manufacturers to create effective barriers to entry;³⁷
- (12) products liability risks;
- (13) overt or covert judicial discrimination;
- (14) overt or covert bureaucratic discrimination; and
- (15) government disclosure and freedom of information policy.

It would be a difficult task to place an empirical value on the impact these factors have on trade. It is clear, however, that they represent substantial increases in costs for exporters. These costs may take the form of increased production and marketing expenses, delays which may result in loss of development potential and market share, delayed entry into new markets, adverse effects on reputation for quality and reliability, and expenses represented by commitments of capital and management resources that could have been used more productively in alternative investment opportunities. Moreover, potential exporters who are unable to make the necessary adjustments or alterations for economic or technological reasons may be forced out of or denied access to the foreign market.

Product safety regulation has two components which may affect international trade. The standard and certification barriers which I have described represent the more obvious category. In addition, manufacturers exporting to foreign countries will face the risk of damage awards if their products are associated with personal injury, property damage and economic losses in the foreign jurisdiction. The effects on international trade of domestic products liability law (that is, the legal rules and principles governing the liability of commercial suppliers for personal injuries, property damage and eco-

³⁶ Uncertainty associated with the applicability of foreign consumer protection law, the likelihood and nature of legislative or regulatory reform, and local and provincial or state law impose considerable risks on foreign manufacturers. GATT, *Multilateral Trade Negotiations, Part 3 of the Non-Tariff Measures*, Standards Involving Imports and Domestic Goods, 14 Feb. 1974 at 3, 4 and No. 272. In addition, domestic manufacturers have the ability to influence the standard setter as an attribute of being located in the same jurisdiction: W. Cline *et al.*, *TRADE NEGOTIATIONS IN THE TOKYO ROUND* (1978), at 201. See J. Shaul and M. Trebilcock, *The Administration of the Federal Hazardous Products Act* (1982) 7 CAN. BUS. L.J. 2, at 31.

³⁷ See text accompanying notes 157-62. This does not change the fact that products stamped with Japanese certification marks are preferred by consumers. See Department of Industry, Trade and Commerce, *MARKETS FOR CANADIAN EXPORTERS: JAPAN* (1979), at 27.

conomic losses associated with defective products) are varied and subtle. To foreign manufacturers of consumer goods, products liability risks represent current economic costs or future economic risks. While products liability law perhaps aims ultimately at a marketplace with safer products, its deterrent effect is clearly voluntary. Manufacturers are not obliged to produce non-defective products but may choose to respond to products liability risks by adopting any, or a mixture of, conceivable cost or risk reduction measures. A product may be withdrawn from (or never introduced into) the market; changes in design, production techniques, or quality control procedures may be implemented to reduce the frequency of product defects; products liability insurance may be taken out; or no positive steps may be taken, thus making products liability risk a business cost to be absorbed by the firm. Whichever measures are adopted, products liability risks undeniably represent costs to manufacturers.

An evaluation of whether Japanese products liability law operates to impede or facilitate exports to Japan requires a comparison of products liability risks in the Japanese marketplace and in the jurisdiction of the foreign manufacturer. Exports to a particular country will be inhibited if that country's domestic products liability rules are "stricter" than those in the manufacturer's country. Should this be the case, the foreign manufacturer will be confronted with a higher probability of claims being pursued, an increased magnitude of potential claims, or both. If the importing economy represents a significant proportion of a firm's market, the costs associated with products liability risks may adversely affect its export capabilities.

In the next section, we offer a brief description of Japanese products liability law and then evaluate the relative "strictness" of Canadian and Japanese products liability laws. This will permit certain conclusions to be drawn as to their possible impact, all other things being equal, on bilateral trade.

III. JAPANESE PRODUCTS LIABILITY LAW³⁸

The Japanese law of products liability, as yet not consolidated,³⁹ can be found largely in the Civil Code,⁴⁰ as well as in various Acts

³⁸ Major sources in English on this topic include: Z. Kitagawa, *DOING BUSINESS IN JAPAN*, Vol. 7, Part XIII [hereinafter cited as Kitagawa]; Y. Fujita, *Product Liability Law* (1980) 1 JAPAN L.J. 160 [hereinafter cited as Fujita]; Adachi *et al.*, *PRODUCT LIABILITY: A MANUAL OF PRACTICE IN SELECTED NATIONS, JAPAN* (1981).

³⁹ A draft model law on products liability was proposed in 1975 by a group of scholars, but has not been accepted by the Ministry of Justice. Since Japan

directed at specific areas of activity⁴¹ and in local ordinances.⁴² The Civil Code dates from the late nineteenth century,⁴³ and its drafters did not contemplate the development of a discrete, sophisticated and coherent body of consumer protection law. As is typical of most civil law systems, the Code provisions are flexible and drafted in such general terms⁴⁴ that the judiciary are not formally restrained from applying it to new social, economic and technological phenomena.

As a body of law describing the legal obligations of suppliers and users of products which are associated with risks to health and safety, products liability law in Japan could be accurately described as fairly underdeveloped relative to Western concepts of civil legal responsibility.⁴⁵ Several factors may be offered to explain this phenomenon. The first is the non-litigious behaviour of the Japanese.⁴⁶ In a

is a civil law jurisdiction in which general codes purport to establish a complete law for the judiciary to apply to particular facts, there is a reluctance to create specific legislation which might excessively bind judges when the Civil Code is conceptually broad enough to recognize this area of law. The English translation of the proposed Act can be found in Kitagawa, *supra*, note 38, at 4-40.

⁴⁰ The Civil Code, Law No. 89, 1896, as amended. See also Kitagawa, *supra*, note 38, at 4-7; and Y. Noda, INTRODUCTION TO JAPANESE LAW (A. Angelo trans. 1976), at 197.

⁴¹ For example, the Drug Side Effects Injuries Relief Fund Act, Law No. 55, 1979 and the Consumer Products Safety Act, Law No. 31, 1973, which regulate the quality of various designated products such as soft drink bottles by requiring safety inspections and official approval prior to marketing.

⁴² See *Prefectural Ordinance on Consumer Protection of Osaka Prefecture* (1973) JAPAN QUARTERLY 255. Local ordinances adopt a comprehensive approach to products liability rather than a product by product approach. They set out obligations which *should* be fulfilled by business, but because of the Prefecture's limited authority to legislate, the ordinances represent only recommendations and public announcements. Kitagawa, however, warns us not to underestimate their effectiveness in Japan, and calls them one of the most important developments in Japanese products liability law. Kitagawa, *supra*, note 38, at 4-35.

⁴³ H. Tanaka, THE JAPANESE LEGAL SYSTEM (1976), at 60.

⁴⁴ For example, Article 1 of the Civil Code declares, "All private rights shall conform to the public welfare", and "duties shall be carried out in accordance with the principles of good faith and trust".

⁴⁵ "Underdeveloped" in this context can be defined in two ways. In one sense it can be taken to refer to a situation where the law contemplates a remedy in theory, but which for all practical purposes is beyond the reach of the potential plaintiff because of severe procedural and evidentiary problems. In another sense, it can refer to legal concepts which were originally applicable to a large range of conflict situations, and which have been artificially modified to deal with a social and economic phenomenon which did not exist when the concepts were first articulated.

⁴⁶ The number of civil suits *per capita* is reported to be 4 to 10% that of many Western countries. See *supra*, note 43, at 255-60; Material on Canada-Japan Legal and Business Relations (Continuing Legal Education Society of British

society that has developed a sophisticated extra-curial system of dispute resolution,⁴⁷ the litigation alternative is often regarded as a last resort. The Japanese attitudes to litigation may be traceable in part to the Japanese preference for "harmonious reconciliation" over adversarial settlement of social problems. Japanese people have been described as accepting life's problems as the consequences of nature following its own course,⁴⁸ and participation in a lawsuit is sometimes considered shameful⁴⁹ and a serious breakdown of social order. It should also be noted that the concept of legal "rights" is a foreign one⁵⁰ that was not introduced into Japan until the late nineteenth century. The Japanese language did not even contain a word to express the concept until *kenri* was coined during the period of Western code adaptation.⁵¹ Products liability suits in tort were virtually unheard of before 1960.⁵²

The judiciary has been slow to respond to the problem of consumer protection in products liability suits. Many of the principles and conceptual approaches to Japanese products liability law have been developed during major multiple injury cases⁵³ (often asso-

Columbia Seminar) (1980), at 30; D. Henderson and J. Anderson, *Japanese Law: A Profile*, in AN INTRODUCTION TO JAPANESE CIVILIZATION (A. Tiedeman ed. 1974), at 570-91, reproduced in Morishima, INTRODUCTION TO JAPANESE LAW (1980), at 15-16.

Some academics attribute this non-litigious behaviour to the Japanese aversion to conflict while others explain it as a manifestation of structural impediments to litigation, and the availability of alternative informal mechanisms for promoting dispute resolution. For the former view, see T. Kawashima, *Dispute Resolution in Contemporary Japan* (1963) LAW IN JAPAN 41; and for the latter, see J. Haley, *The Myth of the Reluctant Litigant* (1978) 4 J. OF JAPANESE STUD. 359.

⁴⁷ For example several Civil Code provisions and special legislative schemes regulate compromise both before and during litigation and conciliation among the conflicting interests represented in the lawsuit. These procedures are usually executed before a summary court and may be given the effect of formal judgment. For a detailed discussion of the various techniques, see Kitagawa, *supra*, note 38, at Part XIV.

⁴⁸ C. Kim and C. Lawson, *The Law of the Subtle Mind: The Traditional Japanese Conception of Law* (1979) 28 INT'L & COMP. LAW Q. 491, at 501-02. See also F. K. Upham, *Litigation and Moral Consciousness in Japan: An Interpretative Analysis of Four Japanese Pollution Suits* (1976) 10 LAW & SOCIETY REV. 579, at 591.

⁴⁹ Kim and Lawson, *id.*, at 503.

⁵⁰ *Id.*

⁵¹ Henderson and Anderson, *supra*, note 46, at 570-91.

⁵² Kitagawa, *supra*, note 38, at 4-2. See also, S. Niibori and R. Gosway, *Products Liability in Sales Transactions* (1967) 42 WASH. L. REV. 483.

⁵³ These cases include the thalidomide litigation of 1965, the Morigana powdered milk litigation of 1973, the "Big Four" pollution cases of the early 1970s, and more recently the SMON cases involving a drug which caused a neurological disease in 12,000 people. See Upham, *supra*, note 48.

ciated with adulterated food products and adverse pharmaceutical reactions), and relatively little attention has been paid to the plight of the isolated plaintiff and his difficulties in proving his case. Since major products liability cases are exceedingly rare, the Japanese court has simply not had the opportunity to consider the problem over a wide variety of situations.⁵⁴

Finally, several commentators have argued that the limited resort to litigation in Japan is not simply a reflection of social myths which characterize the Japanese as 'litigation averse' and possessing a low level of legal consciousness. Rather, the attenuated products liability laws may reflect the considerable structural obstacles to litigation, including the undersupply of judges and lawyers, procedural delays, inefficient appeal rules, and substantive evidentiary rules which operate against the interests of plaintiffs.⁵⁵ Yet even accepting that point, it is difficult to ignore the obvious argument that had litigation been preferred, one would have expected the public institutional framework and private activities to have developed to meet that demand. Litigation has not been demanded by the Japanese, and that in and of itself reveals something about attitudes and values. In any event, and whatever the reasons, products liability law, except in cases of "mass torts" in which community interests can be seen to justify otherwise purely individualistic behaviour, has not achieved the prominence that it has in some Western societies.

An assessment of products liability risks to foreign manufacturers must take into account several factors which define the nature and extent of the economic risks concomitant to a decision to export to Japan. These include substantive tort liability, substantive contract liability, criminal liability, the effect of public insurance schemes, and the effect of procedural and evidentiary constraints in the litigation process.

A. TORT LIABILITY⁵⁶

Tort liability under the Civil Code does not require a direct exchange relationship between the product supplier and product user

⁵⁴ By 1981, there had apparently only been fifty reported cases where manufacturers had been sued by injured consumers. Kitagawa, *supra*, note 38, at 4-9, n. 1.

⁵⁵ See Haley, *supra*, note 46. In a recent article Haley has expanded on this thesis: J. Haley, *Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions* (1982) 8 J. OF JAPANESE STUDIES 274.

⁵⁶ The cornerstone of tort law in Japan is Article 709 of the Civil Code which provides that a "person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom".

as a precondition of liability, and as a result is more flexible than the traditional structured, bilateral concept of contract liability. It is not surprising, therefore, that the judiciary has turned to delictual concepts as the preferred approach in their development of products liability law. In addition, the conceptually vague nature of the elements of tort liability permits the courts to apply a risk-utility analysis to the issues surrounding hazardous products, a task which is more difficult in contract, which remains constrained by consensual arrangements.

Notwithstanding the marked differences between common law and civil law systems, the Japanese tort approach to products liability risks is comparable in many respects to that of its Canadian counterpart. Both are fault-based systems centred largely around the notion of liability for negligent conduct. Both use the concept of foreseeability to define the limits of legal responsibility, and both have compensation for injury as their principal objective.

There are, however, several significant differences between the Canadian and Japanese systems, the first being the recognition of the right of recovery for pure economic loss in a tort action in Japanese law. The general rule in Canada has been that pure economic loss (economic loss not causally related to physical injury) is not recoverable.⁵⁷ In Japan, Article 710 of the Japanese Civil Code places the tortfeasor under an obligation to compensate for injury "irrespective of whether such injury was to the person, liberty, or reputation of another, or to such person's property rights". There is no distinction in Japanese tort law between recovery of economic losses and recovery for injury or property damage.⁵⁸

Another area of divergence between the Canadian and Japanese tort systems is the frequency with which the respective governments are sued in negligence actions. As it is the Japanese government that must certify products as being fit for consumer use, the government must often defend allegations of state negligence concerning defective products. The Japanese do not recognize concepts of sovereign immunity, and recent Japanese cases have apportioned government

⁵⁷ A. Linden, *CANADIAN TORT LAW* (1982), at 410-29. However, recent decisions in England and Canada suggest that pure economic loss may be recoverable. See D. Cohen, *Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords* (1984) 18 U.B.C. L. REV. 289; *Kamloops v. Nielsen, Hughes and Hughes* [1984] 5 W.W.R. 1, at 38-45 (S.C.C.).

⁵⁸ Adachi, *supra*, note 38, at 11.

liability from thirty-three to as high as sixty per cent.⁵⁹ Although government liability for negligent inspection is not unheard of in Canada, it is exceedingly rare.⁶⁰

Apart from these specific points, the articulation of liability in tort under the Japanese Civil Code is similar to Canadian tort concepts. In order to succeed in a tort action against a foreign manufacturer, a Japanese plaintiff must prove that:

- (1) the product was defective;
- (2) the defect resulted from the defendant's act;
- (3) the plaintiff suffered an injury;
- (4) the injury was caused by the defendant's product; and
- (5) the defendant violated a standard of care expected of him.

Generally the plaintiff will have little difficulty in establishing the extent and nature of her property damage, personal injury or economic losses. She may, however, encounter serious evidentiary problems in establishing the four remaining elements of liability. The Japanese judiciary, recognizing the plaintiff's difficulty, has adopted several techniques which improve the plaintiff's position to some degree. These include establishing the manufacturer's standard of care as near-absolute in some cases, and permitting proof of causation through utilization of epidemiological data in others.

The Japanese conception of a defective product may be articulated in three ways.⁶¹ As in Canada, a product may be viewed as defective in design, in manufacture, or in the sufficiency of warnings and instructions which accompany it. Failure to provide adequate information or warnings of dangerous consequences associated with certain product uses may be considered to be a defect in product design as, for example, where a manufacturer supplies a liquid heating agent without warning the user of its contamination by toxic

⁵⁹ *Yagi et al. v. Japan et al.*, Kanazawa District Court, 879 Hanrei Jiho 26, 1 March 1978; *Oyama et al. v. Japan et al.*, Tokyo District Court 899 Hanrei Jiho 48, 3 Aug. 1978. Adachi, *supra*, note 38, at 20. See also M. R. Reich, *Public and Private Responses to a Chemical Disaster in Japan: The Case of Kanemi Yusho* (1982) 15 LAW IN JAPAN: AN ANNUAL 102, at 119.

⁶⁰ *McCrea et al. v. White Rock et al.* [1975] 2 W.W.R. 593, 56 D.L.R. (3d) 525 (B.C.C.A.); *Ostash et al. v. Sonnenberg et al.* and *Ostash et al. v. Aeillo* [1968] 63 W.W.R. 257, 67 D.L.R. (2d) 311 (Sask. C.A.); compare *Barratt v. Corporation of the District of North Vancouver* [1980] 2 S.C.R. 418, 114 D.L.R. (3d) 577.

⁶¹ Kitagawa, *supra*, note 38, at 4-15.

chemicals.⁶² In order to attract products liability in tort the defect must also pose some actual or potential risk to the health or safety of the user or other members of the public.⁶³

The existence of a defect is determined by a state-of-the-art test applied at the date of the alleged negligence.⁶⁴ Where the design or manufacturing process in question is sophisticated, a plaintiff unfamiliar with the relevant technology may face serious difficulty in proving the existence of the alleged defect.⁶⁵ It is true that the court may, in some cases, be willing to infer the existence of a defect from circumstantial evidence of unusual injury incurred during normal use. There are, however, recent decisions where plaintiffs' actions have failed because of an inability to prove the existence of the defect.⁶⁶ Whether the plaintiff's injuries occur in isolation or instead are part of a larger products liability disaster will likely have a significant impact on this issue, as the Japanese courts apparently apply a risk-utility analysis to determine the existence of a defect.⁶⁷ The isolated plaintiff, without access to data demonstrating the extent of the product safety risk, will often have considerable difficulty in establishing this element of tort liability.

The plaintiff is also required to demonstrate that the defect was in fact the cause of his injury. Once again, victims face considerable obstacles. Not only will they be ignorant of the relevant technology, they may not have the resources or tools to pierce the veil of industrial secrecy surrounding many commercial and industrial enterprises in the absence of a discovery process.⁶⁸

⁶² *Kubota v. Kanemi Soko K.K. et al.*, Fukuoka District Court, 866 Hanrei Jiho 21, 5 Oct. 1977 (*The Kanemi Cooking Oil Case*). Reich, *supra*, note 59, at 108.

⁶³ The word 'defect' translates into one of two Japanese words: *kashi*, which suggests that the product quality deviates from that which was the subject of the contract, and *kekkan* which implies that the defect is dangerous, the latter being the subject of products liability.

⁶⁴ *The Kanemi Cooking Oil Case*, *supra*, note 62.

⁶⁵ For example, in the SMON cases, the Minister of Health and Welfare commissioned a special research group to investigate the etiology of SMON, which took two and one half years to complete. See *Terms of Settlement: The SMON Litigation* (1979) 12 LAW IN JAPAN: AN ANNUAL 99, at 101.

⁶⁶ See *Ito v. Honda Giken K.K.*, Fukuoka District Court, 869 Hanrei Jiho 91, 15 Feb. 1977.

⁶⁷ In determining the drug companies' liability in the SMON litigation, the court noted that "all drugs . . . are double-edged swords producing both efficacious results and side-effects. . . . The usefulness of a drug is negated if it has disproportionately serious side-effects compared with its efficacy." *Oyama v. Japan*, Tokyo District Court, 838 Hanrei Jiho 29, 17 Jan. 1977, translated in (1978) 11 LAW IN JAPAN 76, at 85.

⁶⁸ See text accompanying notes 102-07.

The courts have adopted several methods to reduce the plaintiff's evidentiary burden in certain specific tort contexts. In pollution cases, where proof of causation can be particularly elusive, the injury usually multiple, and the defendant often economically powerful and perhaps unco-operative, the tools of epidemiological and statistical proof have been developed.⁶⁹ These developments have permitted legal causation to be established even where details of the precise mechanism describing the etiology of the plaintiff's injury is not clear,⁷⁰ and where evidence of the specific source of pollution is within the control of the defendant.⁷¹

This approach is not representative of products liability cases in general, but a claim exhibiting the same essential characteristics of widespread physical harm and involving a high degree of technological and scientific uncertainty may permit a plaintiff to establish causation through judicial acceptance of inferential techniques. In situations of isolated or minor injury, however, proof of specific causation remains a major obstacle to injured plaintiffs. Even where injuries are relatively numerous, a potential plaintiff may not be aware of, or have access to, relevant evidence regarding the frequency and incidence of injury to others who have chosen not to litigate. This problem will be exacerbated to the extent that individual Japanese plaintiffs choose not to single themselves out and take the initiative to litigate or to join plaintiff litigation associations in the case of mass torts.

The plaintiff must finally establish a violation of a standard of care expected of the defendant. Admittedly, in many cases, demonstration of the defective product will lead to an inference of negligence on the part of the defendant. As in Canadian tort law, negligence is established through the application of an objective standard to the situation of the particular defendant.⁷² The standard of

⁶⁹ Epidemiological proof allows the plaintiff to establish causation by correlating such factors as seasonality, locality and chronology of symptoms with the production cycle of the polluter. Statistical proof requires correlation between a particular effluent and the incidence of disease. See *Pollution Case Law* (1973) 20 JAPAN QUARTERLY 251, at 251-55.

⁷⁰ See Upham, *supra*, note 48, at 608-09; *Komatsu et al. v. Mitsui Kinzoku*, Toyama District Court, 22 Kakyu Minshu (Nos. 5-6) Bessatsu 1, 30 June 1971; *Toyama et al. v. Mitsui Kinzoku*, Kanazawa Branch of Nagoya High Court, 674 Hanrei Jiho 25, 9 Aug. 1972.

⁷¹ *Ono et al. v. Showa Denko*, Niigata District Court, 22 Kakyu Minshu (Nos. 9-10) 29 Sept. 1971.

⁷² *Mitsubishi Jukogyo K.K. v. Kamesake*, Tokyo High Court, 863 Hanrei Jiho 47, 4 July 1977, held that an automobile dealer is not expected to detect latent design defects in automobiles. *Kato v. Nanso Seiyaku K.K.*, Tokyo District Court, 6 Kakyu Minshu 1440, 14 July 1955, held that a druggist is

care (the behaviour which the court determines a person ought to have exhibited), may be expected to vary with the expected private and social costs of the conduct in question. In cases involving the manufacture of food, drugs and automobiles (where defects present a significant social risk in terms of the frequency, nature and severity of personal injuries), the Japanese courts have imposed what is essentially an absolute duty on the defendant⁷³ both to produce a safe product and to monitor its safety on behalf of those persons who continue to use it. Where possible cases of public hazards are involved, enterprises are responsible for constant re-examination and supervision of goods in circulation.⁷⁴

This brief description of the Japanese 'tort' products liability regime suggests that the economic risks defined by substantive tort law in Japan do not differ significantly from those in Canada. Unlike manufacturers who export to the United States, Canadian exporters to Japan enjoy essentially the same protection from lawsuits created by concepts of fault and causation as exist in the domestic market. To some extent the risks are increased in the case of exports, due to the recognition in Japan of recovery of economic losses, and the willingness of Japanese courts to accept inferential causation arguments. At the same time, the existence of potential state liability may offset the perceived increase in risk. In addition, liability in tort is simply one aspect of a much broader legal environment which encompasses contract risks, the criminal law, and the reality of prospects of litigation which are faced by exporting manufacturers. An analysis of these aspects of potential liability offers additional insights into the impact of products liability on trade.

B. CONTRACT LIABILITY⁷⁵

The Japanese law of contract offers two general solutions to the problem of injuries associated with the use of defective products:

not required to test the drugs he sells. Both cases held that the product manufacturer was liable in negligence for insufficient testing but in *Kato*, the damage award was only \$140 U.S. as the court found that the manufacturer was unaware of possible injury.

⁷³ *The Kanemi Cooking Oil Case*, *supra*, note 62. Negligence was *prima facie* inferred in a situation where a food manufacturer produced and marketed cooking oil contaminated with toxic polychlorinated biphenyls. During the 1970s proposals for the establishment of a strict products liability regime received considerable study. To date, these reform proposals have not been implemented. See Fujita, *supra*, note 38, at 160.

⁷⁴ *Oyama v. Japan*, *supra*, note 67, at 85 (translation).

⁷⁵ For an English language discussion of Japanese contract law in general, see W. Shattuck and Z. Kitagawa, UNITED STATES-JAPANESE CONTRACT AND SALE PROBLEMS (1973).

liability for imperfect performance of contractual obligations,⁷⁶ and liability for latent product defects.⁷⁷ Imperfect performance liability is contingent on the seller's negligence and as a result is not strict, although the retailer is faced with displacing a presumption of negligence.⁷⁸ Contractual liability for latent defects, because it is strict, is limited to the value of the damaged product itself,⁷⁹ the popular judicial view being that responsibility for consequential losses should not be imposed in the absence of fault.

Imperfect performance liability is couched in terms of obligees and obligors, and therefore applies only to contractual parties and not to foreign manufacturers. There are two exceptions to this "privity" requirement which may be relevant to products liability risks. The first permits the court, in addition to holding the retailer liable, to subrogate the retailer's liability to the plaintiff against his distributor or manufacturer. This gives the plaintiff access to both parties.⁸⁰ The other exception to the privity rule is judicial expansion of contract so as to extend the defendant's contractual duty of care to persons other than the actual purchaser who might reasonably be expected to use the product.⁸¹

The potential contractual risks of Canadian manufacturers in the Japanese domestic consumer market must be taken to be relatively insignificant.⁸² As well, the extent of damage recovery for breach of contract in Japanese law would seem to be consistent with that in

⁷⁶ Civil Code, Art. 415: "If an obligor fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may demand compensation for damages."

⁷⁷ Civil Code, Art. 570: "If any latent defects exist in the object of a sale, the provisions of Article 566 shall apply *mutatis mutandis*..." Art. 566 provides that "Where the object of a sale is subject to... [easement, pledge, etc.]... and the buyer was unaware thereof, he may rescind the contract only if the object of the contract cannot be attained thereby; in other cases the buyer may demand only compensation for damages."

⁷⁸ Fujita, *supra*, note 38, at 163.

⁷⁹ Damages for personal injuries are therefore not recoverable, and since in most cases the value of the product itself relative to the injuries complained of is immaterial, the imperfect obligation alternative is more attractive to an injured consumer.

⁸⁰ Article 423; *Kamimaki v. Ohashi*, Gifu District Court, Ogaki Branch, 307 Hanrei Taimuzu 87, 27 Dec. 1937 (The 'Egg-Tofu' Case). Where infected egg-tofu caused the death of two people and the poisoning of over 400 others, the manufacturer was held liable in tort, the retailer for imperfect performance, and the wholesaler by subrogation of the retailer's imperfect performance claim against the wholesaler.

⁸¹ *Id.*, where the heirs of the deceased (who had not purchased the product) brought the action on behalf of themselves and the victims.

⁸² Niibori and Cosway, *supra*, note 52.

Canadian law.⁸³ While the relaxation of the privity doctrine and the subrogation rights against manufacturers would seem to broaden contractual products liability risks in the case of Japanese consumers, there is no evidence in the responses from manufacturers in our survey that this risk is perceived as significant.

C. CRIMINAL LIABILITY

In addition to facing potential civil liability in tort and contract for negligence related to defective products, certain individuals⁸⁴ within defendant organizations may be liable for criminal negligence under Article 211 of the Criminal Code.⁸⁵ This provision imposes criminal liability where there is a violation of the duty of care "required in the conduct of his [one's] profession or occupation". Whether such criminal charges will be laid rests on the discretion of the public prosecutor, the exercise of which, in turn, will most often depend on the degree of negligence and the severity and frequency of the injury.⁸⁶ As in cases of civil liability, the duty of care imposed on an individual will vary with the inherent danger of the product and will be particularly high in the production of potentially high-risk products such as food and drugs.⁸⁷ While criminal liability will not usually develop from the typical product liability case in Japan, the risk certainly exists.

In light of the limited data on the criminalization of manufacturing enterprises in the cases of products liability suits in Canada⁸⁸ as

⁸³ H. T. Ricks, *A Comparison of the Scope of Contract Damages in the United States and Japan* (1978) 12 INT'L LAWYER 105, at 107, 130.

⁸⁴ The defendant will usually be the person actually in charge of the negligent process and not the person only nominally in charge, such as directors or presidents. In *Japan v. Hayasaka*, Sendai High Court, 846 Hanrei Jiho 43, 10 Feb. 1977, a factory chief was acquitted but the manufacturing supervisor directly in charge was convicted. In 1970, the Japanese Automobile Consumers' Union attempted to persuade the National Police Agency to charge Honda with criminal offences ranging from negligent manslaughter to attempted murder, relating to design defects in the Honda No. 360 subcompact. See H. Otake, *Corporate Power in Social Conflict: Vehicle Safety and Japanese Motor Manufacturers* (1982) 10 INT. JOURNAL OF SOCIOLOGY OF LAW 75, at 83-84.

⁸⁵ Criminal Code, Law No. 45, 1907.

⁸⁶ Niibori and Cosway, *supra*, note 52, at 488-89.

⁸⁷ *Japan v. Hayasaka*, *supra*, note 84. The court held that because the product was intended for consumption by infants, foreseeability of injury constituted the slightest anxiety, however vague or uncertain, about the safety of the ingredients.

⁸⁸ We are unaware of any reported Canadian cases involving criminal liability for defective consumer products. The American experience is similar, although the Ford Pinto and Maverick cases are well known. See M. E. Wheeler, *Product Liability, Civil or Criminal — The Pinto Litigation* (1981) 17 FORUM 250.

well as in Japan, it would be presumptuous to compare the risks faced by manufacturers in the domestic Canadian market and the Japanese export market. Our impression would be that the risks in both cases would be marginal, and are unlikely to influence export decisions.

D. PUBLIC INSURANCE AND COMPENSATION PLANS

In assessing the relative risks faced by manufacturers exporting to Japan, one must be cognizant of the existence of state insurance programs which may result in the externalization of costs to the Japanese consumer-taxpayer.⁸⁹ Perhaps because of perceived inadequacies in the ability of tort law to provide compensation for victims of particular classes of accident, the Japanese government has made efforts to implement a number of compulsory insurance programs.⁹⁰ These programs have been designed to ensure compensation for injured consumers and to shift their losses to those who may be in a better financial position to bear them, such as suppliers, employers and the state. Products liability risks to which foreign importers must respond may be significantly altered by these public insurance or compensation schemes. In cases where contributions to the fund are not required, the consumer will still be compensated and the manufacturer will escape liability costs completely. On the other hand if mandatory contributions by all manufacturers, both foreign and domestic, constitute the source of the insurance scheme's funds, then the manufacturer faces a present, fixed cost which replaces the future, uncertain cost of a damage award against him and may be less than or greater than that future cost, depending on the insurer's ability to assess the particular risk represented by this manufacturer's activities.

Under Japanese workers' compensation law⁹¹ employees who are injured by a defective machine in their work environment can, after recovery of worker compensation scheme benefits, sue the negligent employer for any additional damage.⁹² The court in this case may decide on joint and several liability of the employer and the manu-

⁸⁹ See G. Calabresi, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970), at 248-49.

⁹⁰ For a detailed discussion of the justifications of these plans with particular emphasis on drug related injuries, see J. Fleming, *Drug Injury Compensation Plans* (1982) 30 AM. J. COMP. LAW 297.

⁹¹ Workmen's Accident Compensation Insurance Act (WACIA), Law No. 50, 1947. See Kitagawa, *supra*, note 38, Vol. 6, Part XII, Ch. 2 for a summary of the relevant law.

facturer. It is only if there is no fault on the part of the employer that the employee may consider suing the manufacturer of the defective machine for additional damages. This is unlikely since most Japanese collective labour agreements apparently contain a clause establishing a right of recovery of such damages from the employer.⁹³ It is clear that where worker compensation benefits are paid out to an injured employee, the products liability costs for foreign as well as domestic manufacturers of defective machines and tools are significantly reduced. The Japanese "no fault" automobile insurance scheme⁹⁴ has a similar impact on manufacturers of defective vehicles or automobile parts. The Automobile Indemnification Guarantee Act⁹⁵ imposes strict liability on the owner-operator of a vehicle involved in an automobile accident, and since minimum private insurance is compulsory, the private insurer must bear the loss or seek indemnification from the manufacturer.⁹⁶

In addition to these public insurance funds which socialize risk in certain sectors of Japanese society, compensation schemes are also common in Japan. These schemes are funded by mandatory contributions from manufacturers and are designed to provide compensation for injuries caused by specific products. For example, under the Consumer Products Safety Act,⁹⁷ an association is charged with the procurement of products liability insurance for all products granted the 'SG' mark.⁹⁸ The insurance is funded through the proceeds from fees paid by manufacturers for mandatory safety stickers. Compensation awards up to a maximum of twenty million yen⁹⁹ per person are paid where the association determines that the manufacturer is legally liable. The Drug Side Effects Injuries Relief Fund

⁹² A 1980 amendment to the WACIA introduced a set-off provision between WCI Pension Benefits and civil damages. WACIA, Art. 67 (Law No. 104, 1980), effective 1 Dec. 1981.

⁹³ Kitagawa, *supra*, note 38, at 4-27.

⁹⁴ A summary of these plans is contained in W. Shimeall, *No-Fault Auto Insurance: The Japanese Experience* (1973) 9 *FORUM* 771.

⁹⁵ Law No. 97, 1955, Art. 3.

⁹⁶ According to Kitagawa, this type of case is rarely reported: *supra*, note 38, at 4-28.

⁹⁷ Law No. 31, 1973.

⁹⁸ While this mark is often compared with the Good Housekeeping Seal of Approval, the similarities are not as compelling as they might first appear. The significance which is attached to this type of standard by a very large percentage of Japanese consumers is unparalleled in North America. See text accompanying notes 151-61.

⁹⁹ This figure is for 1982.

Act¹⁰⁰ also depends on mandatory manufacturers' contributions which are assessed in proportion to sales, and are partially dependent on a risk rate. The maximum benefit awarded is considerably below the expected tort damages awards because of the exclusion of non-pecuniary loss and the limitation on compensation for economic loss.¹⁰¹

Canadian manufacturers enjoy similar benefits under provincial health care insurance programs and worker compensation programs to the extent that the *ex ante* contributions to the scheme do not coincide with actual expected accident costs, and to the extent that Canadian compensation programs do not contemplate cost recovery through exercise of subrogation rights. Again, empirical evidence as to the relative degree to which public insurance and compensation programs will externalize costs is lacking, although even this perfunctory assessment suggests that the Canadian manufacturer may benefit from his export decisions in the case of specific products.

E. PROCEDURAL AND EVIDENTIARY CONSTRAINTS

The liability of a foreign enterprise may arise in several contexts, which will have a direct effect on the probability of a lawsuit being brought, and the probability of a successful claim being pursued. First, the importer to Japan (although controlled by a foreign enterprise) may itself be a Japanese legal entity. Second, the foreign enterprise may itself be named as a foreign litigant in defence of an action by a Japanese consumer. Third, a domestic enterprise or distributor may seek to protect itself from liability by joining the foreign manufacturer in the products liability suit. Whatever the relationship of the parties, the potential liability of foreign based manufacturer-defendants will be directly affected by certain procedural constraints which reduce the likelihood of successful litigation. These include the jurisdiction of the Japanese court, the choice of law, and the availability of evidence to the plaintiff in the preparation of her case.

The general rules regarding the jurisdiction of a Japanese court are found in Articles 1 and 2 of the Code of Civil Procedure. These sections provide that the defendant's domicile¹⁰² is determinative, but

¹⁰⁰ Law No. 68, 1979.

¹⁰¹ Presently \$7,000 for a personal injury pension and \$6,160 for a bereaved family pension: Fleming, *supra*, note 90, at 43.

¹⁰² Article 21 defines domicile as "the principal place of living".

that where the domicile is not in Japan or cannot be determined, the defendant's residence shall prevail. Thus it appears that the jurisdictional issue will often be determined in favour of the foreign enterprise. There are, however, several subsidiary rules which may alter this result. Where the defendant is a foreign corporation or association, its usual forum is considered to be the place of its "office, place of business or person in charge of the affairs thereof in Japan".¹⁰³ With respect to tort claims, the Code of Civil Procedure permits an action to be brought "before the court of the place where the act was committed".¹⁰⁴ This has been interpreted judicially to mean either the place of the tortious conduct or the place where the injury occurred.¹⁰⁵ As most products liability claims will be articulated as tort claims, this is perhaps the most significant provision under which the Japanese court may assume jurisdiction. Where the products liability claim is expressed as a contract claim, the consumer-plaintiff's residence usually determines the forum.¹⁰⁶ In view of the Code's provisions there is a significant possibility that at least some Japanese consumer-plaintiffs will be forced to sue in Canada if they are to recover compensation. The costs of transnational litigation are apt to be substantial.

Once it is determined that the Japanese court will assume jurisdiction over the foreign enterprise, the court must then determine which national substantive law will apply to determine liability: the law of the defendant's jurisdiction (that is, Canada) or the substantive law of Japan. An injury occurring in Japan will generally give

¹⁰³ Code of Civil Procedure, Art. 4, par. 3. Note that Article 429 of the Commercial Code requires that any corporation doing continuous business in Japan establish an office and representative in Japan. Article 4 has been invoked even where the office was relatively temporary and informal. *George v. International Air Service Co.* Tokyo District Court, 16 Rodo Reishu 308, 26 April 1965. The strictness of the rule is apparently tempered through application of discretionary principles which provide for its relaxation where "justice and reason" call for an alternative forum. Y. Nomura, *Japanese Court Jurisdiction in Transnational Litigation* (1984) 31 OSAKA UNIV. L. REV. 21, at 30-33.

¹⁰⁴ *Id.*, Art. 15.

¹⁰⁵ For example, Japanese victims of an airplane crash who alleged defects in the design of the aircraft brought suits in Japan against the American manufacturers: *Yabutani v. The Boeing Company*, Tokyo District Court, 754 HANREI JIHO 58, 24 July 1974, translated in (1975) 19 JAP. ANNUAL OF INT'L LAW 225. See generally A. Gotoh, *Products Liability and International Jurisdiction* (1977) 21 JAP. ANNUAL OF INT'L LAW 15.

¹⁰⁶ Article 5 of the Code of Civil Procedure grants jurisdiction to "the court situated in the place of performance" of the duty which, in Japan, is taken to mean the duty to pay damages for breach of contract. See generally Dicey and Morris, *THE CONFLICT OF LAWS* (10th ed. 1980), at 209.

rise to the application of Japanese tort law.¹⁰⁷ Moreover, even where foreign law is applicable, if the events in question do not constitute a tort under Japanese law, Japanese law will apply to absolve the defendant from liability notwithstanding that foreign law may impose legal responsibility.¹⁰⁸ Thus where foreign liability is strict but where the parallel Japanese liability is fault-based, fault must be established.

The liability of a foreign manufacturer is also affected by evidentiary rules which may operate to its advantage. In Japan there is no parallel to the Canadian interrogatory or discovery procedures by which evidence can be obtained prior to trial under the authority of law.¹⁰⁹ Apart from the office of the public prosecutor,¹¹⁰ only the Japanese court has the authority to demand the production of evidence,¹¹¹ and a foreign party must therefore enlist its assistance to do so. The Japanese court will render its assistance only when officially requested by the foreign state,¹¹² and this process can take up to a full year to complete.¹¹³ Even where the Japanese court does exercise its authority, non-disclosure privileges granted by the Code of Civil Procedure¹¹⁴ are substantial, particularly in the area of in-

¹⁰⁷ Law concerning the Applications of Laws in General, Law No. 10, 1898, Art. 11. Para. 1 provides that tort disputes should be "governed by the law of the place where the facts forming the cause of such obligation have occurred". Although this provision is unclear, academic and judicial opinion suggest this interpretation. See also Kitagawa, *supra*, note 38, at Part XIV, 5-64; *Toho K.K. v. Hachisuka* Tokyo District Court, 16 Kaminshu 923, 27 May 1965. Admittedly, Japanese law relating to international products claims is not well-developed. See Gotoh, *supra*, note 105, at 17, 19.

¹⁰⁸ *Id.*, Art. 11, par. 2.

¹⁰⁹ Kitagawa, *supra*, note 38, at Part XIV, 5-93; Fujita, *supra*, note 38, at 174-75.

¹¹⁰ Fujita, *id.* Only the office of the Public Prosecutor has the power to take compulsory depositions and to subpoena evidence.

¹¹¹ See Code of Civil Procedure, Art. 271 on examination of witnesses, and Art. 314 on the production of documents.

¹¹² Kitagawa, *supra*, note 38, at Part XIV, 5-103. This is usually accomplished by 'Letters Rogatory' and carries a number of conditions including the provision of a detailed list of questions and a guarantee of reciprocity from the foreign state.

¹¹³ *Id.*, at 5-104.

¹¹⁴ Under Articles 280 and 281 a witness may refuse to testify where it may lead to criminal prosecution or disgrace for himself, his family or his employees, or where it relates to technical or professional secrets. Under Article 312, the holder of a document may refuse to produce it except where he has referred to it in litigation, where the person demanding it has a right to it, or where the document establishes a legal relation between the parties. Under Article 313, the person demanding the document must first set out its nature and the fact to be proved by it.

dustrial secrets, and thus an effort to obtain pre-trial evidence will be expensive and may prove to be fruitless. These restrictions on pre-trial access to information seriously prejudice the establishment of a products liability claim and present the most difficult hurdle for a plaintiff in the Japanese legal system.

In addition, the plaintiff in most products liability cases in Japan will usually be acting as an individual. Japanese law does not contemplate representative class actions, and thus formal collective action and the benefits of representative products liability suits are not possible. Procedural rules require that the individuals be enumerated in the statement of claim, and that the representative must be chosen by and from the group.¹¹⁵ Moreover, the size of the group is limited by jurisdictional rules which require, in the case of tort claims, that a plaintiff bring his action in one of two forums: either the place where the injury occurred or the place where the unlawful act was committed.¹¹⁶ As most widespread injuries will occur across a number of jurisdictions, an all-inclusive plaintiff group is only possible if the claim is brought in the jurisdiction where the act was committed and this, of course, would reduce the convenience and increase the cost of a group action. It should be noted, however, that collective plaintiff groups may be organized which may nevertheless achieve essentially the same result by less formal means. In multiple injury cases it is not uncommon for victims to form associations through which the preparation of the case can be managed and pursuant to which the defendant is encouraged to settle the claims out of court.¹¹⁷

F. EFFECTS ON BILATERAL TRADE

From even this cursory examination of Japanese products liability law it is possible to draw the following general conclusions:

- (1) The non-litigious behaviour of Japanese consumers makes the

¹¹⁵ Articles 46 and 47 permit representation in bringing or defending a suit to groups or associations not having the status of juridical persons, and Articles 59-63 govern co-litigants. If the group members are not enumerated in the statement of claim as co-litigants under Article 59, then a representative must be chosen and his authority certified in writing pursuant to Article 52.

¹¹⁶ For example, in the SMON litigation, decisions were rendered in nine different district courts. *Terms of Settlement*, *supra*, note 65, at 102. Similarly, the Kanemi Yusho cooking oil disaster was resolved in three separate trials. See Reich, *supra*, note 59, at 106, 109.

¹¹⁷ Again, in the SMON litigation, the victims were represented by at least twenty patient groups with a national liaison council. See *Terms of Settlement*, *id.*, at 99-117. See Reich, *id.*

probability of a products liability claim being brought against the Canadian exporter relatively small.

- (2) The probability of pursuit or success of a products liability claim against the Canadian manufacturer is greatly reduced by the absence of a discovery process resulting in the Japanese consumer being confronted with formidable evidentiary problems.
- (3) The use of risk-utility analysis by the Japanese courts may mean that, unless there is evidence of widespread injury caused by a specific Canadian product, the existence of a defect and causation may be difficult to prove.
- (4) Canadian manufacturers do not face strict contractual liability in Japan (in respect of liability for personal injury and property damage¹¹⁸), while manufacturers producing for the Canadian market may in certain provinces and circumstances¹¹⁹ be held strictly liable to compensate for injuries caused by defective goods.
- (5) Canadian companies may benefit from the joining of the Japanese government as a defendant in products liability cases.¹²⁰ The state may be jointly and severally liable with the manufacturer. While a finding of negligent state approval or inspection does not absolve the manufacturer, it will usually reduce the cost of liability.¹²¹
- (6) Canadian exporting manufacturers face products liability damage awards which as a general matter, and at least on a comparative basis, are significantly lower than those faced in Canada.¹²²

¹¹⁸ By the Act Concerning the Applications of Laws, Art. 11, even if foreign law is applicable to the particular products liability claim, if the events do not constitute a tort under Japanese law, then the latter applies. Thus if foreign liability is strict, and Japanese liability is fault based, fault must always be established.

¹¹⁹ In Saskatchewan and New Brunswick, consumers can sue manufacturers directly to recover compensation for personal injury and property damage resulting from a breach of implied contractual obligations relating to product quality. Consumer Products Warranties Act, R.S.S. 1978, c. G-30, s. 11; Consumer Product Warranty and Liability Act, S.N.B. 1978, c. C-18.1, s. 12. It is also possible for a consumer to recover compensation without proof of negligence from a manufacturer based upon express statements contained in informational material distributed by him. *Murray v. Sperry Rand Corporation* (1979) 23 O.R. (2d) 456 (Ont. H.C.); *Naken v. General Motors of Canada Ltd.* (1978) 21 O.R. (2d) 780, 92 D.L.R. (3d) 100 (Ont. C.A.), appeal allowed on other grounds [1983] 1 S.C.R. 72, 144 D.L.R. (3d) 385.

¹²⁰ The State Redress Act, Art. 1 grants compensation for intentional or negligent harm inflicted by a civil servant in the course of his duties. It should be noted that state liability is secondary in nature.

¹²¹ In both the thalidomide and SMON litigation, the government was held responsible for approximately one third of the damage awards.

¹²² In the thalidomide litigation, the average award was \$133,000 per child, \$13,000 for parents and \$13,000 for legal fees. In *The Kanemi Cooking Oil Case*, *supra*, note 62, the average award from a manufacturers' compensation fund for skin and kidney diseases was \$70,000.

These conclusions are confirmed by an analysis of products liability insurance behaviour by enterprises in Japan. In general, Japanese firms do not appear to consider this type of insurance to be essential. In 1977, only 24% of Japanese manufacturers carried this variety of coverage despite the fact that this protection is relatively inexpensive.¹²³ This contrasts with their American counterparts, 86% of whom subscribe to products liability insurance.¹²⁴ In addition, products liability insurance appears to be of negligible concern to Canadian manufacturers who are considering exporting to Japan.¹²⁵ These observations reflect a situation where both the degree of risk and the magnitude of loss associated with the occurrence of products liability claims may be so low as to justify a company selling in the Japanese market dispensing with products liability insurance altogether. That is, whether societal norms discourage litigation, whether the legal system itself precludes access to the court system, or whether even successful products liability claims represent relatively minor costs, manufacturers marketing potentially defective products in Japan can expect less serious legal consequences than their Japanese counterparts in most cases can expect in North America.

In summary, a Canadian manufacturer considering the Japanese market is not likely to perceive products liability risks as a major deterrent to export,¹²⁶ especially in comparison with other potential markets such as the United States or the European Economic Community where the risks associated with defective products are per-

¹²³ Economic Planning Board, *PRODUCTS LIABILITY AND THE BURDEN OF COMPENSATION FOR INJURY* (1980), cited in Adachi, *supra*, note 38, at 60. The cost of this coverage ranges from .01% to 3% of gross sales and insurance companies offer it at a loss in order to compete for other insurance business.

¹²⁴ U.S. Department of Commerce, Final Report of the Industry Study, *INTER-AGENCY TASK FORCE ON PRODUCT LIABILITY* (vol. 1, 1977), at IV-25. The report also indicates that the average cost was .281% of gross sales in 1976, at IV-33. According to an informal survey undertaken by the Ontario Law Reform Commission in 1978, the cost of products liability insurance in Canada was approximately .5% of gross sales in 1976. Ontario Law Reform Commission, *REPORT ON PRODUCT LIABILITY* (1979), at 72.

¹²⁵ The responses to the authors' questionnaire presented two common scenarios. In some cases, the firm's previous insurance policy covered its products worldwide, while in other cases the company indicated that the perceived risk of Japanese products liability claims was insufficient to warrant a new or extended policy to cover Japanese exports.

¹²⁶ This conclusion was confirmed by the responses in questionnaires received from Canadian manufacturers. In fact, the low products liability costs are an attractive feature of the Japanese market for Canadian firms exporting there.

ceived to be more serious.¹²⁷ This perception of litigation risks acknowledges that regulation of product quality in Japan is carried out by a mixture of formal and informal prospective controls by the state, and by *ex post* tort litigation designed to internalize social costs with an emphasis on the former regulatory tool. Most societies, including Canada and Japan, have chosen a mixture of the two methods. Yet one cannot stress too heavily the dramatic difference in the relative balance between the methods which have been adopted in Japan, as compared to that in Canada or the United States. As recently as 1967 a comprehensive study of Japan products liability law uncovered *no* products liability lawsuits against Japanese retailers and wholesalers.¹²⁸

This is not to say that Canadian manufacturers can anticipate escaping substantial adverse commercial, social and market consequences if they export defective or dangerous goods to Japan. Considerably different values are at play in Japan with respect to both commercial and private dealings. Western business enterprises may be faced with consistent and pervasive expectations of Japanese consumers, commercial agents, and even state officials, to assume voluntarily responsibility for their shortcomings in situations where we might very well assume that legal coercion would be both adequate and appropriate.¹²⁹

IV. JAPANESE STANDARDS AND INTERNATIONAL TRADE

A technical standard may be defined as any law, regulation, specification or other requirement with respect to the properties of a product or the manner, condition or circumstances under which a

¹²⁷ See Committee on Consumer Policy, *SAFETY OF CONSUMER PRODUCTS: POLICY AND LEGISLATION IN OECD MEMBER COUNTRIES* (1980), at 50; H. Tebbens, *INTERNATIONAL PRODUCT LIABILITY: A STUDY OF COMPARATIVE AND INTERNATIONAL LEGAL ASPECTS OF PRODUCT LIABILITY* (1979). For a discussion of the insurance practices of Canadian manufacturers exporting to "strict liability" markets, see P. Halpern and J. Carr, *Consumer and Corporate Affairs Canada, LIABILITY RULES AND INSURANCE MARKETS* (1981), at 22, 70-71.

¹²⁸ Niibori and Cosway, *supra*, note 52.

¹²⁹ In some of the multiple injury cases (see *supra*, notes 48, 53, and 59), out-of-court settlements provided for the establishment of foundations which handled the health care, educational, and employment problems of the victims. See also P. Lansing and M. Wechselblatt, *Doing Business in Japan: The Importance of the Unwritten Law* (1983) 17 INT'L LAWYER 647, at 653. Kitigawa says, however, that the consumer's filing of a products liability suit provided a "strong impetus" for the manufacturer to agree to such a settlement: *supra*, note 38, at 4-38.

product is produced or marketed.¹³⁰ While compliance with standards may not be mandatory under Japanese law, it may nonetheless be advisable because of a consumer preference for goods that display a mark known to them to represent an acceptable level of quality or safety. Sometimes standards and associated certification marks provide the consumer with information by assuring him that goods conform to a certain level of quality or safety.¹³¹ In addition, they may permit him to make comparisons of products manufactured domestically and abroad.¹³² Thus, standards not only serve a consumer protection purpose, but also reduce information search costs, and facilitate the exchange of goods in the marketplace by promoting their interchangeability.¹³³

Despite these trade facilitating effects, standards may also adversely influence the movement of goods across national borders. Since standards may be tailored to domestic technical experience and expertise, and to domestic consumer and industrial needs, they frequently have the effect of distorting international trade. A company that manufactures to its domestic standards will be at a competitive disadvantage in a foreign market if a foreign state demands higher or even different standards. This may or may not be the intended result, since it is the disparity in standards which is responsible for this trade barrier. Whether the purpose of the standard is the protection of domestic industry or the promotion of a legitimate domestic policy objective, and whether one standard is perceived to be stricter than another is irrelevant to its impact on trade. While international harmonization of standards appears to be the underlying rationale of many international standards organizations and trade agreements, its complete realization is clearly an unrealistic goal. There will always exist differing national values, priorities and physical circumstances which make uniform international standards inappropriate.¹³⁴

¹³⁰ See Agreement on Technical Barriers to Trade, in General Agreements on Tariffs and Trade, Basic Instruments and Selected Documents, 26th Supp., 1979 (also referred to as the GATT Standards Code). For a detailed discussion of the rationale and effects of standards, see D. Lecraw (Economic Council of Canada), *VOLUNTARY STANDARDS AS A REGULATORY DEVICE: WORKING PAPER No. 23* (1981); R. Legget, *STANDARDS IN CANADA* (1970).

¹³¹ See text accompanying notes 154-61 for a discussion of quality marks in the Japanese market.

¹³² See Legget, *supra*, note 130, at 201-09.

¹³³ *Id.*, at 209-23.

¹³⁴ Sweeney, *supra*, note 29, at 186. The Preamble to the Standards Code recognizes the right of a country to enact "measures necessary to ensure the

In addition, the standards setting *process* may adversely affect international trade. Imports may be reduced where there is inadequate information respecting standards available to foreign manufacturers, where insufficient notice of regulatory standard reform is given to foreign enterprises, or where foreign companies are not formally represented on committees which promulgate standards, or cannot participate effectively in informal business-government relationships. Finally, procedures which implement standards such as testing, certification, and labelling and packaging requirements may operate as obstacles to international trade.

For the foreign manufacturer, these difficulties related to standards represent costs which, although difficult to quantify, will affect the price or profitability of its product in a foreign market. These costs may take numerous forms, including search costs, costs of changing design or production techniques,¹³⁵ testing and certification fees, or delay costs. The result may be a loss of competitive advantage since domestic manufacturers which need to satisfy only one standard may take advantage of economies of scale. Ultimately, as a result of these trade-restricting effects, the market can expect a decrease in imports, and a concomitant increase in the price of remaining imports,¹³⁶ or perhaps in the price of domestic goods.

If international trade negotiations are to progress, it must be determined whether the operation of particular standards as trade impediments can be considered fair and legitimate; that is, whether they are to be classified as protectionist¹³⁷ or rather are to be assessed

quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices", or "for the protection of its essential security interest".

¹³⁵ Manufacturers may find it more profitable not to make this type of change, but rather may choose to modify and reconstruct the final product to comply with the standards of a particular export market. Costs may nevertheless still be significant. For example, it is estimated that tear-down and reconstruction of American automobiles in Japan to meet various standards requirements (such as emission standards) adds over \$1,000 to the price of each vehicle: TASK FORCE REPORT (1979), *supra*, note 7, at 29-30.

¹³⁶ *Id.* The price of the Volkswagen Golf apparently increases by one third as a result of 41 Japanese technical regulations: *Hohe Hürden für Importautos*, *Die Zeit*, 29 May 1981, cited in J. Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective* (1982) 19 Com. Mkt. L. Rev. 5, at note 7.

¹³⁷ This assumes that trade barriers which have as their sole purpose the protection of domestic industry are undesirable as unnecessary impediments to the free flow of international trade. Inherent in this position is an assumption, or perhaps an objective, that uncompetitive domestic industries should be abandoned, and resources should be reallocated to industries that are competitive internationally. According to some economists this would result

as economically or culturally justified domestic policies. In the next section we present a simplified and generalized outline of the most common standards barriers which have been encountered by North American business enterprises in attempting to do business in Japan. It should be borne in mind that this area is rapidly changing and numerous recent Japanese trade liberalization measures have already had a significant impact on specific industries and products.¹³⁸

A. JAPANESE TECHNICAL STANDARDS AS NON-TARIFF BARRIERS¹³⁹

A foreign manufacturer's first contact with the Japanese product standards system traditionally occurred when import approval was sought. In order to ensure at an early stage that potential imports met the requisite standards, the Japanese government required detailed and comprehensive disclosure of all pertinent information on approval applications,¹⁴⁰ which often had to be accompanied by a product sample. Inaccurate information had serious results: a cosmetics company that mistakenly wrote "annex" instead of "head office" on its application was ordered by Japanese customs officials to recall all of its lipstick cases from the market.¹⁴¹ In addition, import applications were required to be submitted through a resident company, usually a Japanese trading company. Thus the foreign exporter, even before his product entered the market, was faced with trade barriers, as the disclosure requirements represent increased costs and greater risks.¹⁴² First, there was the possibility of delay

in consumer savings, increased investment opportunity, technological innovation and lower inflation. See Cline, *supra*, note 36, at 6-7. See also Jackson, *supra*, note 16, at 325.

¹³⁸ See F. Coccodrilli, *Dispute Settlement Pursuant to the Agreement on Technical Barriers To Trade: The United States-Japan Metal Bat Dispute* (1983-84) 7 FORD. INT'L L.J. 137.

¹³⁹ To talk of a unitary Japanese standards system is perhaps misleading since the various standards schemes regulating different products are obviously administered by different private and governmental bodies, and in the latter case are established under the authority of widely differing Acts, such as the Road Vehicles Act, No. 105 (1960), Electrical Appliances and Materials Control Law, No. 234 (1961), and the Consumer Product Safety Law, No. 31 (1973). For a brief summary of the effect of these and other laws on imports, see JETRO, JAPAN'S IMPORT SYSTEM (1978).

¹⁴⁰ For example, a manufacturer may be required to provide a complete list of ingredients, processing details or product test results.

¹⁴¹ *Foreign Firms are Irked Over Needless Procedures*, *supra*, note 18, at 3. Another example is cited in which approval was denied where the spaces between the figures in the production date (year, month, date) were too wide.

¹⁴² See generally, C. Wunsch, *Trade Secret Confidentiality and Toxic Substances Regulation: A Non-Tariff Trade Barrier in the Chemical Trade*, (1981) 14 CORN. INT'L L.J. 173.

because of uncertainty about the sufficiency of the disclosed information. Second, there was the risk of proprietary information being released to competitors by Japanese authorities, resulting in a subsequent loss of market share.¹⁴³ Third, the residency requirement effectively committed a foreign exporter to a particular Japanese agent, since switching import agents entailed reapplication for import approval with all of its associated costs.

A related problem for foreign manufacturers concerned the Japanese import classification system. The decision on the part of officials as to the classification of an imported product determined which standards, quotas and duties (if any) were applicable, and clearly affected the manufacturer's competitive position. These decisions sometimes appeared to be discriminatory in cases where a product fell into several possible groups due to the existence of overlapping classifications. For example, despite a commitment made by the Japanese government to the international community to remove duties on all automobile parts, some Canadian manufacturers of automobile windshields were obliged to pay duties because their products were given more specific customs classifications such as "laminated glass". Apparently, the more specific code prevailed in such cases.¹⁴⁴

If the exporter was successful in obtaining approval, his product next had to be submitted to Japanese customs officials, at which point there was also potential for costly delays.¹⁴⁵ For example, at one time Canadian lumber was required to be inspected piece by

¹⁴³ The danger for a foreign firm exporting to Japan is that its product may be effectively barred from the market when its technology is released to competitors who may have lower production costs.

¹⁴⁴ This problem was brought to our attention in one of the questionnaire responses and was being investigated by the Canadian embassy in Tokyo, during the summer of 1983.

A Canadian manufacturer of potato granules was faced with stringent Japanese specifications to be met by their product until the Japanese officials were convinced that there had been an incorrect classification, and that potato *flake* standards were inappropriate for this particular product. See F. Weil and N. Glick, *Japan — Is the Market Open? A View of the Japanese Market Drawn from U.S. Corporate Experience* (1979) 11 LAW AND POL'Y INT'L BUS. 845, at 864-65 for a case in which reclassification of potato chips resulted in an increase in duty from 16% to 35%.

¹⁴⁵ *Id.*, at 864. An American manufacturer of electronic components found that at Japanese Customs each control had to be disassembled, photographed, and reassembled before it could be sold on the Japanese market. Of course, Canadian bureaucrats have used similar tactics to impede the importation of Japanese products. See *Tighter Customs Inspections Slow Flow of Japanese Cars*, *supra*, note 9.

piece.¹⁴⁶ In addition, there has been some concern expressed by Western exporters that standards and customs rules were capable of being used at this stage to discourage "non-essential" imports in the pursuit of other government policy objectives.¹⁴⁷ At this time, as at the import approval stage, Japanese custom officials verified whether the relevant Japanese standards had been complied with. Although the specific standards regulations applicable to a particular product depend upon its classification, one can recognize several common standards problems faced by foreign exporters both at the approval stage and when the product passed through customs.

First, many Japanese standards regulated the design rather than the performance characteristics of a product, making it possible for goods to have performance attributes which were superior to those of a corresponding conforming product, but making these goods susceptible to rejection by Japanese officials because of minor differences in design.¹⁴⁸ In order to penetrate the market it became necessary for foreign companies to implement costly design and production technique changes. This factor has also had a negative effect on product innovation because a manufacturer's investments in product improvements sometimes resulted in rejection of the product by Japanese customs officials.¹⁴⁹

Another area of difficulty which often confronted exporters is the Japanese "positive list" approach to harmful substances in food, clothing, agricultural products, packaging, cosmetics and pharmaceuticals. Rather than maintaining a list of prohibited or restricted substances, the Japanese government lists in its regulations those

¹⁴⁶ This barrier has since been removed. See *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 17 Feb. 1981, at 38:8.

¹⁴⁷ Several Canadian manufacturers contacted by the author expressed a concern that trade barriers to their particular product appeared particularly insurmountable at times when Japan had exchange problems. Decisions made by low-level Japanese bureaucrats may be subject to review by the Office of Trade Ombudsman, which was established by the Japanese as part of their trade liberalization measures.

¹⁴⁸ For example, an American electrical cord was barred from the Japanese market because its strands were thicker than those making up cords manufactured to Japanese standards. The thickness was not related to performance. See Weil and Glick, *supra*, note 144, at 866.

Similarly, American metal baseball bats were denied entry when the JSBB (Japanese Rubberized Baseball League) established design standards relating to the alloy used in the bats and to the inclusion of rubber plugs in the ends of the bats. See *supra*, note 138, at 150. The use of design standards may violate Art. 2.4 of the AGREEMENT ON TECHNICAL BARRIERS TO TRADE, *supra*, note 130.

¹⁴⁹ Weil and Glick, *supra*, note 144.

ingredients which are permitted, for which uses, and in what amounts.¹⁵⁰ If for example a new food product contains an additive not included in the Food Sanitation Regulations, or if it contains an approved additive in larger amounts than permitted, it is denied import approval, or is rejected at customs. If the foreign enterprise can demonstrate that the additive is harmless, a procedure exists pursuant to which approval *may* be granted after several months. These potential or actual delays sometimes necessitate more expensive production techniques to ensure product stability and longer shelf life,¹⁵¹ and there is always an increased risk of product rejection.

These difficulties were joined by product certification barriers. As a general rule, until the introduction of recent trade liberalization measures, product testing to determine conformity to standards had to be carried out in Japan, and foreign laboratory test data were unacceptable.¹⁵² In addition, any modification to the product triggered re-certification problems. This peculiarity of the Japanese standards system clearly represented delays, risks and costs for the foreign exporter, especially where standards were unavailable in English, or when the reasons for rejection by the Japanese testing authority were unarticulated. This barrier has been a source of considerable friction in Japanese trade relations especially in view of the fact that many Western countries generally accept foreign (Japanese) test data.¹⁵³

In addition, imports have explicitly or implicitly been denied access to various Japanese marks of quality.¹⁵⁴ For example, the Japan Industrial Standard (JIS)¹⁵⁵ mark of quality is awarded after testing not merely samples of the product but also the plant, equipment,

¹⁵⁰ See TASK FORCE REPORT (1980), *supra*, note 7, at 31.

¹⁵¹ A Canadian firm exporting cookies to Japan reported this experience in the authors' survey.

¹⁵² Weil and Glick, *supra*, note 144, at 871-72. See Office of the U.S. Trade Representative, REPORT TO THE UNITED STATES CONGRESS ON THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE — "STANDARDS CODE" (1983), at 21.

¹⁵³ TASK FORCE REPORT (1979), *supra*, note 7, at 21. See text accompanying notes 163-70 for a description of the trade liberalization measures in this context.

¹⁵⁴ Jackson, *supra*, note 16, at 327. Examples of Japanese certification marks are JIS, JAS (Japan Agricultural Standard), SG or S. The latter two standards indicate the product has been approved under the Consumer Products Safety Act, Law No. 31, 1973, and are mandatory for certain manufactured goods including pressure cookers and baseball bats. The SG mark indicates that the manufacturer participates in an insurance program established by the Product Safety Association. See *supra*, note 138, at 149.

¹⁵⁵ See Lecraw, *supra*, note 130, Appendix B, at 50-52.

and quality control system of the manufacturer. While the mark is voluntary (except where it is adopted as mandatory by legislation¹⁵⁶), the certification procedures have had the effect of denying some foreign products the prestige and potential market power associated with the mark. Furthermore, imports have been excluded from carrying an industry stamp of approval. Manufacturers of certain recreational equipment were effectively forced out of the Japanese market when national sports leagues refused to place their stamps on foreign-made equipment.¹⁵⁷ Finally, Japanese *processes* which set standards have posed serious problems to Western exporters.¹⁵⁸ For example, standards have been unavailable in English or difficult to obtain;¹⁵⁹ they have been changed without notice or with insufficient notice given to foreign manufacturers;¹⁶⁰ and the standards-formation process has traditionally been closed to foreigners.¹⁶¹

The conclusion one can draw from this analysis is that Japanese product standards and certification procedures have undeniably

¹⁵⁶ See, for example, the Electrical Appliance and Material Control Law. No. 234, 1961.

¹⁵⁷ Foreign manufacturers of products such as aluminum baseball bats, volleyballs and tennis balls have been victims of this practice: *How the U.S. Struck Out In Japan*, NEW YORK TIMES, 25 Oct. 1981, at B1, col. 1. But see *Baseball's Best Trade*, BOSTON GLOBE, 22 July 1983, at 30, which reports a new agreement between the United States and Japan to permit export of metal bats to Japan, reached after extended negotiations of government officials from both countries and manufacturers of bats. See *supra*, note 138, at 152-55.

¹⁵⁸ It is not clear if these barriers can be ascribed to the Japanese government's deliberate decisions to exclude foreigners, or if language and distance explain the inability of foreign businesses to participate effectively in the process.

¹⁵⁹ See Weil and Glick, *supra*, note 144, at 868. The responses to our questionnaire indicate that this is not a major problem for Canadian manufacturers since standards which are not published in English by the Japanese government are usually translated into English by one of the Japanese trading companies through which many Canadian companies export to Japan.

¹⁶⁰ *Id.*, at 870. Domestic industry is often involved in the standards setting process, thereby affording domestic manufacturers a temporal advantage over foreign firms. For example, an American manufacturer introduced electric griddles in Japan in 1974. The following year, a new Japanese standard set the temperature at two degrees less than the capability of the American brand. By the time notice was received and changes made in order for the American product to comply, the market had been flooded with two million units, most of which were made in Japan.

¹⁶¹ Recently some Japanese standards-setting bodies have been opened to permit foreign representation. In 1978 the Japan Electrical Association allowed American representatives to sit on its standards formulation and revision committees. See MITI (Overseas Public Relations Office), IMPLEMENTATION OF THE IMPROVEMENT IN JAPAN'S STANDARDS AND CERTIFICATION SYSTEMS (13 Feb. 1984); MITI, STANDARDS INFORMATION No. 4 (15 Feb. 1984), at 1, 4.

operated as barriers to trade. Moreover, unlike quotas and explicit tariffs, non-tariff barriers may not be foreseeable, thus introducing uncertainty into the international trade environment which is a major concern of exporters.¹⁶² In addition, compliance costs entail expensive design and production technique modifications. This capital investment would have had to have been absorbed by the foreign manufacturer in cases where the domestic Japanese market was relatively competitive. Where these non-tariff costs were significant, the market was effectively closed to the foreign exporter. Where uncertainty, increased costs and delays associated with Japanese standards were foreseen, a manufacturer may simply have decided that the diversion of capital and management resources over an extended period would be unjustified. Thus a non-tariff standards barrier may operate either as a tariff, increasing the price of imported goods by an amount reflecting the costs and risks associated with meeting Japanese standards, or as an absolute prohibition of the product where the marginal costs associated with exporting to Japan and meeting the standards exceed the expected marginal revenues associated with the export market.

B. JAPANESE TRADE LIBERALIZATION MEASURES

In an attempt to reduce some of these standards barriers, Western businesses and governments have demanded, in the context of bilateral and multilateral negotiations with the Japanese, that market-opening reforms be implemented. In response, a series of trade liberalization measures have been announced by the Japanese which are designed to reduce the trade barriers to varying degrees depending upon the industry in question.

In January of 1980, the Agreement on Technical Barriers to Trade (usually referred to as the GATT Standards Code),¹⁶³ to which both Canada and Japan are signatories, came into effect. The primary object of the Code is to reduce the number of unnecessary standards obstacles to international trade. At the same time, the Code recognizes domestic sovereignty of each nation to enact legitimate measures "necessary . . . for the protection of human, animal or plant life or health or the environment".¹⁶⁴ The Code encourages

¹⁶² *Supra*, note 146, at 38:5.

¹⁶³ *Supra*, note 130. See R. Middleton, *The GATT Standards Code* (1980) 14 J. WORLD TRADE LAW 201; Sweeney, *supra*, note 29.

¹⁶⁴ Standards Code, *supra*, note 130 at art. 2.2.

the use of international standards,¹⁶⁵ the promulgation of performance rather than design standards,¹⁶⁶ the provision of notice and comment to foreign enterprises in standards setting processes (transparency provisions),¹⁶⁷ the acceptability of foreign test data,¹⁶⁸ and access to certification systems.¹⁶⁹ While the traditional standards structure in Japan is frequently criticized as being in contravention of Japan's GATT obligations, it is fair to say that the Standards Code has been relied upon by the West to only a limited degree to influence the Japanese government to reduce its standards barriers. The general language in which the exemption of permissible standards is couched, and the absence of an effective enforcement machinery, have placed in question the obligatory nature of the Code's provisions.¹⁷⁰

Nevertheless, recent Japanese import promotion measures indicate that the Japanese government views seriously its responsibilities under the Standards Code.¹⁷¹ For example, amendments to the industrial standardization law, which provides access to the JIS marking system to foreigners, were made in April 1980.¹⁷² More recently, the first general reduction of non-tariff barriers occurred in April

¹⁶⁵ *Id.*, art. 2.2, art. 2.3.

¹⁶⁶ *Id.*, art. 2.4.

¹⁶⁷ *Id.*, art. 10.

¹⁶⁸ *Id.*, art. 5.2.

¹⁶⁹ *Id.*, art. 7.2.

¹⁷⁰ A. Blair, *Prospects for Implementation of the GATT Standards Agreement in the United States* (1980) 20 VA. J. INT'L L. 699; Bourgeois, *supra*, note 136, at 5.

Nonetheless, the dispute resolution mechanisms of the Code have proved effective in some circumstances. It is simply too early to determine if the legislative reforms carried out by the Japanese under the Code will be followed by complementary regulatory and administrative reforms. See *supra*, note 138.

¹⁷¹ See *GATT Chief Both Defends and Chides Japan Amid Trade Friction*, THE JAPAN ECONOMIC JOURNAL, 30 March 1982, at 4.

¹⁷² See REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP, *supra*, note 14, at 60. The mark is now awarded to foreign products and domestic goods without apparent discrimination. In both cases the criteria for the grant of the mark include the inspection and assessment of the quality control procedures at the factory where the goods are manufactured and the maintenance and testing of facilities by an agency authorized by the Minister. The increased costs of foreign enterprise review continue to be an effective barrier. On at least one occasion, the Americans have argued successfully for the introduction of "self-certification" procedures. See *supra*, note 138, at 138.

and May of 1983,¹⁷³ and the second occurred in April 1984.¹⁷⁴ Under these measures, several legislative and administrative reforms have been adopted to support the Code's objectives, including the adoption of a system which permits acceptance of certain test data outside Japan;¹⁷⁵ the direct application for testing in Japan by foreign companies;¹⁷⁶ simplified approval procedures;¹⁷⁷ approval of foreign laboratories for inspection and certification purposes;¹⁷⁸ gradual conformity of many Japanese standards with international

¹⁷³ The Law to Amend a Part of the Related Laws to Facilitate the Obtaining of Type Approval, etc. by Foreign Manufacturers, 20 April 1983. See *Japan Closer to Easing Import Curbs*, THE GLOBE AND MAIL, 25 March 1983, at B6, col. 5; MITI (Information Office), IMPROVEMENT OF JAPAN'S STANDARDS AND CERTIFICATION SYSTEMS (13 May 1983).

This package of reform measures included the revision of seventeen laws to provide for non-discriminatory treatment of foreign manufacturers and the introduction of administrative reforms relating to standard drafting processes, internationalization of standards, acceptance of foreign test data and simplification of certification procedures.

¹⁷⁴ At the time of writing only a provisional translation of External Economic Measures announced by MITI on 27 April 1984 had been published. See *infra*, note 175. (On file, University of British Columbia, Faculty of Law.)

¹⁷⁵ On 15 February 1984, MITI released detailed information describing the procedures pursuant to which foreign test data would be accepted by the Japanese government. The procedures, which are still complex, permit foreign manufacturers to participate on standards setting committees and permit certain test data generated by foreign enterprises to be submitted to the relevant Japanese authorities. These procedures were further amplified in MITI (Standards Information Centre), *Standards Information No. 5* (26 April 1984) which set out the specific laws for which foreign test data will be accepted and the guidelines for designation of foreign certification laboratories.

These measures were part of a broader program of tariff and non-tariff reduction measures announced by the Japanese government. See H. Okonogi (MITI), JAPAN EXTERNAL ECONOMIC MEASURES (27 April 1984). On 11 June 1984 Applied Research Laboratories in the United States was named a Designated Foreign Inspection Body under Japan's Electrical Appliances and Material Control Law. See MITI, STANDARDS INFORMATION No. 9: U.S. TESTING INSTITUTION NAMED "DESIGNATED FOREIGN INSPECTION BODY" UNDER JAPAN'S ELECTRICAL APPLIANCES AND MATERIALS CONTROL LAW (11 June 1984).

¹⁷⁶ MITI, STANDARDS INFORMATION No. 7: REGISTRATION OF DIMPLEX HEATING LTD. OF GREAT BRITAIN BY DIRECT ACCESS IN ACCORDANCE WITH THE ELECTRICAL APPLIANCES AND MATERIAL CONTROL LAW (26 April 1984); MITI, STANDARDS INFORMATION No. 11: REGISTRATION OF S.A. SEB. OF FRANCE BY DIRECT ACCESS IN ACCORDANCE WITH THE CONSUMER PRODUCT SAFETY LAW (19 July 1984).

¹⁷⁷ The inspection procedure for subsequent similar shipments of a product has been streamlined considerably, thereby cutting costly delays.

¹⁷⁸ MITI, STANDARDS INFORMATION No. 12: UL WAS APPROVED AS A FOREIGN INSPECTION BODY UNDER THREE JAPANESE LAWS BY MITI (14 Aug. 1984); MITI, STANDARDS INFORMATION No. 8: APPROVAL OF A FOREIGN INSPECTION INSTITUTE UNDER JIS LAW — THE SINGAPORE INSTITUTE OF STANDARDS OF INDUSTRIAL RESEARCH (SISIR) WAS APPROVED AS AN "APPROVED INSPECTION INSTITUTE" (2 May 1984).

standards;¹⁷⁹ the implementation of an after-permit examination customs system;¹⁸⁰ the introduction of a centralized customs classification system; and the opening of standards drafting committees to foreigners.¹⁸¹ In a measure specific to Canada-Japan trade, the Canadian Standards Association in 1981 reached an agreement with the Japan Electrical Testing Laboratory pursuant to which certain Canadian products can be tested and certified in Canada to have met Japanese standards. The Japanese Electrical Testing Laboratory will utilize the certificate along with the test report issued by the Canadian Standards Association to simplify its testing practice in accordance with the Rules of Utilization of Test Data by Foreign Testing Bodies approved by the Ministry of International Trade and Industry.¹⁸²

In addition, the Japanese government has reduced tariffs on over 1700 mined and manufactured products a full year in advance of the schedule agreed upon at the MTN Tokyo Round.¹⁸³ Tariffs on agricultural, forestry and marine products are also to be reduced in 1985, one year earlier than scheduled. These reductions are to take effect "providing that other leading nations do the same in implementing their own advanced reductions."¹⁸⁴ What remains to be seen is whether these tariff and non-tariff liberalization measures

¹⁷⁹ Where international standards exist, as in the case of International Electrotechnical Commission (IEC) standards, International Commission on Rules for Approval of Electrical Equipment (CEE) standards, International Standard Organization (ISO) standards or FAO/WHO Committee Evaluations of Food Additives, the government has committed itself to attempt conformity. Where no such standards exist the government will participate in international standards-setting bodies. There has already been considerable relaxation of Japanese automobile standards in order to conform with E.E.C. and North American standards. See *Transport Ministry to Publicize Simplified Car Import Procedures — The Japanese Market is Open to Foreign Autos*, THE JAPAN ECONOMIC JOURNAL, 14 Feb. 1984, at 10. See also MITI, STANDARDS INFORMATION NO. 6: JAPAN JOINS THE CERTIFICATION SYSTEM OF THE INTERNATIONAL COMMISSION FOR CONFORMITY CERTIFICATION (27 April 1984).

¹⁸⁰ This system allows examination of documents for the purposes of duty assessment to be made after the goods are released from customs custody.

¹⁸¹ *Supra*, note 161. See also MITI, STANDARDS INFORMATION NO. 10: 1984 FISCAL YEAR PLAN FOR PREPARATION OF NEW AND REVISED DRAFTS OF JAPANESE INDUSTRIAL STANDARDS (JIS) (27 June 1984). In addition, the comment period for such government bodies has been extended from 45 to 72 days.

¹⁸² *Supra*, note 10, at 20.

¹⁸³ *Supra*, note 174.

¹⁸⁴ *Id.*

will result in a truly open Japanese market, or indeed whether additional non-tariff barriers will appear to take their places.¹⁸⁵

On balance it appears that a Canadian manufacturer dealing with the Japanese market today is less likely to encounter the standards barriers he would have confronted a decade ago. Nevertheless, standards will continue to operate as non-tariff barriers as long as disparities exist, and international harmonization of all technical standards is an unrealistic aspiration as long as nations react to divergent domestic, economic, cultural, social and political influences. In the next section we attempt to articulate these influences on product safety regulation in Japan, and suggest how they might affect decisions to adopt Western standards and products liability law.

V. JAPANESE PRODUCT SAFETY REGULATION AND THE INTRODUCTION OF WESTERN IDEOLOGY

The high profile character of Western-Japanese trade relations and our often inexplicable and surprising ignorance¹⁸⁶ of the Japanese makes any treatment of "the" Japanese national character susceptible to the pitfalls of oversimplification and stereotyping. Mutual misunderstandings are perhaps inevitable despite improved communication between the two cultures in this century.¹⁸⁷ In addition, an analysis of Japanese attitudes involves the danger of overemphasizing traditional Japanese culture and society while ignoring the changes which have transpired since the Second World War. To ignore the partial Westernization of traditional Japanese attitudes

¹⁸⁵ Some recent comments in the Western press have been decidedly negative: P. Agress, *U.S. Calls on Japan to Eliminate Import Barriers*, BUSINESS AMERICA, 22 March 1982, at 4; *U.S. Trade Deficit Cited in Friction with Japan*, THE GLOBE AND MAIL, 20 Sept. 1984, at B6, col. 5.

¹⁸⁶ Western businessmen appear to be less willing to incur substantial expenditures on research of the Japanese market. In contrast to their Western counterparts Japanese exporters thoroughly familiarize themselves with their export markets. This is perhaps due to the pre-eminence of English as the international language of commerce, and of Western business practices as the method of transacting.

This factor may, however, be undergoing significant changes. See J. Shinn, *A New Wave of 'Japan-ism'*, Parts I and II in THE JAPAN ECONOMIC JOURNAL, 20 and 27 Oct. 1981, at 24. See also Abbott and Totman, *supra*, note 12, at 147-50.

¹⁸⁷ E. Wilkinson, MISUNDERSTANDING, EUROPE VERSUS JAPAN (1982), at 13. The very existence of labels such as 'Japan, Inc.' and 'the Japanese economic animal' testify to the stereotyped perceptions many Westerners have of the Japanese. *Id.*, at 75.

and habits is to commit a grave sociological error.¹⁸⁸ We must emphasize that our purpose is not to present a comprehensive characterization of Japanese culture, but rather to abstract several relevant cultural attributes which may assist us to understand present Japanese policies toward products safety regulation. It is our thesis that these policies can be explained: first, by the Japanese aversion to risk-taking, and the related preference for certainty and harmony; second, by their attitude towards foreigners; and third, by the absence of an effective products liability litigation system.¹⁸⁹ Before identifying the consequences of these social characteristics, we wish to elucidate briefly the historical, cultural and physical forces that make these characteristic of Japanese society.

The Japanese cultural tradition stresses the priority of the "relationship", and thus the interests of the group over the interests of the individual. It has its roots in lingering feudalistic values,¹⁹⁰ the religious and cultural homogeneity of Japan's inhabitants,¹⁹¹ and the teachings of Confucius.¹⁹² For the Japanese, the identity of the individual is submerged in the larger group, whether it be family, company, village or nation, and is constrained by the mutual obligations and duties owed to others and the group (*on*), as well as by a set of rules of conduct known as *giri*.¹⁹³ The pursuit of individual goals is considered to be detrimental to the harmony of the group (*wa*), in which there is a strict hierarchy imposing on the occupier

¹⁸⁸ *Id.*, at 89-159.

¹⁸⁹ The relevance of culture to explain Japanese economic success has been noted by others. See K. Yamamura, *supra*, note 22, at 130. At least some part of the regulatory framework within which Japan business operates must be seen as "products of Japanese culture — to be recognized as such and seen as inherent assets of Japanese society...". *Id.*, at 131.

¹⁹⁰ The feudal regime was legally terminated only in the latter part of the last century. R. Benedict, *THE CHRYSANTHEMUM AND THE SWORD* (1946). Japanese feudalism was at its peak in the sixteenth century, but even prior to that time clan-like social organization appears to have been a common feature of Japanese society. See generally R. Cole, *JAPANESE BLUE COLLAR* (1971); H. Wren, *The Legal System of Pre-Western Japan* (1968) 20 HAST. L.J. 217.

¹⁹¹ Y. Noda, *The Far Eastern Conception of Law* (1971) 2 INT'L ENCYCLOPEDIA COMP. L. 120, at 129.

¹⁹² Confucianism stresses obedience to a hierarchial system and the importance of mutual personal obligations. Kim and Lawson, *supra*, note 48, at 494.

¹⁹³ *Giri* (*gi*: just or right; *ri*: reason or reasonable behaviour) means the manner of behaviour required of one person toward others in consequence of his social status: Y. Noda, *INTRODUCTION TO JAPANESE LAW* (1976), at 175. For a detailed discussion of the Japanese system of obligations see Benedict, *supra*, note 190, Ch. 6-7; Gibney, *supra*, note 20, Ch. 6.

of each position a range of specific responsibilities, duties and rules of conduct.

This collective consciousness has deep historical, religious and cultural roots. Centuries of relative isolation have produced a homogeneity which has had a significant socially cohesive effect.¹⁹⁴ Japanese religion combines elements of Confucianism, Hinduism, and Buddhism with Shintoism, and is responsible in part for encouraging this group mentality. Confucianism, for example, emphasizes adherence to the accepted social order at the expense of individual action.¹⁹⁵ When Buddhism was adopted in Japan it had to be altered so that it would not conflict with the Japanese social rank system, for one of its tenets was the obliteration of social distinctions.¹⁹⁶ As the state religion, Shintoism was often invoked to cultivate national unity. One author has coined the term 'Japanesism' to describe the effect religion has had on social conduct,¹⁹⁷ referring to a group cohesion with strong religious overtones, and to an emphasis on ceremony and ritual.

A central element of Japanese group consciousness is the family relationship. Within the family there is a household head and an established hierarchical ranking which determines the rights, privileges, and pattern of daily life of each family member. Associated with a rank are duties and responsibilities to subordinates, since the holder of a superior position in the group is, in Ruth Benedict's words, a trustee, not an autocrat.¹⁹⁸ This structure nurtures in the Japanese a need for dependence (*amae*) on a superior,¹⁹⁹ and an expectation that a person's stability and needs are the responsibility of his senior. This atmosphere, where the achievement of individual needs and ambitions is discouraged, and dependence on others for security is encouraged, reflects a culture which places a high value on certainty, and which may be described as averse to risk-taking and conflict. Thus one may be able to articulate a cultural bias in

¹⁹⁴ Wren, *supra*, note 190, at 221; T. Kawashima, *The Status of the Individual in the Notion of Law, Right and Social Order in Japan*, in *THE JAPANESE MIND: ESSENTIALS OF JAPANESE PHILOSOPHY AND CULTURE* (Moore ed. 1967), at 262.

¹⁹⁵ Kim and Lawson, *supra*, note 48, at 496.

¹⁹⁶ Gibney, *supra*, note 20, at 106.

¹⁹⁷ I. Dasan (Y. Shichhei), *JAPANESE AND THE JEWS* (1970); Wren, *supra*, note 190, at 223.

¹⁹⁸ Benedict, *supra*, note 190, at 54.

¹⁹⁹ T. Doi, *THE ANATOMY OF DEPENDENCE* (1973). Gibney, *supra*, note 20, Ch. 6.

favour of 'certainty' and avoidance of risk which is reflected in the psychological discomfort which the Japanese experience when the hierarchical social ranking is not established.²⁰⁰

The family-group concept pervades many aspects of Japanese society because of its consistency (in different contexts) of attitudes, expectations and values. At the workplace the collective interest is equally pervasive.²⁰¹ The lifetime tenure system, while not as pervasive as some believe, still applies to a significant portion of the workforce. Together with its associated benefits²⁰² it provides significant financial and social security for labour which may be unavailable in an individualistic, mobile labour market. Individual goals are identified with, and perhaps subsumed by, company objectives, and social and psychological security is provided in the work group. Thus the company is often referred to as *uchi* (my house).²⁰³ The relatively stable employment structure of Japanese industry is consistent with the view of a culture which emphasizes certainty and stability in relationships among its members. Risk aversion has been found, in some cultures, to correlate directly with unwillingness to experience job rotation, and with resistance to changes in job activities.²⁰⁴

The concept of the hierarchical family relationship as a social ideal can be extended to the level of the national government, giving it a paternalistic role in the regulation of its citizens' behaviour.²⁰⁵ Paternalism may be more readily justified if one accepts that individual choice exercised through contract risk allocation may entail substantial transaction and error costs, and that social responsibility for victims of accidents justifies limited interference with individual liberty. Although the co-operative nature of the government-business

²⁰⁰ Nakane, *supra*, note 21, at 26-31.

²⁰¹ For recent statistical information compiled in a survey entitled *Comparison of Office Environment in Japan and the U.S.*, see *Japanese Prefer Working in Big Rooms with Others to Lone Offices*, THE JAPAN ECONOMIC JOURNAL, 11 May 1982, at 5. See also Yamamura, *supra*, note 22, at 133.

²⁰² These include automatic pay raises, housing, welfare and fringe benefits, day care facilities and organized social events. R. Dore, BRITISH FACTORY JAPANESE FACTORY (1973); F. Gibney, MIRACLE BY DESIGN (1982), at 55-72. Extended job security and associated benefits are enjoyed by an estimated 25% of the workforce.

²⁰³ Nakane, *supra*, note 21, at 3. A von Mehren, *Some Reflections on Japanese Law* (1958) 71 HARV. L. REV. 1486.

²⁰⁴ M. R. Greene, RISK AVERSION, INSURANCE AND THE FUTURE (1971).

²⁰⁵ J. Strayer, *The Tokugawa Period and Japanese Feudalism*, in STUDIES IN THE INSTITUTIONAL HISTORY OF EARLY MODERN JAPAN (1968), at 3, 8.

relationship is perhaps better known to Western commentators²⁰⁶ the relationship between the individual and government is equally noteworthy. Just as the Japanese individual in feudal society exchanged loyalty for protection from a lord, today he seeks similar economic and social security from the state.²⁰⁷ This national characteristic has been noted in corporate as well as private contexts. Benjamin Rowland has analyzed Japanese corporate behaviour and concludes that "the key to Japan's economic and financial system . . . has been the premise that the state will serve as the risktaker of last resort".²⁰⁸ Product safety regulation which emphasizes government intervention *ex ante*, and which thus limits individual choice in favour of insurance and risk reduction, is consistent with this description of Japanese society.

Associated with paternalistic values which discourage individualism, the structured relationships of the group system provide its members with security. That is, Japanese society is one in which it is not generally accepted for the individual to make decisions without regard for the group and, in fact, is one where people are ill at ease with such decisions because of their dependence for security on the group and its accepted modes of conduct.²⁰⁹ In the context of product safety regulation, these cultural attitudes would logically lead to an emphasis on state and mandatory private products liability insurance programs, and on state programs which establish specified levels of product safety risk and which reduce the levels of risk to a minimum level, taking into account social attitudes of dependency. These general cultural attitudes can be analyzed in two contexts. The first is the Japanese preference for domestic products, which has been recognized as an important "third level" non-tariff

²⁰⁶ See Narita, *supra*, note 18; Yamanouchi, *Administrative Guidance and the Rule of Law* (1974) 10 LAW IN JAPAN 22; Johnson, *The Japanese Legal Milieu and its Relationship to Business* (1976) 13 AM. BUS. L.J. 340, at 346.

²⁰⁷ In a statement released on 21 December 1982 by Keidanren (Japan Federation of Economic Organizations) on trade-related regulatory administration, it was recommended that this type of thinking be abandoned. The Japanese tendency to look to the government to intervene to protect its citizens should cease, it was suggested, and instead Japanese citizens should stand on their own feet. *KKC Brief*, No. 3, Jan. 1983.

²⁰⁸ B. Rowland, *Japanese Corporate Behaviour: An Outside View*, in U.S.-JAPANESE ECONOMIC RELATIONS: COOPERATION, COMPETITION, AND CONFRONTATION (D. Tasca ed. 1980), at 83, 84.

²⁰⁹ D. Haring, *Japanese National Character: Cultural Anthropology, Psychoanalysis, and History* (1953) 42 YALE REV. 375.

barrier.²¹⁰ The second is Japanese enterprises' approach to product quality and safety decisions.

The strong Japanese identification with the group combined with a sense of national insularity and vulnerability results in a 'them-us' syndrome, which at a national level translates into a desire to keep foreigners at a distance. This, of course, has been recognized as an important subordinate factor in the non-tariff trade barrier sector.²¹¹ For centuries the Tokugawa regime neither permitted Japanese citizens to travel abroad nor allowed foreigners to enter Japan. Japan had to be forced into opening its doors to the West in the late nineteenth century and treaties clearly adverse to Japanese interests were imposed upon it.²¹² The country was deprived initially of its customs autonomy and found itself unable to protect its domestic industry from a flood of foreign imports. Japan was unable to revise these treaties until it adopted a legal system acceptable to the West.²¹³

For geographical reasons Japan has relied almost exclusively on imports for a considerable percentage of its resource materials, food and oil,²¹⁴ which places the nation in a position of substantial economic dependence on multi-national corporate enterprise and foreign governments. The willingness with which governments use trade sanctions for political or economic reasons has at times left Japan in an extremely vulnerable position, and may have fostered a justifiable fear that inadequate supply and service is a risk of dealing with a foreign supplier.²¹⁵ Reliance on foreign resources gave rise to the generally held view that the Japanese were working at a *dangerous* level of dependence on imports.²¹⁶ As a result many Japanese view imports as inherently undesirable, and until recently have been re-

²¹⁰ TASK FORCE REPORT (1980), *supra*, note 7. See Abbott and Totman, *supra*, note 12, at 133-34.

²¹¹ Abbott and Totman, *id.*

²¹² *Id.*, at 140.

²¹³ Henderson, *supra*, note 46, at 577.

²¹⁴ In any given year Japan imports 99.8% of its oil, 88.7% of its natural gas and 79.2% of its coal. Economic and Foreign Affairs Research Association, UNITED NATIONS YEARBOOK OF WORLD ENERGY STATISTICS; STATISTICAL SURVEY OF JAPAN'S ECONOMY (1981), at 29. See also *The Man from MITI Speaks His Mind*, FORTUNE, 4 Oct. 1982, Vol. 106, No. 7, at 92.

²¹⁵ See N. Akao, JAPAN'S ECONOMIC SECURITY: RESOURCES AS A FACTOR IN FOREIGN POLICY (1983); R. Morse, THE POLITICS OF JAPAN'S ENERGY STRATEGY: RESOURCES-DIPLOMACY-SECURITY (1981).

²¹⁶ J. Hirschmeier, T. Yui, THE DEVELOPMENT OF JAPANESE BUSINESS 1600-1980 (1981), at 242-43.

luctant to lift protectionist trade barriers and thereby encourage increased foreign dependence.²¹⁷ An emphasis on the quality standards of foreign products may derive from a concern about leaving product quality in the hands of foreign companies, which may be accustomed to trading off (to a greater extent than would the Japanese) product safety or quality for lower production costs.²¹⁸ These risks may not be subject to *ex post* litigation controls and, most important, will not be subject to the internalized constraints on behaviour which the Japanese enterprise may reflect. This is not to say that all of Japan's actions in this regard have been justifiable, but taking Japanese attitudes into account makes Japan's international trade position more comprehensible to an outsider.

Cultural attitudes towards risk and conflict reflected in attitudes towards foreign goods may be reflected as well in the behaviour of Japanese manufacturers towards product standards and quality control, which are significantly different than those adhered to by many manufacturers in the West.²¹⁹ Although the term 'zero defects' originated in America, it has been the Japanese who have chosen to take it seriously. Wherever feasible, the Japanese endeavour to inspect each product for flaws or defects before it enters the market. They may be willing to concede that 'perfection' is an unrealistic goal, but that does not prevent them from striving to attain it. The detailed design specifications and rigorous certification procedures complained of by Western business enterprises may reflect a concern with detail which has been described as a generalized Japanese cultural characteristic. Production of complex consumer goods "necessitates adherence to performance standards in each part, which reflects each employee's willingness to pay close attention to detail and his desire to assure the quality of the product".²²⁰ As Cleaver

²¹⁷ This attitude towards foreign products is also apparent in the case of foreign capital. See R. S. Ozaki, *THE CONTROL OF IMPORTS AND FOREIGN CAPITAL IN JAPAN* (1972), at 124-26.

²¹⁸ An example of one response by the Japanese is a private import agreement pursuant to which the Japanese buyer establishes both the raw materials and production formula for the product which it intends to import. See *THE JAPANESE ECONOMIC JOURNAL*, 6 Sept. 1983, at 14. It has been reported that the Japanese hold the belief "that the American cars, in general, are of inferior quality". R. Roy and A. Rassuli, *International Trade Barriers and the United States Automobile Industry* (1983) 14 *TOL. L. REV.* 263, at 277.

²¹⁹ R. Schonberger, *JAPANESE MANUFACTURING TECHNIQUES* (1982), at 61; S. Kikuchi, *Japanese Quality Control Method Increasingly Finds its Way Abroad*, *THE JAPAN ECONOMIC JOURNAL*, 1 June 1982, at 11.

²²⁰ Yamamura, *supra*, note 22, at 137.

has put it, employee attitudes may reflect "pride in the manufacture of a good product".²²¹

In contrast, few Western manufacturers even attempt one hundred per cent inspection, but instead choose to apply random sampling methods of products quality control.²²² Rather than incurring the additional immediate production costs associated with stringent quality control, many Western manufacturers are willing to accept the fact that there will always be a certain percentage of defective products entering the market.²²³

The Japanese believe that quality is good and better quality is therefore better than lesser quality. They will go beyond any sort of rational trade-off to achieve this. For example, if you analyze the percentage defects in a process and the costs of making that percentage less, you will very often find that it makes sense to go from five percent defects to one percent defects. If you then ask whether it makes sense to go from one percent defects to 1/10 of a percent defects, the economists will generally say, "No, that does not make sense." And the American firm will not, therefore, take that step.

The Japanese firm will. If you say to them, "That's silly. It makes no economic sense," they will answer, "We don't care. Better quality is better than poorer quality." Once they get to 1/10 of one percent, they will go to 1/100 or 1/1000 of one percent. Then they will look at you with a disarming smile and say, "That's what makes us such fierce competitors. You may be satisfied with one percent defects, but we are not."

In situations where one hundred per cent inspection is impractical the Japanese have rejected the random sample method and have selected alternative methods such as checking the first and last part manufactured in every lot. The rationale is that if the first part was manufactured correctly the machine was working properly at the outset, and if the last part is also flawless, then the process remained stable throughout and all the parts in the lot are satisfactory.

The results of such quality control speak for themselves. The Japanese ratio of defective auto part products is usually 0.1-0.2%

²²¹ C. G. Cleaver, *JAPANESE AND AMERICANS: CULTURAL PARALLELS AND PARADOXES* (1976), at 104.

²²² Schonberger, *supra*, note 219, at 70.

²²³ Robert H. Hayes of the Harvard Business School quoted by Gibney, *supra*, note 202, at 158. The quotation is taken from an interview in the film *People and Productivity: Learning from Japan*, which was planned and edited by Maurice B. Mitchell and Frank Gibney at the Pacific Basin Institute and produced by C. Olin for the Encyclopaedia Britannica Educational Corporation.

compared to a North American ratio of 1.0-2.0%.²²⁴ Standards reflect similar attitudes. In the case of imported agricultural products, the Japanese had established a "zero tolerance" level for prohibited insects. Canadian export certificates, however, often identified the product as "substantially free" from the insect and thus Canadian products would be denied entry.²²⁵ The point is that product safety regulation in Canada either explicitly or implicitly accepts that risks to health, safety and lives can be evaluated in monetary terms and that "acceptable levels" of risk must be established. On occasion the Japanese must also do this, but they do not admit it so easily.

Allocation of risk of personal injury in exchange for compensating payments in the form of price reductions may assume positive attitudes towards consumer sovereignty, an assumption which may be less justifiable in the case of Japan than in some Western societies. The Japanese may very well be willing to forego the welfare gains associated with contract risk allocation in exchange for minimum safety standards for a wide variety of consumer goods. Homogeneity of attitudes towards risk may reinforce the view that a 'standard form' multilateral contract with relatively rigorous safety standards is desirable. Social welfare may be maximized by conscious directed decisions regarding product safety rather than by atomistic market decisions.²²⁶ In dealing with risks to health and safety, decisions to use market allocative devices, coupled with compensation through litigation, assume a positive answer to the question "Do individuals want to make the necessary and appropriate value judgments?" In a society which is highly structured it may be that consumers would prefer that experts replace them in that decision process. The benefits of certainty, the avoidance of risk, and distributional considerations may be associated with the view that "freedom from risk of

²²⁴ A. Kubota, *Selling Canadian Auto Parts to Japan (1) — Indications are Strong Japanese Will Rather Invest in Canada*, THE JAPAN ECONOMIC JOURNAL, 29 Sept. 1981, at 24.

²²⁵ MARKETS FOR CANADIAN EXPORTERS, *supra*, note 37, at 26.

²²⁶ Ozaki, *supra*, note 217, at 56. Studies on Japanese managers, employees and investors are now frequently reported and published in the Western academic press. Consumer behaviour has not been as widely analyzed, but it has been noted that the behaviour, rather than being characterized by risk-taking, is hierarchical, and that tastes are characterized by "generally accepted levels". See Gibney, *supra*, note 20, at 186-89.

Thus the phenomenon of expressed consumer demand for a variety of goods, perhaps artificially distinguished from one another, and similar emulations of Western consumer behaviour and living styles were not generally perceived as characteristics of the Japanese consumer until the early 1970s. See D. Henderson, *FOREIGN ENTERPRISE IN JAPAN* (1983), at 77; G. Allen, *JAPAN'S ECONOMIC POLICY* (1980), at 162-63.

injury" is a merit good which ought to be allocated paternalistically rather than through the market.²²⁷

Freedom is an ambiguous concept, carrying with it a price of uncertainty.²²⁸ Japanese society and culture emphasize the relative status of specific groups and individuals, reducing the degree of uncertainty associated with one's role. The 'paternal' authority reflected in strict regulation of quality and product safety control, which a substantial portion of the population assumes to be self-evident, encourages a high degree of certainty in a long-run sense.²²⁹ This socialization of risk may represent a decision on the part of the Japanese government that the benefits associated with individual autonomy can be sacrificed for different social objectives. In contrast, in some Western countries in which ideological values emphasize individual autonomy, social policy demands that manufacturers in most situations be free to produce goods associated with a higher degree of risk of personal injury, provided the consumer is furnished with the necessary information and warnings to permit an informed decision.²³⁰ The view that personal injury risks are voluntarily assumed (at a price) is inconsistent with the Japanese philosophy that disputes are unnatural,²³¹ that contracts and risk allocation are secondary to the natural spirit of friendship and good will,²³² and that the relationship of merchant and client is one of status, with the client as the superior.²³³

Equally important to this analysis is an appreciation of product safety regulation as a multi-institutional regulatory process. Product design, safety risks and accident compensation objectives are influenced both by *a priori* regulatory standards, and prospectively and retrospectively by civil products liability claims. As described earlier, the Japanese, for whatever reasons, have not adopted formal litigation of disputes with deterrent or cost-internalization objectives. A call for relaxation of standards regulation in accordance with Western social ideals ignores the fact that the complementary alternative

²²⁷ See G. Mooney, *Human Life and Suffering* in *THE VALUATION OF SOCIAL COST* (D. Pearce ed. 1978), 120, at 125.

²²⁸ E. Fromm, *ESCAPE FROM FREEDOM* (1941), Ch. 2.

²²⁹ A. Lauterbach, *Social Factors in Business Uncertainty*, in *EXPECTATIONS, UNCERTAINTY AND BUSINESS BEHAVIOR* (M. J. Bowman ed. 1958).

²³⁰ R. Hirshhorn, *Regulating Quality in Product Markets* in *THE REGULATION OF QUALITY* (D. Dewees ed. 1983), 55, at 72-76.

²³¹ See text accompanying notes 47-52.

²³² Gibney, *supra*, note 20, at 118-23.

²³³ Kim and Lawson, *supra*, note 48, at 510.

product safety regime (i.e., products liability law) has evolved quite differently in Japan, where it may represent a more advanced stage of evolution. Reform of the Japanese standards system would thus seem to demand from the Japanese a reconsideration and reformulation of the civil liability of manufacturers for product-related injuries. This is not to say that the dual task is necessarily either impossible or undesirable. It simply points out that product safety regulation involves two institutions, and that reform of the regulatory process in Japan is likely to be difficult, time-consuming and particularly disruptive to existing legal and social norms in Japan for a number of reasons.

First, regulatory control of product quality and safety is reinforced by the magnitude and nature of bureaucratic power in Japan. Government standards regulation reflects an informal consensus of all interested participants rather than a pure command model of state interference with business enterprise. The co-operative structure of government-business relations as well as the interchange of personnel between the two communities suggest that regulatory supervision in Japan does not mimic that of the West. Activities including standard setting may be generated by co-operative decisions of private industry and the state.²³⁴ Thus, obligatory internationalization of regulatory measures established through Western regulatory processes, if they differ from the co-operative processes of the Japanese, may work to the disadvantage of the Japanese.²³⁵

Second, the emphasis of the Japanese on regulatory control of product safety may reflect an acknowledgement that corporate decision-making which takes place through collective action by groups of managers diffuses accountability and responsibility, and justifies risk-taking behaviour by business enterprise which would not be undertaken by individuals.²³⁶

Third, the Japanese may believe that investments in quality and safety regulation represent a form of accident insurance which will

²³⁴ K. Mochizuki, *Government-Business Relations in Japan and the United States: A Study in Contrasts*, in U.S.-JAPANESE ECONOMIC RELATIONS, CO-OPERATION, COMPETITION AND CONFRONTATION, *supra*, note 208, at 86-88.

²³⁵ Japan Culture Institute, *The Bureaucracy: Japan's Pool of Leadership*, in POLITICS AND ECONOMICS IN CONTEMPORARY JAPAN, *supra*, note 22, at 81, 85; N. Nobuyoshi, "Japan, Inc.": Reality or Facade? *Id.*, at 117.

²³⁶ R. Clark, *THE JAPANESE COMPANY* (1979), at 126-27. Dore, *supra*, note 202, at 227-28. This diffusion of responsibility, and thus the propensity for greater corporate risk-taking than would be engaged in by individuals, suggests that ex-post compensation will prove to be an unsatisfactory product safety regulatory program. See Hirschmeier and Yui, *supra*, note 216, at 254.

not be carried out through atomistic market transactions. In the case of personal injury losses, individuals consistently under-insure either because they underestimate the probability of the accident occurring,²³⁷ or because they fail to take into account external costs.

Fourth, Japanese seem to understand, in a way that we are just now recognizing, that "as far as the sociology of law is concerned" corporate power is such that products liability law is not an effective means of control.²³⁸ The attitudes and behaviour of Japanese consumer groups,²³⁹ the administrative costs of organizing litigation, and the corporate control of technical expertise all combine to limit the effectiveness of litigation as a corporate control technique.

Fifth, in adopting a balance between civil products liability rules and direct product safety regulation, the Japanese have acknowledged that the products liability system of safety regulation, while it may bring reduced administrative costs, is ineffective where the manufacturer does "not face the threat of suit for harm done".²⁴⁰ This risk of externalization of costs is magnified in the case of foreign manufacturers, where there are substantial structural barriers to litigation, and where social attitudes provide exogenous disincentives to litigation.

Finally, the recent experience of the Japanese faced with catastrophic products liability injuries has inevitably contributed not only to the promulgation of more rigorous product standards, but also to the reluctance of the Japanese government to remove any of the existing standards. As described previously, the Japanese have experienced serious and widespread injuries resulting from the activities of foreign manufacturers. The four pollution cases,²⁴¹ the tha-

²³⁷ H. Kunreuther, *DISASTER INSURANCE PROTECTION: PUBLIC POLICY LESSONS* (1978), at 113-15.

²³⁸ Otake, *supra*, note 84, at 76, 86.

²³⁹ While organized consumer movements do exist, their roles have been generally limited to education and information initiatives. Reich, *supra*, note 59.

²⁴⁰ See S. Shavell, *Liability for Harm Versus Regulation of Safety* (1984) 13 J. OF LEGAL STUD. 357, at 363.

²⁴¹ (1) The Itai-itai disease in Toyama (*Komatsu et al. v. Mitsui Kinzoku*, Toyama District Court, 22 KAKYU MINSHU (Nos. 5-6) Besatsu 1, 30 June 1971; *Aoyama et al. v. Mitsui Kinzoku*, Kanazawa Branch of Nagoya High Court, 674 HANREI JIHO 25, 9 Aug. 1972). (2) Minamata disease in Niigata (*Ono et al. v. Showa Denko*, Niigata District Court, 22 KAKYU MINSHU (Nos. 9-10) 29 Sept. 1971). (3) Asthma at Yokkaichi (*Shiono et al. v. Showa Yokkaichi Sekiyu et al.*, Yokkaichi Branch of Tsu District Court, 672 HANREI JIHO 30, 24 July 1972), and (4) Minamata disease in Kumamoto (*Watanabe et al. v. Chisso*, Kumamoto District Court, 696 HANREI JIHO 15, 20 March 1973).

lidomide case,²⁴² the Boeing case²⁴³ and more recently the Chloroquine cases,²⁴⁴ among others, have made injuries from defective products a sensitive issue for the Japanese government. While some judicial developments to aid plaintiffs in products liability suits resulted from these cases,²⁴⁵ regulatory action has been taken to ensure not simply that injured parties are more likely to be compensated but, more important, that the injuries do not occur in the first place.²⁴⁶

The present reluctance of the Japanese government to bring its standards into complete accord with international standards is clearly and succinctly summarized in a recent MITI publication which states:²⁴⁷

The United States has been requesting that the Japanese Government allow U.S. manufacturers to self-certify compliance with Japanese standards on safety, etc. This suggests that we should adopt the approach of dealing with accidents, etc., *after the fact*, i.e., through recall of cars from the market, civil judicial procedures, etc. However, Japan's system on automobile accidents, pollutions, etc. has long been predicated on the idea that they should be prevented *before the fact*. . . .

It is difficult to prove any direct connection between product safety regulation and Japanese legal ideology as we have characterized it. Nonetheless we do think that several points can be made.

²⁴² Between 1954 and 1961 the Ministry of Health and Welfare issued permits to manufacture a drug called "Isomin" which contained Thalidomide. After 1960 a significant number of infants were born with birth defects; 63 families sued the government and Dai Nippon Pharmaceutical Co. claiming that the deformities had been caused by use of this drug. See H. Teff and C. Munro, *THALIDOMIDE: THE LEGAL AFTERMATH* (1976), at 4, 7; K. Tadashi, *THALIDOMIDE IN JAPAN* (1965), at 501-02.

²⁴³ *Yabutani v. The Boeing Company*, Tokyo District Court, 754 HANREI JIHO 58, (1975) 19 JAP. ANN. OF INT'L LAW 225.

²⁴⁴ This antimalarial drug caused widespread side-effects such as retinitis. *National Government Reaches First Settlement on Chloroquine Case*, JAPAN TRADE LAW BULLETIN, July 1982, at 13.

²⁴⁵ *Id.*, at 15.

²⁴⁶ The Japanese goal of reducing the risk of injuries due to defective products through standardization and inspection of goods prior to their entry on the market has the effect of narrowing the options open to manufacturers and consumers in dealing with products liability risks. Accident reduction costs and costs of compliance, as well as insurance costs will, at least to some extent, be passed on to all consumers in the price of the product. The individual is not free to trade off price and risk of injury, but rather is forced to pay for a minimum amount of safety and insurance.

²⁴⁷ MITI, REVIEW OF STANDARDS AND CERTIFICATION SYSTEMS (25 March 1983), at 7.

First, the traditional cultural attributes of the Japanese, especially their concern with hierarchy and ordering and the "communal and anti-individualistic attitudes" of some litigants²⁴⁸ can be contrasted with Western individualism and market allocative institutions.²⁴⁹ Certainly, there is a correlation between culture and attitudes towards risk.²⁵⁰

Second, litigation is not a central political or social institution in Japan. On balance, it is impossible to say whether this is due to structural obstacles to litigation²⁵¹ or to culture, history and religion; indeed, it does not matter. Our point is simply that the social phenomenon called "products liability" will not be resolved in Japan through "*ex post*" tort compensation and "market deterrence"²⁵² to the same degree that it is in Western societies. For some mixture of reasons the Japanese response has favoured regulatory control of this problem, and not litigation.²⁵³

In a recent paper Ronald Dore discussed the "obligational contracting" basis of Japanese market relationships.²⁵⁴ Dore character-

²⁴⁸ Upham, *supra*, note 48, at 613, 616.

²⁴⁹ See R. Abel, *A Critique of American Tort Law* (1981) 8 BRIT. J. OF LAW & SOCIETY 199.

For example, contract law reflects a movement away from tradition and hierarchical status relationships to relationships based on individual expressions of autonomy, free will and valuation of commodities. The ideology of self-determination, the exercise of free will, a passive state and the immateriality of community ideals of justice are simply too significant to ignore in the ideology of contract law in England and Canada. Traditional contract theory chose to isolate the transaction and its participants from *all* pre-existing social, cultural and even legal relations — the paradigmatic discrete transaction so vividly pictured by Victor Goldberg and Ian Macneil. See V. Goldberg, *Toward an Expanded Economic Theory of Contract* (1976) 10 J. OF ECON. ISSUES 45; I. Macneil, *THE NEW SOCIAL CONTRACT* (1980), at 1-18; P. Gabel and J. Feinman, *Contract Law as Ideology in THE POLITICS OF LAW* (D. Kairys ed. 1982), at 176-77.

²⁵⁰ M. Douglas and A. Wildavsky, *RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNICAL AND ENVIRONMENTAL DANGERS* (1982), at 91-101.

²⁵¹ See Haley, *supra*, notes 46 and 55.

²⁵² See Shavell, *supra*, note 240, and Calabresi, *supra*, note 89.

²⁵³ T. Kawashima, *Dispute Resolution in Contemporary Japan*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* (A. von Mehren ed. 1963). H. Tanaka, *THE JAPANESE LEGAL SYSTEM* (1976), at 254.

²⁵⁴ R. Dore, *Goodwill and the Spirit of Market Capitalism*, based on the Hobhouse Memorial Lecture, London School of Economics, May 1983 (unpublished transcript). See also J. Landa (Institute for Policy Analysis), *THE ECONOMICS OF THE ETHNICALLY-HOMOGENEOUS MIDDLEMAN GROUP: A LOW-COST CLUB-LIKE ECONOMIC ORGANIZATION FOR ECONOMIZING ON CONTRACT-ENFORCEMENT AND INFORMATION COSTS*, Working Paper No. 7924 (October 1979).

Landa argues that, in the absence of a legal framework, the behaviour of the actors is constrained by a social structure which decreases information costs associated with assessing the trustworthiness of the other participants.

izes the Japanese contract model as embodying long-term relationships, a dynamic definition of these relationships, and mutual trust, in contrast to the discrete contract model which underlies so much of traditional Canadian contract doctrine. He explains the distinction between Western contracting models and the Japanese contracting model by reference to cultural sources, including the long-term future orientation of the Japanese, risk aversion, and a preference for equality and risk-sharing. The Japanese sense of duty towards their (relational) contracting partner, and the associated reduction in conflict is explained as an aspect of their culture and history. This explanation of contract law is equally apt for Japanese products liability law in particular, and for the regulation of product safety in general. If these attitudes describe the Japanese character, and have influenced the legal response to product safety regulation, it is our view that Western trade policy which demands radical regulatory reform is ill-advised because it is insensitive to the reality of Japan.

VI. A POSSIBLE COURSE OF ACTION

If it is true that we ought not to demand the crude Westernization of Japanese product safety regulation, what alternative courses of action are open to us? The problems associated with non-tariff standards barriers are substantially different from those with which trade negotiators have had experience in the past. The following remarks offer some tentative proposals for the development of trade policy in the future.

One of the major difficulties with reform of standards barriers arises from their specificity and diversity. Complaints have ranged from the cost of metric and language labelling requirements to the unacceptability of foreign inspection data and packaging design standards, to the stringency of inspection requirements. Foreign suggestions for improvement have demanded that the Japanese internationalize their standards, abolish re-inspection of goods, exercise administrative discretion to except minor transgressions, and accept imperial and metric labelling. The initial stage of any Canadian initiative in the area of non-tariff standards barriers must be the acquisition of industry-specific or product-specific information relating to product standard trade barriers faced by Canadian industry.²⁵⁵ Each particular commodity, and perhaps each product, faces

²⁵⁵ In *A REVIEW OF CANADIAN TRADE POLICY*, published in 1983 by the Dept. of External Affairs, only two paragraphs in the 237-page document were devoted to non-tariff standards barriers.

a unique standard barrier.²⁵⁶ The negotiation of such trade impediments requires identification of affected Japanese interests, consultation with the relevant governmental authority, articulation of the non-trade related social, economic or product safety objective sought to be achieved by the Japanese law, analysis of the validity of the objective, identification of alternative means to achieve the objective, and then the articulation of appropriate proposals for reform taking into account the legal structure of Japanese society.

Unlike tariffs, the non-tariff standards barrier involves issues, public and private enterprises, and constituencies which are not usually present when the opponents or proponents of tariff and quota reduction proposals negotiate trade policy. At the very least, standards barrier reforms involve piecemeal liberalization measures and do not lend themselves to global solutions, nor even perhaps to quantification. A proposal which reflects these characteristics is the facilitation of private consultation between Canadian industry and their private Japanese counterparts in order to encourage the specific reforms necessary in the case of particular manufactured products exported to Japan.²⁵⁷ Assisting groups such as the Canada-Japan Businessmen's Conference²⁵⁸ with its emphasis on private bilateral consultation and informal assistance in market penetration may be the most efficacious method to reduce non-tariff standard barriers.

Thus one can argue that development of Canadian institutions which deal specifically with product standards and certification barriers must have two characteristics. First, they must involve bilateral

²⁵⁶ See *Foreign Firms are Irked Over Needless Procedures*, *supra*, note 18, at 1, 3.

²⁵⁷ It should be recognized that many Japanese trade barriers have cultural or social aspects and are not directly subject to governmental control. The complex distribution system, parochial business practices, monopsonies and cultural and language barriers are examples: *supra*, note 255, at 155-56.

²⁵⁸ CANADA-JAPAN BUSINESSMEN'S CONFERENCE REPORT (1983). The Canada-Japan Business Cooperation Committee has, since 1976, involved representatives from the private sectors in both countries in bilateral trade consultation, communication and negotiations. It does not appear, however, that standards barriers have been a major concern of the committee. *Id.* See also Minister of Supply and Services Canada, WINNING WORLD MARKETS (1978); Ministry of Industry, Trade and Commerce, MARKETS FOR CANADIAN EXPORTERS: JAPAN (1979); F. Langdon, THE POLITICS OF CANADIAN-JAPANESE ECONOMIC RELATIONS 1952-1983 (1983), at 145.

Bilateral negotiations of trade barriers relating to product standards may further a Canadian interest in acting independently of the United States. Langdon, *id.*, at 77. As well, governmental efforts to increase trade in manufactured goods have been historically unsuccessful. The primary actors must be private enterprises: *id.*, at 90.

negotiations with Japan²⁵⁹ which while acknowledging the multi-lateral aspect of standards barriers, will focus on the particular non-tariff product standards barriers which characterize Canada-Japan trade. At the same time the peculiar balance of governmental and private institutions which define the Japanese industrial complex, and the product-specific nature of most standards barriers demand that the negotiations involve both commercial and governmental representatives in co-operative ventures. This "product by product" approach will, it seems, serve broader Canada-Japan trade interests as well.²⁶⁰

Moreover, business enterprises, whether engaged in these bilateral negotiations or acting independently, must be willing to engage in expensive and time-consuming marketing investments to overcome linguistic barriers, cultural biases, the complex Japanese distribution system and other non-legal barriers. The unilateral authority of the Japanese government to modify these practices is limited, further supporting the necessity of private commercial activity.²⁶¹ To the extent that the Canadian government is involved, it must be willing to invest in a similar manner in order to deal effectively with the complex political and economic environment of Japan, especially in view of the mixture of second and third order social and cultural considerations reflected in non-tariff standards barriers.²⁶²

Japanese trade barriers may be reduced, as well, through unilateral Canadian action. Recent developments in standard-setting which effectively delegate regulatory power to private standard-setting bodies consisting of manufacturing interests permit international trade effects to be considered in the development of Canadian standards.²⁶³ It is fair to say that Canadian manufacturers will take into account foreign marketing opportunities in a consensus model of standard-setting. The effect may be that Canadian standards complement Japanese standards.

A further recommendation is directed at the implementation stage of product standards, which includes the administrative review process and certification procedures. Canadian industry and government

²⁵⁹ See A REVIEW OF CANADIAN TRADE POLICY, *supra*, note 257, at 203.

²⁶⁰ *Id.*, at 220-22.

²⁶¹ *Japan Makes Serious Bid to Open Markets*, FINANCIAL POST, Special Report on Japan, 28 May 1983, at s. 3, col. 4.

²⁶² Abbott and Totman, *supra*, note 12, at 147-50.

²⁶³ *C.S.A. President Advocates Consensus as Alternative to Government Rules*, THE GLOBE AND MAIL, 20 July 1982, at B1, col. 1.

must make substantial investments in order to participate effectively in Japanese standard-setting, testing and certification bodies, as well as in Japanese trade associations. The recent experiences of American industry suggest that Japan is beginning to permit foreign representation in limited sectors of its standard-setting institutions.²⁶⁴

Private unilateral action may also take the form of the establishment of a Canada-Japan Trade Office (CJTO) in Canada. The Trade Promotion division of the Bureau of Pacific Affairs in the Department of External Affairs is currently responsible for the task of resolving standards barrier disputes. The Pacific Relations division in the Department is not involved with these issues, and the Joint-Economic Committee, consisting of government representatives from both countries focuses on issues of far broader scope than non-tariff standards barriers. The Trade Promotion Group currently deals with each non-tariff standards barrier case which is brought to its attention on a reactive basis, and is unable to collect comprehensive data on the impact of non-tariff barriers on Canada-Japan trade. The Canada-Japan Trade Office would, of course, perform the important function of acting as a conduit and focus for business enterprise in order to make known to government the existence of non-tariff trade barriers. The export orientation of the CJTO would co-ordinate trade policy with Japan and, more important, would act as a liaison between Canadian regulators, business enterprise and the Japanese government. The CJTO would communicate directly with the Office of Fair Trading in Japan and with the Office of Trade Ombudsman established in Japan as a result of United States negotiations.²⁶⁵ The experience of the Office of Trade Ombudsman in Japan confirms the idiosyncratic, highly variable nature

²⁶⁴ See *supra*, note 181. In addition, the Treasury Board Directive mandating socio-economic impact analysis for major federal regulations obliges federal regulators to take into account international trade aspects of proposed regulatory measures. See Treasury Board Canada, Administrative Policy Manual, Chapter 490, *Socioeconomic Impact Analysis*, December 1979, 3.3.2.(g); and Appendix E, Evaluation Methodologies, at 2.4. See also REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP, *supra*, note 14, at 59-60, 69.

Canadian manufacturers can, through private negotiations, reduce the impact of standards established by private industry in Japan. See *Personal Computers Multi-Function Models Introduced in Succession*, THE JAPAN ECONOMIC JOURNAL, 4 Oct. 1983, at 29.

²⁶⁵ The Japan-United States Economic Relations Group, SUPPLEMENTAL REPORT OF THE JAPAN-UNITED STATES ECONOMIC RELATIONS GROUP, prepared for the President of the United States and the Prime Minister of Japan, October 1981, at 17, 18. *Trade Barriers Come in Creative Packages*, INDUSTRY WEEK, 5 April 1982, No. 1, at 26.

of industry complaints in this context. The CJTO would, it seems, perform a function similar to that of the Trade Facilitation and Trade Study Groups in the United States in providing detailed sectoral analysis of Japanese business practices.²⁶⁶ Experience in those contexts suggests that private and informal consultative institutions are likely to lead to more profitable negotiations. As well, the informal consultative process in which this office would engage would seem to be consistent with Japanese practices, while ensuring the involvement of the Canadian government.²⁶⁷ At the very least, this institution would collect data on standards barriers and detail the peculiar problems which Canadian exporters face, whether they relate to inspection procedures, enforcement decisions, standards or foreign certification requirements.

The impetus for much of the reform that has taken place so far has been the influence of American and E.E.C. interests which has resulted in indirect benefits to Canadian trade interests.²⁶⁸ The lesson is that these bilateral and unilateral measures described above must be augmented by co-operation with American and European interests in multilateral negotiations concerning specific standards and standards barriers.²⁶⁹ In specific cases co-operation with American interests at international standard-setting organizations will be an effective strategy for penetrating the Japanese market.²⁷⁰ At the very least we should recognize that Canada is not one of Japan's leading trade partners, and that our interests may be sacrificed if Japan responds bilaterally to the concerns of its major trading partners.²⁷¹ This suggests that Canada should continue its international activities in international standards organizations, and should con-

²⁶⁶ See TASK FORCE REPORT (1980), at 14-15. TASK FORCE REPORT (1979), at 5. See Abbott and Totman, *supra*, note 12, at 112-14.

²⁶⁷ *United States-Japan Trade White Paper*, *supra*, note 7.

²⁶⁸ *Japan Eases Test Rules on Products*, THE GLOBE AND MAIL, 27 Feb. 1984, at B12, col. 1.

²⁶⁹ *EEC Renews Demands on Japan to take Import Promotion Steps*, THE JAPAN ECONOMIC JOURNAL, 11 Oct. 1983, at 3; *IIIC Co-ordination Urged*, THE GLOBE AND MAIL, 7 Oct. 1983, at B15, col. 3.

²⁷⁰ *Hard Work Pays Off For Canadian Exporters of Refrigerators*, CONSENSUS, October 1983, Vol. 10, No. 4, at 10; *Canadian Chain Saw Exporters Could Benefit from New Standard*, *id.*, at 11.

²⁷¹ M. Donnelly, *Growing Disharmony in Canadian-Japanese Trade* (1981) 36 INT'L JOURNAL 879, at 883. F. Langdon, *Problem of Canada-Japan Economic Diplomacy in the 1960's and 1970's, the Third Option*, in CANADIAN PERSPECTIVES ON ECONOMIC RELATIONS WITH JAPAN (K. Hay ed. 1980), at 73.

tinue to be sensitive to United States-Japan non-tariff barrier negotiations.

VII. CONCLUSION

Our description of Japanese products liability law and regulatory standards, the elucidation of the underlying rationales of Japanese product safety regulation, and our articulation of tentative proposals for Canadian trade negotiators, does not have the purpose of seeking to vindicate Japanese international trade measures. It does however seek to demonstrate that the view that Japanese international trade policy is unnecessarily protectionist is perhaps a narrow-minded one. While the Westernization of Japanese culture in the twentieth century is undeniable, it is ethnocentrism taken to its worst extreme to ignore Japanese history and values and assume that regulatory measures which North American countries may consider desirable for themselves are similarly desirable for Japan.

Several decades ago a book was written called *The Taming of the Nations*,²⁷² the thesis of which is compellingly appropriate to trade relations with Japan today. According to its author, to be effective a nation's law must correspond to its ideological inner order, a phrase which refers to the normative values, beliefs and habits of a people.²⁷³ Further, an effective *international* policy for relations with that nation must recognize and take into account its ideological inner order.²⁷⁴ This paper has explored that part of the Japanese ideological inner order which may be relevant to product safety regulation. Our conclusion is that international trade relations in product safety matters may require a substantially different strategy than that which is appropriate for Western nations. Successful trade relations with Japan in the long term cannot be achieved without a sensitivity to Japanese culture and values.

²⁷² F. S. C. Northrop, *THE TAMING OF THE NATIONS: A STUDY OF THE CULTURAL BASES OF INTERNATIONAL POLICY* (1971).

²⁷³ *Id.*, at 5.

²⁷⁴ *Id.*, at 6.