INTERNATIONAL TRADE IN SERVICES FROM THE JAPANESE VIEWPOINT

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I. INTRODUCTION

The recent buzzword in Japan is "kokusaika" or "internationalization," such as internationalization of the yen, internationalization of the manufacturing process, or internationalization of education which means more emphasis on English and world history. Internationalization of the service market has also attracted increased attention in Japan.

One of the important goals of the GATT Uruguay Round is to establish a new framework of rules on trade in services. Both the Japanese government[1] and business associations[2] are strongly sup-

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[1] According to a statement of the Minister for Foreign Affairs, Sousuke Uno, at the Ministerial Meeting of the Trade Negotiation Committee at Montreal on December 5, 1988, the Japanese government recognized three goals of the GATT Uruguay Round: First, to establish GATT as a regime that looks toward the future, more specifically, to shape a new trading system seeking to establish rules on intellectual property, to expand trade in services and to cope with trade-related problems of investment; second, to reform and empower the GATT system so as to enable it to resist protectionism in its various contemporary guises, such as unilateralism, bilateralism, reciprocity-based attitudes and inward-looking regionalism; and third, to facilitate structural adjustment in the economies of the developed and developing countries alike through further trade liberalization.

Also, the following statement is found in the Report of the Advisory Group on Economic Structural Adjustment for International Harmony, submitted to the Prime Minister on April 7, 1986, the so-called "Maekawa Report": "While respecting positively to the interest of developing countries, the Government should actively participate in the establishment of international rules in such new fields as trade in services and intellectual property rights. The Government should also seek to improve the GATT rules and strengthen the GATT system in order to restore the credibility of the GATT." *See* Ministry of Foreign Affairs, Documents on Japan's Economic Structural Adjustment (Economic Policy Series, No.3), at 29 (1987). This report has played a significant role in making Japanese governmental policy. As to "Maekawa Report" generally, see Wolff, *Japan-U.S. Relations—Convergence and Cooperation in a Changing World Economy*, PRIVATE INVESTORS ABROAD § 5.03 (1986).

[2] The *Keizai Dantai Rengokai* ("*Keidanren*"), or Federation of Economic Organizations, which is one of the biggest economic organizations in Japan, has expressed its view that Japan should endeavor to liberalize trade in services as part of her responsibility to the world economy. *See* Inouye, *Promotion of Uruguay Round Called for—Mt. Fuji Roundtable on Trade in Services—*, 110 KEIDANREN REV. ON JAPANESE ECONOMY 9 (1988).

porting this task. As for the Japanese services market, the Japanese government is implementing numerous measures in order to improve market access. On the other hand, the Japanese government expressed its great concern about several provisions of the United States Omnibus Trade and Competitiveness Act of 1988, including those concerning trade in services.

The objective of this paper is to discuss international trade in services from the Japanese viewpoint and to overview the Japanese market of services. Part II of this paper will consider the possible rules on trade in services that could emerge through the negotiations of the GATT Uruguay Round in comparison to the provisions on services in the United States-Canada Free Trade Agreement of 1988. Part III will point out some problems in the provisions on services prescribed in the United States Omnibus Trade and Competitiveness Act of 1988 from the Japanese viewpoint. And Part IV will look into the present Japanese laws concerning services provided by foreigners, placing the focus on the exceptions to the principle of national treatment.

II. POSSIBLE GLOBAL RULES ON TRADE IN SERVICES

A. The United States-Canada Free Trade Agreement of 1988

It would be useful to examine the provisions on service trade in the United States-Canada Free Trade Agreement of 1988[3] in order to have an accurate image of the possible global rules on the service trade that could result from the negotiations of the GATT Uruguay Round.

This agreement has two separate sets of provisions: one for financial services (Chapter 16) and one for most other services (Chapter 14). The services covered by chapter 14 are limited to those specified in Annex 1408.[4] The agreement includes a very wide range of services, but excludes such sectors as transportation, basic telecommunications, doctors, dentists, lawyers, and government-provided services (health, education and social services).

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[3] United States-Canada Free Trade Agreement *signed* Jan. 2, 1988, *reprinted in* 27 I.L.M. 293 (1988).

[4] Covered services are specified by using the Standard Industrial Classification (SIC) numbers included in the Schedule of Annex 1408, with the addition of those separately specified by Annex 1404.

The primary principle in chapter 14 is national treatment.[5] Necessity to protect the public welfare, specifically for "prudential, fiduciary, health and safety, or consumer protection reasons",[6] requires certain exceptions. And, most importantly, the obligation of national treatment in the U.S.-Canada Free Trade Agreement is prospective.[7] It will not require any change in existing laws and practices.

Regarding financial services, covered in chapter 17, the commitments of the United States and those of Canada are not the same, because of the sensitiveness of this sector. Their obligations or concessions are not symmetrical.

As a whole, these rules seem to be very moderate, and they can be a basis of the discussion in making new global rules on trade in services.

B. GATT Uruguay Round

At the Midterm Review of the Uruguay Round of Multilateral Trade Negotiations held in Montreal from December 5 to 9, 1988, it was agreed with regard to trade in services that such basic principles and conceptions as transparency, progressive liberalization, national treatment, most-favored-nation treatment and market access would be explored. Also, the increasing participation of developing countries and the wider range of coverage of possible service sectors were recognized as important. However, the precise meaning of these principles has not yet been identified.

Transparency with regard to trade in services will be difficult to clarify, because it is hard to identify barriers against services trade. But this concept is very important in making services trade more active. With regard to progressive liberalization, there are two possibilities: first, to provide for prospectively applicable obligations to liberalize trade in services as recently provided in the U.S.-Canada Free Trade Agreement,[8] i.e., an obligation not to make new trade barriers; second, to provide for step-by-step obligations to liberalize, i.e., obligation to amend the exiting laws and practices. Indeed, the second alternative seems to be better theoretically, while the first one would be more practical in reality.[9] However, even if the first could

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[5] Article 1402(1).

[6] Article 1402(3)(a).

[7] Article 1402(5).

[8] *See supra* note 7 and accompanying text.

[9] With regard to trade in goods, see Protocol of Provisional Application to the GATT, Oct. 30, 1947, 55 U.N.T.S. 308 T.I.A.S. No. 1700, ("grandfather rights").

be adopted, some explicit goal of liberalization should be prescribed.

National treatment should be the basic governing principle[10] as in the U.S.-Canada Free Trade Agreement.[11] This principle, in the case of trade in services, would mean that services of foreign origin should be accorded the same treatment as those of local origin. Most-favored-nation treatment should also be included as a basic principle. This principle would mean that services of any foreign origin should be treated like those of most-favored-nation origin, i.e., no discrimination among foreign countries as sources.[12]

As to the market access, it is difficult to place this concept into a proper position within the framework of trade in services. Considering the relationship with progressive liberalization as stated above, improvement of access to the services market would be the objective of liberalization. Or, market access would be a indicator of how liberalization has been accomplished. While it would be necessary to consider the development of the developing countries, making too many exceptions for these countries would be harmful to global development. Finally, the coverage of service sectors should be as wide as possible. Making a list of services covered by the agreement would be useful to ensure common understanding of what is discussed, though this process would be hard.

III. PROBLEMS IN THE U.S. OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988

The Japanese government expressed its great concern about several provisions in the United States Omnibus Trade and Competitiveness Act of 1988, including, as to the trade in services, provisions on primary dealers, shipping and telecommunications.[13]

The Primary Dealers Act of 1988[14] provides that the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York are prohibited from designating, or permitting

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[10] With regard to trade in goods, see GATT, Article III.

[11] *See supra* note 6 and accompanying text.

[12] With regard to trade in goods, see GATT, Article I.

[13] In the letter from the Ambassador of Japan, Nobuo Matsunaga, to Secretary of State George Shultz on August 23, 1988, "Super 301", Section 337, Section 201, and provisions concerning "Toshiba" problems, investment, introduction of import fees to help trade adjustment, steel imports, and antidumping and countervailing duties are also mentioned.

[14] Primary Dealers Act of 1988, Pub. L. No. 100-418, Title III, Sec. 3501, 22 U.S.C. § 5341.

the continuation of any prior designation of, any person of a foreign country[15] as a primary dealer in government debt instruments "if such foreign country does not accord to United States companies the same competitive opportunities in the underwriting and distribution of government debt instruments issued by such country as such country accords to domestic companies of such country."[16] This provision is based on the finding, among others, that "in contrast to the barriers faced by the United States firms in Japan, Japanese firms generally have enjoyed access to United States financial markets on the same terms as United States firms" and that "United States firms seeking to compete in Japan face or have faced a variety of discriminatory barriers effectively precluding such firms from fairly competing for Japanese business, including—(A) limitation on membership on the Tokyo Stock Exchange; (B) high fixed commission rates (ranging as high as 80 percent) which must be paid to members of the exchange by nonmembers for executing trades; (C) unequal opportunities to participate in and act as lead manager for equity and bond underwriting; (D) restrictions on access to automated teller machines; (E) arbitrarily applied employment requirements for opening branch offices; (F) long delays in processing applications and granting approvals for licenses to operate; and (G) restrictions on foreign institutions' participation in Ministry of Finance policy advisory councils."[17] This provision will take effect 12 months after August 23, 1988.[18]

The Foreign Shipping Practices Act of 1988[19] provides that when the Federal Maritime Commission determines that laws, rules, regulations, policies, or practices of foreign governments, or practices of foreign carriers or other persons providing maritime or maritime-related services in a foreign country, result in the existence of conditions that "(1) adversely affect the operation of United States carriers in United States oceanborne trade; and (2) do not exist for foreign carriers of that country in the United States under the laws of the United States or as a result of acts of United States carriers

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[15] "A person is a 'person of a foreign country' if that person, or any other person which directly or indirectly owns or controls that person, is a resident of that country, is organized under the laws of that country, or has its principal place of business in that country." 22 U.S.C. § 5342(d)).

[16] 22 U.S.C. § 5342(b)(1).

[17] 22 U.S.C. § 5342(a)(3) and (4).

[18] 22 U.S.C. § 5342(e).

[19] Foreign Shipping Practice Act of 1988, Pub. L. No. 100-418, Title X, Sec. 10001.

or other persons providing maritime or maritime-related services in the United States",[20] the Commission shall take such action as it considers necessary and appropriate against any foreign carrier that is a contributing cause to, or whose government is a contributing cause to, such conditions, in order to offset such conditions.[21] Such action may include limitations on sailing to and from United States ports or on the amount or type of cargo carried, suspension of any or all tariffs filed with the Commission, suspension of the right of an ocean common carrier to operate under any agreement filed with the Commission, and a fee, not to exceed $1,000,000 per voyage.[22]

The Telecommunications Trade Act of 1988[23] provides that the United States Trade Representatives shall identify priority foreign countries that have telecommunications trade barriers.[24] The President shall enter into negotiation with such priority foreign countries[25] in order to obtain the following objectives: "(1) to obtain multilateral or bilateral agreements (or the modification of existing agreements) that provide mutually advantageous market opportunities for trade in telecommunications products and services between the United States and foreign countries; (2) to correct the imbalances in market opportunities accruing from reductions in barriers to the access of telecommunications products and services of foreign firms to the United States market; and (3) to facilitate the increase in United States exports of telecommunications products and services to a level of exports that reflects the competitiveness of the United States telecommunications industry";[26] and if the President is unable, before the close of the negotiating period, to enter into an agreement with any priority foreign country, the President shall take actions including those described in section 301 of the Trade Act of 1974.[27]

There appear to be several problems in the above provisions of the Omnibus Trade and Competitiveness Act of 1988. First, sectoral reciprocity is harmful. This concept is incompatible with most-favored-nation treatment, which is one of the basic principles in trade in goods and would similarly be a fundamental principle in trade in

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[20] 46 U.S.C. § 1710a(b).
[21] 46 U.S.C. § 1710a(e)(1).
[22] 46 U.S.C. § 1710a(e)(1)(A), (B), (C) and (D).
[23] Telecommunications Trade Act of 1988, Pub. L. No. 100-418, Title I, § 1371.
[24] 19 U.S.C. § 3103(a).
[25] 19 U.S.C. § 3104(a).
[26] 19 U.S.C. § 3104(c).
[27] 19 U.S.C. § 3105(a) and (b).

services, as stated above.[28] And reciprocity would lead the world services trade to a lower level of freedom of economic activity. Second, there is a perception gap concerning the changing Japanese financial market.[29] In fact, some improvements of market access were implemented in 1988 with regard to the underwriting and distribution of Japanese government debt instruments. Third, these provisions seem to be inflexible.[30] There are a lot of "shalls". For instance, in the telecommunications area the President shall conclude agreements within a specified negotiating period.[31] Negotiation, however, needs a wide range of flexibility, especially in such a sensitive field of trade. Forth, these provisions are retaliatory, and retaliation just invites counter-retaliation without any benefits. And fifth, while these provisions require national treatment or reciprocal treatment in the field of financial, shipping and telecommunications services, there should be certain exceptions based upon, for example, prudential concerns or national security reasons. Even in the United States-Canada Free Trade Agreement there are special provisions on financial services, which provide for non-symmetrical obligations or concessions,[32] and basic telecommunications is excluded from the scope of the Agreement's application.[33]

IV. JAPANESE SERVICES MARKET

A. Economic Structure of Japan

Services are becoming an increasingly important sector of the Japanese economy. The value of services provided in Japan surpassed that of goods produced in Japan by 1975, and in 1985 the former

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[28] *See supra* note 10 and accompanying text.

[29] *See infra* note 48 and accompanying text.

[30] Indeed, there are some flexible provisions such as that of the Foreign Shipping Practices Act of 1988 under which the President has discretion to disapprove the determination of the Federal Maritime Commission if the President finds that disapproval is required for reasons of the national defense or the foreign policy of the United States 46 U.S.C. § 1710a(e)(3).

[31] The "negotiating period" means, with respect to countries identified not later than the date that is 5 months after August 23, 1988 under section 3103(a), the 18-month period beginning on August 23, 1988, and with respect to countries identified thereafter under section 3103(c)(1)(B), the 1-year period beginning on the date of such identification. 19 U.S.C. § 3105(1). This period may be extended for not more than two 1-year periods. 19 U.S.C. § 3105(2)(A).

[32] Free Trade Agreement, Part V, Ch. 17 (Articles 1701-1706). *See supra* note 3.

[33] *See supra* note 4 and accompanying text.

was 56.1 percent of Japan's Gross Domestic Product. Japan is now executing an overall economic structural adjustment through the reformation of its goods-export-oriented economic structure.[34] Therefore, the Japanese service markets are expected to grow more and more in the future.

B. Japanese Laws on Services

1. Article 22(1) of the Constitution

Article 22(1) of the Constitution of Japan provides: "Every person shall have freedom . . . to choose his occupation to the extent that it does not interfere with the public welfare." "Every person" here is construed to include foreigners, and this freedom to choose an occupation is construed to include the freedom of doing business in general. Therefore, the freedom of doing business, including services business, in Japan by foreigners may be restricted for reasons of "public welfare".

There seem to be three kinds of businesses distinguished according to the degree of strength of the requirement of public welfare. When the needs of public welfare to regulate the conduct of a specific business are strong enough to be above a specific level, no one can conduct such a business at all, regardless of his nationality or residence. For example, it is illegal for all, except some authorized public organizations, to sponsor a lottery.[35] It is feared that the private lottery business may become a part of organized crime and may harm the public order. Conversely, there are many kinds of businesses where the needs of the public welfare to regulate operations are weak enough to be below another specific level. In this area anyone can conduct such a business. Between the above two levels, the public welfare requires special regulations on the activities of persons and entities with foreign elements, such as foreign nationality or residence, or, in the case of juridical persons, the foreign law according to which it is established or the foreign nationality or residence of its stockholders or executives.[36] It is this kind of regulation that will be examined here.

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[34] *See* "Maekawa Report", *supra* note 1.

[35] Article 187 of the Criminal Code of Japan.

[36] Hereinafter, the term "foreigner" refers to a person who has a foreign nationality. In the case of a dual national, that person is a foreigner if all of his nationality elements are foreign. The term "foreign company" refers to a company that was established according to foreign laws. The term "entity" includes a company or other organization.

2. Treaty of Friendship, Commerce and Navigation Between Japan and the United States of America

Some provisions of the Treaty of Friendship, Commerce and Navigation,[37] which entered into force between Japan and the United States on October 30, 1953, cover trade in services. While Article VII, paragraph 1 provides for "national treatment with respect to engaging in all types of commercial, industrial, financial and other business activities . . .", paragraph 2 of the same article provides that "[e]ach Party reserves the right to limit the extent to which aliens may within its territories establish, acquire interests in, or carry on public utilities enterprises or enterprises engaged in shipbuilding, air or water transport, banking involving depository or fiduciary functions, or the exploitation of land or other natural resources." The Protocol provides that "the term 'public utility enterprises' as used in Article VII, paragraph 2, is deemed to include enterprises engaged in furnishing communications services, water supplies, transportation by bus, truck or rail, or in manufacturing and distributing gas or electricity, to the general public."

Similarly, although Article VIII, paragraph 2 provides that "[n]ationals and companies of either Party shall not be barred from practicing the professions within the territories of the other Party merely by reason of their alienage", the Protocol provides that "[t]he provisions of Article VIII, paragraph 2, shall not extend to the professions of notary public and port pilot."[38] In addition to these exceptions, both Parties made the reservation that Article VIII, paragraph 2 shall not extend to professions which involve the performance of functions in a public capacity or in the interest of public health and safety.

The above provisions imply that there exist several sectors of services for which the countries want to apply different rules to foreigners than those applied to their nationals.

3. Service Sectors To Which National Treatment Is Not Applied[39]

There are several service sectors to which national treatment is not applied in Japan: telecommunications services, broadcasting services,

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[37] Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, 4 U.S.T. 2063, T.I.A.S. No.2863.

[38] *See infra* note 42.

[39] This section is based upon the following article: Dogauchi, *Keizai no Kokusaika*

banking services, and such professional services as notaries public, port pilots and patent lawyers. It is interesting to note the criteria used to distinguish providers having foreign connections from domestic providers. While nationality or residence or both are the adopted criteria for a person,[40] with regard to a juridical person, several criteria are adopted: the governing law according to which the entity was established, nationality of its representatives and executives, or nationality of its stockholders. In addition, percentage of foreign executives and stockholders permitted depends on the importance of the sector in reference to "public welfare."[41]

On the other hand, with regard to banking services and patent lawyers, reciprocity is applied.

(a) Telecommunications Services

The reformation of the laws governing telecommunications services in April 1985 by the Electric Telecommunications Business Act (Law No.86 of 1984) brought to an end a century of government monopoly and introduced the principle of competition into the area of telecommunications services. Thus, restrictions were lifted on foreign capital participation for telecommunications carriers, such as VAN (Value-Added Network) service companies.

However, with regard to the telecommunications services relating to circuit facilities, Article 11(iv)-(vii) of the Electric Telecommunications Business Act and Article 5(1)(i)-(iv) of the Wireless Telegraphy Act (Law No.131 of 1950) prevent the licensing of foreigners, foreign governments and their representatives, foreign companies and other entities, and any entity, including Japanese companies, whose representatives are not Japanese nationals or over one-third of whose executives or direct or indirect stockholders are foreigners, foreign governments or foreign entities.

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to 'Gaikoku' tekinamono no Nihon niokeru Houkisei: Nihon-hou niokeru 'Nihon' to 'Gaikoku' tono Kubetsu ("Internationalization of Economy and the Legal Regulation on 'Foreign' Ones: Distinction Between 'Foreign' and 'Japanese' in Japanese Laws") (in Japanese), 875 JURIST 238 (1987).

[40] Residence is adopted as one of the criteria in the case of patent lawyers. *See* section IV.B.3.(d).

Incidentally, residence is also adopted in several tax laws such as the Income Tax Act (Law No.33 of 1965) and the Foreign Exchange and Foreign Trade Control Act (Law No.228 of 1949, amended substantially by the Law No.65 of 1979) according to which relevant Ministers may order a "foreign investor" to alter the particulars of its direct domestic investment (Article 27(7)).

[41] *See* section IV.B.1; *compare with* telecommunications services (IV.B.3.(a)) *and* broadcasting services (IV.B.3.(b)).

Moreover, special regulations are embodied in Article 4(1) of the International Telegraph and Telephone Company Limited Act (Law No.301 of 1952) and Article 4 of the Nippon Telegraph and Telephone Company Limited Act (Law No.85 of 1984). According to these provisions, foreigners, foreign entities and Japanese entities one-half of whose members, executives or stockholders are foreigners or foreign entities may not acquire the stocks of those two types of companies because of their position as basic telecommunications services providers in Japan.

Purportedly, these regulations are necessary in reference to the "public welfare" prescribed in Article 22(1) of the Constitution, because of the importance of telecommunications services in the society, especially in case of national emergency.[42]

(b) Broadcasting Services

More stringent restrictions are applied to public broadcasting than those applied in telecommunications services. Thus, Article 5(4)(i) and (ii) of the Wireless Telegraphy Act (Law No.131 of 1950) and Article 5(i)-(iv) of the Cable Television Act (Law No.114 of 1972) provide not only that foreigners, foreign governments and their representatives, and foreign companies and other entities may not be licensed to do business in this area, but also that any entities, even Japanese, any one of whose executives is not a Japanese national, or over one-fifth of whose stockholders are foreigners, foreign governments or foreign entities may not be licensed. Additionally, Article 53-2 of the Broadcasting Act (Law No.132 of 1950) provides that broadcasting companies may refuse to enter on their stockholders' lists the name and address of the person or entity listed in Article 5(4) of the Wireless Telegraphy Act who acquired their stocks, when such entry would make the percentage of such kind of stockholders exceed one-fifth level.

This one-fifth criterion, as opposed to the one-third criterion in the case of telecommunications, reflects the importance of broadcasting services to the "public welfare". The same regard for public welfare is indicated by the requirement that for companies broadcasting publicly, none of their executives may be a foreigner which

[42] However, there seem to be enough grounds for reconsidering whether the criterion of nationality is effective as opposed to that of residence for in a crisis it would be easier for the government to control foreigners living in Japan than Japanese nationals living abroad.

is more severe than the requirement in the area of telecommunications that a representative may not be a foreigner.

(c) Banking Services

Article 4(3) of the Banking Act (Law No.59 of 1981) and Article 4 of the Enforcement Order of the Banking Act requires reciprocity in the licencing in this area of a party over one-half of whose stocks are owned by banks doing banking business in accordance with foreign laws.

(d) Professional Services

Article 12(1)(i) of the Notaries Public Act (Law No.53 of 1908) and Article 5(i) of the Port Pilots Act (Law No.121 of 1949) prevent foreigners from being cetified as notaries public or port pilots.[43] The Patent Lawyers Act (Law No.100 of 1921) provides some different restrictions. Article 2 provides that foreigners may be patent lawyers provided that reciprocity exists in their home countries, they have residences in Japan, and that they pass the Japanese qualifying examination.[44]

C. *Service Trade Friction and Recent Changes*

In the 1950s and 60s, trade friction arose between Japan and other countries in areas such as textiles, and in the 1970s, friction occurred in the areas of exports of steel, color TV sets, machine tools and automobiles. Then, in the 1980s, in addition to problems in high technology areas such as semiconductor chips, service sectors also became a subject of confrontation in Japan-U.S. trade relations.

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[43] *See* Treaty of Friendship, Commerce and Navigation Between Japan and the United States, *supra* IV.B.2.

Although the provision of the Public Notaries Act is considered to be a necessary restriction in view of the fact that notaries' authority is substantially similar to that of judges in making notarial deeds on which public power is exercised, the above provision of the Port Pilots Act seems unreasonable. The objective of this provision was perhaps to secure national security because the circumstances of harbors had been crucial for national defense in the time of war. Today, however, this kind of information is open to the public in Japan, and there are many workers whose jobs are more crucial to the national security, such as those engaging in maintenance of basic telecommunication systems.

[44] In contrast, in the case of doctors, lawyers, architects and accountants, there are no qualifying restrictions on foreigners other than the requirements that they pass Japanese qualifying examinations. *See infra* note 49. Three categories of the restrictions mentioned therein apply to foreigners who do not pass Japanese examinations.

Having recognized the necessity of overall measures to solve and prevent trade friction, the Action Program for Improved Market Access was announced by the Government of Japan on July 30, 1985.[45] The principle of this program was that the government would allow consumers to choose and act on their own responsibility through less government intervention. Several improvements have since been implemented in service sectors. Following are some examples of those changes.

With regard to financial services, nine foreign trust companies were in June 1985 permitted to undertake trust business in Japan. In October 1985, the interest rates on fixed-term deposits began to be deregulated and the minimum size of such deposits has since been reduced in stages.[46] The internationalization of the yen has been spurred by the lifting of restrictions on the issue of Euro-yen bonds and the liberalization of yen-denominated bond issues in Japan by nonresidents. The Tokyo offshore market for financial transactions opened in December 1986.[47] As of November 1987, twenty-three investment consulting companies affiliated with foreign capital have been granted permission to set up operations in Japan. And in December 1987 it was decided to increase membership in the Tokyo Stock Exchange by twenty-two, including sixteen foreign stock-brokerage houses.[48] In addition, as of February 1988, a total of forty-four foreign stock-brokerage houses have a license to operate in Japan.

With regard to transportation services, the Ministry of Transportation appointed a Trucking Service Access Officer to be responsible for handling problems confronting foreign companies entering the Japanese trucking market. Local offices were instructed to process the applications for entry by foreign firms as quickly as possible by

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[45] The specified areas were tariffs, import quotas, standards and certifications, import procedures, government procurement, financial and capital markets, import promotion and telecommunications.

[46] With regard to the fixed-term deposits, the minimum amount to which free interest rate may apply was Y1,000,000,000 in October 1985. Since then, the amount has been gradually reduced (in April 1986, Y500,000,000; in September 1986, Y300,000,000; in April 1987, Y100,000,000; in April 1988, Y50,000,000; in November, Y30,000,000). And, with regard to MMC (Money Market Certificates), beginning at Y50,000,000, the amount will be reduced Y3,000,000 (equivalent to about $23,000) in June 1989.

[47] As of February 1987 it comprised $123.8 billion in asset volume.

[48] As to the provision concerning Japanese financial markets in the Prime Dealers Act of 1988, 22 U.S.C. § 5342(4)(A), *see supra* note 17 and accompanying text.

preparing brochures written in English to explain the paperwork and other procedures necessary to obtain a license.

With regard to construction services, beginning in September 1986, experience in foreign construction projects was deemed to be the equivalent of the experience in Japanese projects that is required as a prerequisite for application for participation in public works construction projects. Moreover, in connection with the construction of Kansai International Airport in November 1987, and several other big projects in March 1988, special agreements were concluded between the Japanese and the United States Governments. According to these agreements, the Japanese Government shall apply the principle of nondiscrimination to foreign contractors in awarding contracts for public construction projects and shall also encourage Japanese private companies to make contracts with foreign contractors.

Furthermore, with regard to the legal services,[49] while the qualifications to practice law stipulated in the Lawyers Act (Law No.205

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[49] Incidentally, with regard to the qualifications authorized by foreign countries, the following three categories are found:

(a) Article 11(iii) of the Doctors Law (Law No.201 of 1948) provides that a person who has foreign qualifications as a doctor is eligible to take the national qualifying examination to engage in medical treatment in Japan even if he or she has not graduated from a Japanese medical college, provided that the Minister of Health and Welfare recognizes his or her ability to be equal to or higher than those of Japanese medical college graduates. The following laws have the same provisions: the Dentists Law; the Dental Hygienists Law; the Dental Technicians Law; the Pharmacists Law; the Health Nurses, the Midwives and Hospital Nurses Law; the Radiotherapy Technicians Law; the Veterinarians Law, and others. In the case of doctors and dentists, it is reported that the Minster of Health and Welfare recognized about thirty persons to be eligible to take the national examination. This category is the most stringent in comparison with categories (b) and (c).

Additionally, a new law was enacted, that is the Law Concerning the Special Exceptions of Article 17 of the Doctors Law and Article 17 of the Dentists Law with Regard to the Clinical Training by Foreign Doctors and Dentists (Law No.29 of 1987). Article 17 of the Doctors Law and the Article 17 of the Dentists Law prohibits a person who is not qualified as a doctor or a dentist by the Japanese authority from practicing in Japan. The above new law, however, enables a person who, *inter alia*, has foreign qualifications with a three-year experience of practice in that country and who stays in Japan for the purpose of studying medicine, to do clinical operations as a trainee in Japan—an exception to the general prohibitions.

(b) According to the Law on Special Measures Concerning the Handling of Legal Business by Foreign Lawyers (Law No.66 of 1986), a person who, *inter alia*, has qualifications as a lawyer authorized by a foreign country extending the same treatments to Japanese lawyers and has practiced in

of 1949) contain no provisions to exclude non-Japanese persons from this area, a special law was enacted. With the passage in May 1986 of the Law on Special Measures Concerning the Handling of Legal Business by Foreign Lawyers (Law No.66 of 1986), which was put into force on April 1, 1987, foreign lawyers who do not possess Japanese qualifications may offer legal services relating to their foreign laws, subject to reciprocity.[50]

Of course there still exist a number of problems in the Japanese services market.[51] However, it is worth noting that some measures taken by Japan extend even beyond the concept of national treatment. Those measures constitute special treatments for foreign service pro-

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that country for more than five years, may offer certain legal services relating to that foreign law without fulfilling such requirements as successfully passing the Japanese bar examination. As of September 28, 1988, forty-two foreign lawyers have been registered as Foreign Legal Business Lawyers: 16 New York lawyers; 9 California lawyers; 5 Washington D.C. lawyers; 2 Hawaii lawyers and 10 United Kingdom lawyers.

(c) Article 4(3) of the Architects Law (Law No.202 of 1950) provides that a person who has foreign qualifications as an architect is able to be qualified as a Japanese architect without passing the national qualifying examination upon the condition that the Minister of Construction recognizes his or her ability to be equal to or higher than that of Japanese architects in the case of the first class architects; in the case of the second class or wooden building architects, the presidents of the local public entities recognize his or her ability. With regard to the first class architects, it is reported that one or two persons are qualified as Japanese architects every year, and almost all of them are Japanese.

Article 16-2 of the Public Accountants Law (Law No.103 of 1948) provides for similar treatment, provided that the Minister of Finance assigns the examination in order to make sure that the foreign applicant's knowledge about Japanese laws on accounting is sufficient. Seventy-four persons have been qualified since 1950 when the above provision was inacted: 43 Americans, 22 British, 5 other foreigners and 4 Japanese. As of 1987, however, nobody has been qualified since 1976. According to the Ministry of Finance, the reason is that no one has applied since then.

[50] *See supra* note 49 (Category (b)). The English translation of the Law and the Ministral Order appears in 26 I.L.M. 881 (1987). *See* Note, *Japan's New Foreign Lawyer Law*, 19 LAW & POL'Y IN INT'L BUS. 361 (1987). As to the situation in Japan before the passage of the above law, see Kosugi, Regulation of Practice by Foreign Lawyers, 27 AM. J. COMP. L. 678 (1979); Shapiro and Young, *The Role of Law and Lawyers in Japan and the United States*, 7 MICH. Y.B. OF INT'L LEGAL STUD. 25 (1985); Norman, *A Statutory Analysis of the Right of U.S. Lawyers to Practice in Japan*, *id*, at 45; and Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer-Substitutes: The Market for Regulation in Japan*, 27 HARV. INT'L L.J. 499 (1986).

[51] For example, the International Engineering & Construction Industries Council submitted to the Office of the U.S. Trade Representative on December 20, 1988, that the complaint U.S. design and construction firms are still being shut out of the Japanese market. *See* 6 INT'L TRADE REP. (BNA) 11 (Jan.4, 1989).

viders in order not to place them at a *de facto* disadvantage.[52]

V. CONCLUSION

Because of strong opposition by some developing countries, such as India and Brazil, it will be difficult to get perfect agreement on rules for trade in services through the Uruguay Round. In addition, considering that liberalization of international trade in services would inevitably liberalize domestic service markets, it would be difficult to have full support from countries having non-market economies.

Therefore, it is possible that a side Code on trade in services would provide for very moderate measures like those prescribed in Chapter 14 of the United States-Canada Free Trade Agreement of 1988.[53] With regard to the exceptional sectors to which national treatment would not apply, provisions in the above Free Trade Agreement, the Treaty of Friendship, Commerce and Navigation Between Japan and the United States,[54] and the Japanese internal laws[55] would be instructive in making new global rules. In addition, recent Japanese experience in improving service market access would also be helpful.[56]

However, in view of the present internationalization of business activities, it may be necessary to reconsider what kinds of services business by foreigners must be regulated in the interest of public welfare. The notion of public welfare is easily abused. Politics are in danger of being localized, while the economy is increasingly internationalized. Law is a product of politics and national politics is directed by nationals. Therefore, law is in danger of being localized instead of internationalized, and discriminating under the name of public welfare against foreigners who do not have the right to vote. In the case of Japanese laws, there seems no reason to prevent foreigners from being port pilots,[57] or to prevent people who do not have residences in Japan from being patent lawyers.[58] In addition,

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[52] For example, the Japanese bar examination is difficult for foreigners who can not understand Japanese. Of approximately 30,000 who take the bar examination, only about 500 pass.

[53] *See* II.A.

[54] *See* IV.B.2.

[55] *See* IV.B.3.

[56] *See* section IV.C.

[57] *See supra* note 43.

[58] *See supra* note 44 and accompanying text. There seems to be no reason to require Japanese residence only for patent lawyers, where there are no such requirements in the case of other lawyers and accountants. This residence requirement means that no one may be a patent lawyer in several countries simultaneously.

considering the activities of multinational enterprises, it would be necessary to explore what are the most adequate criteria to distinguish foreign providers from domestic providers in the service sectors where special regulations are necessary in order to secure public welfare.[59]

[59] In the case of Japanese laws, see section IV.B.3.