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Barriers to Foreign Direct Investment in Japan

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Barriers to Foreign Direct Investment in Japan: Crossing the Regulatory and Cultural Minefield to Successful Mergers and Acquisitions

ABSTRACT

Recent polls indicate a dramatic surge in anti-Japanese sentiment in the United States. Sources of this sentiment are Japanese purchases of high-profile United States companies and real estate and the lack of similar opportunities for United States firms in Japan. This Note recognizes that although Japanese interest in mergers and acquisitions has increased, this interest focuses on foreign companies. The reason for the lack of activity within Japan are the various legal, structural, and cultural barriers that impede acquisitions, both foreign and Japanese, of Japanese companies. First, this Note considers T. Boone Pickens Jr.'s recent battle for seats on the board of directors of Koito Manufacturing as an example of how a confrontational approach to foreign access in Japan can prove unsuccessful. This Note then examines both legal and extralegal barriers to foreign investment. It is suggested that the friendly and successful acquisition by British-based Polly Peck International of fifty-one percent ownership in Sansui Electric Company is a model for future foreign direct investment activity in Japan. This Note concludes that continuing pressure for reform, both in Japan and by the United States under the recently completed Structural Impediments Initiative and proposed legislation, will lead to increased foreign investment activity in Japan in the 1990s.

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I. INTRODUCTION

Although Americans have been "bashing"[1] Japan for at least a decade, recent surveys[2] indicate a dramatic and sudden increase in anti-Japanese sentiment in the United States.[3] This anti-Japan feeling is

1. The term Japan "basher" is the currently popular label used to describe a person who believes among other things that Japan's large trade surpluses and expanding investment in the United States are the result of "a combination of aggressive Japanese government policies and monopolistic business practices." Wolf, *U.S. Politicians Turned Japanese Lobbyists*, Wall St. J., Nov. 2, 1990, at A12, col. 4. By contrast, a person who believes that Japan's economic success is the result of "high national savings and investment rates, combined with an industrious and well-trained supply of entrepreneurs, managers and workers" is likely to be labeled a Japan "apologist." *Id.*

2. A recent poll found that 44% of those surveyed in the United States believe that Japan is "America's least trustworthy ally." Smith, *Fear and Loathing of Japan*, FORTUNE, Feb. 26, 1990, at 50. According to another poll, 65% believe "Japan unfairly restrict[s] sales of U.S. goods," *id.*; 61% would favor United States restrictions on Japanese imports, *id.*; and 63% said Japanese investment in the United States should be discouraged (up from 50% in 1985), *id.*

3. *See* Karnow, *A Clouded Mirror Held Up to Japan*, Wash. Post (Nat'l Weekly Ed.) Dec. 31, 1990-Jan. 6, 1991, at 21, col. 1.

particularly strong among white collar conservatives[4] who now view Japan, with its economic might, as the "evil empire" since the Soviet threat has diminished.[5]

In 1990, the assaults against the Japanese became most visible with T. Boone Pickens Jr.'s highly publicized battle over the corporate governance of Koito Manufacturing Company (Koito), with widespread criticism of Japan's failure to pay its fair share of the cost of the war in the Persian Gulf against Iraq,[6] and with the publication of *Agents of Influence*, a book that depicts Japan's manipulative political juggernaut in the United States.[7] The completion of the purchase of MCA, Inc. by Matsushita Electric Industries (Matsushita) for 6.59 billion dollars in the final days of 1990[8] only added to the anti-Japanese sentiment in the United States. The commemoration of the fiftieth anniversary of the bombing of Pearl Harbor in 1991 may exacerbate these feelings.[9]

Japan's tremendous economic success in the United States and in the global marketplace explains the anxious, if not spiteful, sentiment in the United States. Members of "Japan, Inc,"[10] despite the 1990 slump in

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4. *See id.*

> Anti-Japan feeling used to be a largely blue-collar phenomenon, ignited by job losses in autos and steel . . . . Lately such antipathy has subsided, partly because Japanese producers started building cars in the U.S. . . . . Now white collars are taking over the battle.

Smith, *supra* note 2, at 51.

5. Karnow, *supra* note 3, at 21, col. 1. Recent polls have found that a majority of persons surveyed in the United States view Japan as a greater threat to the United States than the Soviet Union. *See* Cross, *View from Tokyo: Trade Talks with the Enemy*, The Independent, June 25, 1990, at 25.

6. *See* Walter, Mossberg, & Kempe, *Footing the Bill: Americans Ask Why Germany, Japan Bear So Little of Gulf Cost*, Wall St. J., Jan. 11, 1991, at A1, col. 6.

7. P. CHOATE, AGENTS OF INFLUENCE, (1990). Mr. Choate, a former TRW, Inc. executive, argues in his book that lobbyists hired by the Japanese are manipulating the United States political and economic system by spending hundreds of millions of dollars to promote Japanese interests. For scathing reviews of Mr. Choate's book, see Karnow, *supra* note 3, at 21, col. 1, and Wolf, *supra* note 1, at A12, col. 4.

8. The merger followed the completion of Matsushita's $66 per share, or $6.59 billion, tender offer for MCA stock. Matsushita's purchase of MCA is the largest takeover to date of a United States firm by a Japanese company. *Matsushita Completes Purchase*, Wall St. J., Jan. 4, 1991, at B4, col. 3.

9. Punctuating the severity of the present conflict between Japan and the United States over trade and investment issues, last year Prime Minister Kaifu "reportedly warned his Cabinet: 'We must not let Japan-U.S. relations drift to a condition similar to that which existed on the eve of World War II.' " Cross, *supra* note 5, at 25.

10. Supposedly, James Abegglen first coined the term "Japan, Inc." to represent his perception of "the close, virtually symbiotic relationship between business and government in Japan." *See* E. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 113

Tokyo's financial markets,[11] continued to purchase United States trophies such as the Rockefeller Group, Columbia Pictures, Pebble Beach Co.,[12] and MCA in a carnivorous fashion.[13] At the same time, cultural, economic, and legal barriers frustrate attempts by foreign investors to enter Japanese markets. This situation probably will continue unchanged into the mid-1990s.

Nevertheless, Japan is not the impenetrable market that some critics suggest. Claims of Japanese exclusivity distort the reality that Japan is changing from a closed market to one that is merely difficult to enter.[14] Increasingly, there are Japanese companies for sale and foreign firms to buy them.[15] After 1980, when Japanese foreign investment laws were

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(1984) (referring to J. ABEGGLEN, THE JAPANESE FACTORY: ASPECTS OF ITS SOCIAL ORGANIZATION (1958)). Today, the West views Japan's intimate government-business relationship as the primary source of Japan's closed corporate culture. *See infra* Part III.C.

11. Japan's financial market underwent a dramatic decline, *see* Chandler, *Believers in Japanese Stocks Experience a Fiery Baptism*, Wall St. J., Jan. 2, 1991, at R7, col. 5, and Japanese interest rates rose by two to four percentage points in 1991, *see* Blustein, *In Japan Too, the Party May Be Over*, Wash. Post (Nat'l Weekly Ed.), Dec. 31, 1990-Jan. 6, 1991, at 21, col. 1.

12. Sources close to the Pebble Beach acquisition recently told the Japanese newspaper *Asahi Shimbun* that the partners who purchased California's public Pebble Beach golf courses last September always intended to sell course memberships in Japan for 100 million yen ($735,000). If put into practice, the plan effectively would close the world-class golf courses to the public. *To play Pebble Beach might cost $735,000*, Desert Sun, Mar. 8, 1991, at C1, col. 1.

13. The Japanese appetite for large foreign acquisitions remains strong even though higher interest rates, falling stock prices, softening real estate sales, and tighter restrictions on bank loans in Tokyo temporarily cut Japanese investment abroad in 1990. *See* Reckard, *Japanese Still Buying But in Subtler Ways*, L.A. Times, Sept. 22, 1990, at D2, col. 3; Wagstyl, *Temporary Brake on Growth-Japan*, Fin. Times, June 18, 1990, at III, col. 1. *Contra* Helm, *Japan's Money Troubles Begin to Jolt U.S. Economy*, L.A. Times, Oct. 18, 1990, at A1, col. 5 (The recent reduction of Japanese investment in the United States has been responsible in part for lowering United States commercial real estate values and increasing United States interest rates.).

14. *See* Rapoport, *You Can Make Money in Japan*, FORTUNE, Feb. 12, 1990, at 85 (noting that United States direct investment in Japan has increased to $16.7 billion in 1988, nearly double the amount in 1985).

15. *See* Azria, *M & A in Japan: Halting Steps Toward a New Era*, 22 MERGERS & ACQUISITIONS 81 (1987). Japanese "[t]argets were traditionally limited to family owned companies in crisis or to quasi-bankrupt ventures . . . . The trend [now] is that healthy Japanese subsidiaries of larger groups and medium-size independents . . . [are becoming] available for transactions." *Id.* Analysts predict that foreigners will begin investing in or acquiring a greater number of midsized Japanese manufacturers in such key industries as consumer electronics, chemicals, and pharmaceuticals. *See* Berger, *Japanese Firms Targeted for Takeover*, San Francisco Chron., Jan. 15, 1990, at C1, col. 2.

amended to allow merger activity, there has been interest in mergers and acquisitions of firms wide-ranging sizes.[16] Though the bulk of the growth in this activity has been in mergers and acquisitions outside Japan, the key issue in the 1990s for foreigners will be whether Japanese resistance to foreign acquisitions of domestic companies will weaken.[17]

This Note explores foreign direct investment in Japan and assesses the role of legal and nonlegal barriers that make Japan a difficult market for foreign entry. This Note begins by considering T. Boone Pickens Jr.'s recent demands for seats on the board of directors of Koito, a Japanese company in which he is currently the largest single shareholder. Because Pickens' experiences with Koito symbolize Japan's closed economic structure for many foreign investors, his campaign provides a framework with which to examine the impediments associated with foreign direct investment in Japan. This Note then discusses the legal and regulatory barriers affecting foreign direct investment in Japan, focusing largely on the Japanese Foreign Exchange and Foreign Trade Control Law,[18] the Japanese Antimonopoly Law,[19] and the use of a regulatory technique known as "administrative guidance." Next, this Note addresses nonlegal barriers to foreign investment in Japan, including corporate structures, cultural values, and business practices that should be understood before a foreign entity attempts a transaction in Japan. This Note provides a brief account of the recent dialogue between Japan and the United States under the Structural Impediments Initiative (SII),[20] as well as several

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16. *See* Wagstyl, *supra* note 13, at III, col. 1.

17. *See* Hall, *Mergers and Acquisitions—Less Shameful than it was*, Fin. Times, Mar. 15, 1990, at IV, col. 4. "At the moment, the market is mainly in Japanese companies wanting to find Japanese purchasers. But just as European hostility to American takeovers subsided after the 1960s, Mr. Asuke [general manager of Sumitomo Bank's investment banking department] believes that the climate in favour of foreign takeovers of Japanese companies is beginning to turn." *Id.* at IV, col. 5.

18. Foreign Exchange and Trade Control Law, Law No. 65 of 1979, *as amended by* Law No. 70 of 1986 [hereinafter 1979 FECL] (translated in Z. KITAGAWA, DOING BUSINESS IN JAPAN, app. 3C-1 (1990)).

19. Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade, Law No. 54, Apr. 14, 1947 [hereinafter Antimonopoly Act] (translated in Z. KITAGAWA, *supra* note 18, app. 7A-1).

20. The Structural Impediments Intiative (SII) was announced first by President Bush and former Japanese Prime Minister Sosuke Uno at an economic summit meeting in July 1989. Under the SII, United States and Japanese negotiators "hope[d] to stem the massive trade imbalance between the two countries by addressing institutional practices that affect the bilateral trade relationship." *See International Trade, U.S., Japanese Officials Commence Second Round of SII Negotiations*, Daily Rep. for Executives, Nov. 7, 1989, at A13 [hereinafter *International Trade*].

unilateral measures, currently under congressional consideration, to remove barriers to United States investment in Japan. Finally, this Note addresses the prospects for future mergers and acquisitions in Japan and offers one possible model for future foreign direct investment activity. Although it is unlikely that a foreigner soon will own the Sony Building in Tokyo's Ginza or that T. Boone Pickens Jr. soon will sit on Koito's board of directors, this Note concludes that a growing discontent among domestic investors of Japanese companies, as well as continuing domestic pressure for reform, will lead to increased foreign takeover and investment activity in Japan in the 1990s.

II. BOONE CO.'S STRUGGLE FOR KOITO

The Koito Manufacturing Company is a Tokyo-based auto parts producer that sells its products mainly to Japanese automakers. The effort of T. Boone Pickens Jr.[21] to control four seats on Koito's board of directors is the most recent and visible example of the difficulties experienced by foreign investors entering corporate Japan. Pickens is battling the Koito board through Boone Company (Boone Co.), an investment banking company based in Amarillo, Texas. By purchasing a 20.2 percent stake in Koito, Boone Co. became the largest single shareowner in Koito and the first foreign firm to purchase a major share in a Japanese company without the prior consent of the Japanese target.[22] Financial analysts predicted that Pickens would retreat quickly from his bid because of the great difficulties faced by an outsider in performing a takeover raid on a Japanese company.[23] Nonetheless, Pickens characterized his hold-

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21. T. Boone Pickens Jr. is an oilman, sometime corporate raider, and the owner and general partner of Mesa Limited Partnership (Mesa Petroleum). Pickens is best known in the United States for his attempted takeovers in the 1980s of Boeing, Diamond Shamrock, Gulf Oil, Newmont Mining Company, Phillips Petroleum, and Unocal. Clancey, *Pickens Sees Opportunity to Stir Anger Against Tokyo*, Reuters, Sept. 7, 1990 (LEXIS, Nexis library, busrpt file). Because of these endeavors, in which he received a very high price for his shares upon termination of his bid for control, some allege that Pickens practices "greenmail" by purchasing stock of a corporation, inflating its price by offering to purchase more shares, and then selling the stock to the major shareholder for a quick profit. Matsuura, *How a Japanese Firm Foiled T. Boone Pickens*, San Francisco Chron., Jan. 8, 1990, at C5.

22. *See* Jameson, *Doing Business with the Japanese*, L.A. Times, Nov. 6, 1989, at D8, col. 2.

23. Perhaps the most formidable opposition to foreign investment in Japan comes from within the Japanese business community. One analyst at a major Japanese brokerage house, for example, stated that "Japan's corporate community really hopes Pickens will fail. . . . This is a new experience for Japan. It would destabilize business here and strain relations between investment companies if we had to deal with corporate raiders."

ings in Koito as a long-term investment and indicated that he wanted to work with the management of the firm.[24]

In September 1989, Pickens increased his stake in Koito to twenty-six percent by purchasing an additional ten million shares.[25] Even with this large stake in the firm, Pickens has complained that Koito continues to prevent him from enjoying proper shareholder's rights in the firm.[26] Two years after his initial share purchase, Pickens holds no seats on Koito's twenty-member board of directors. Pickens cites his experiences with Koito as a textbook case of how Japan remains closed to foreign investment,[27] and he has argued that Japan should increase its reciprocation because of its tremendous economic success in United States markets.[28]

In October 1989, Congressman Don Sundquist introduced a joint resolution in the House of Representatives urging the Department of Treasury and the Department of State to place the issue of Koito's refusal to

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Kynge, *Pickens May Fail in Japan Bid Say Analysts,* Reuters, Apr. 13, 1989 (LEXIS, Nexis library, reuter file).

24. Carlson, *Pickens Increases Stake in Japanese Firm, May Seek Board Seats,* Reuters, Sept. 20, 1989 (LEXIS, Nexis library, busrpt file).

25. *Id.* As of January 1, 1991, Pickens held 42,395,000 of Koito's 160 million outstanding shares. *Pickens Defends "Long-Term Shareholder" Claim,* Report from Japan, Dec. 17, 1990 (LEXIS, Nexis library, omni file). With the new purchase, his stake in Koito will have cost Pickens an estimated $1 billion. *See Pickens Tells Who Financed Koito Stake,* L.A. Times, Dec. 6, 1990, at D2, col. 2 [hereinafter *Pickens Tells*]. Pickens has stated that he intends to buy more shares of Koito, with the goal of eventually owning 33% of the company, a figure that, under Japanese law, would give him new voting privileges and allow him to participate in certain management decisions. Riley, *Pickens has Bone to Pick in Japan,* Wash. Times, July 23, 1990, at D5, col. 3.

26. Koito, for example, rejected Pickens' request to raise the interim dividend for the period ending September 30, 1989 from four yen to seven yen per share. *Pickens Asks Koito to Boost Interim Dividend,* Kyodo News Service, Sept. 20, 1989 (LEXIS, Nexis library, omni file) [hereinafter *Pickens Asks*]. According to Pickens, the proposed interim dividend hike "would not harm the financial stability of Koito." *Id.* Koito's stock value has plunged, however, since Pickens bought his first shares in March 1989. *See Riley, supra* note 25, at D5, col. 3. Pickens claims that Japan's low dividend rates are partly attributable "to the systemic mutual shareholdings among large corporations and the general disregard for the rights of shareholders." *Pickens Asks, supra.*

27. Referring to Japan's closed corporate culture, Pickens alleges "[n]ot only do [Japanese companies] want to keep out Americans from participating in Japan's economy, but they also don't want the Japanese public to see how their closed corporate structure benefits a few elites to the detriment of the public." Carlson, *supra* note 24.

28. According to Pickens, his rebuff by Koito is particularly unfair since the Toyota Motor Corporation (Toyota), Koito's second largest shareowner with a 19% stake, has three former employees on the Koito board. Pickens, *Japan's Invisible Export, Worse Menace Than Trade Tile?,* Wash. Times, Mar. 2, 1990 at F1.

provide board representation to its largest shareholder, Boone Co., on their agenda in the next bilateral talks with Japan under SII.[29] In addition, Senator Tom Harkin and Congressman John Bryant both have proposed bills that would require foreign corporations to register and disclose information related to their United States investments if those interests exceeded five percent of the corporation's issued stock.[30] Clearly, there is a growing sentiment in Washington that the United States should implement trade barriers that can be used in negotiations with Japan.

Pickens also has attacked the Japanese *keiretsu* system,[31] a cartel-like practice unique to Japan that critics argue limits competition. Appearing before a Senate subcommittee, Pickens claimed that Toyota, as a *keiretsu* parent company of Koito, dictated Koito's pricing policies and, as a result, bought car lighting products from Koito at an unfair discount.[32] Pickens claims that this *keiretsu* relationship also permits Toyota to exercise continuing influence over the broader corporate affairs of Koito because Toyota has placed three former Toyota executives on Koito's

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29. *Congressional Initiatives in Boone Co.'s Investment in Koito Manufacturing Released by Senators*, PR Newswire, Oct. 26, 1989 (LEXIS, Nexis library, prnews file) (listing recent Japanese acquisitions in the United States and noting the inability of United States citizens to exercise shareholder rights in Japan).

30. Benham, *Will Rising Foreign Investment Spark Response From Congress?*, Investors Daily, Mar. 14, 1990, at 29, col. 1.

31. The *keiretsu* system has been defined generally as a business cartel involving "the interweaving of companies through interlocking boards of directors, joint research and development efforts, equity exchanges and membership in exclusive management clubs." Webster, *Anti-Competitive Japanese Business Practices Examined*, UPI Newswire, May 3, 1990, (LEXIS, Nexis library, omni file). For a more complete discussion of Japan's *keiretsu* system, see *infra* Part IV.A.

32. *FTC and International Antitrust Laws: Hearing Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2nd Sess. 53, 56 (1990) [hereinafter *Antitrust Hearings*] (statement of T. Boone Pickens Jr., General Partner Mesa Limited Partnership). As a result of this arrangement, Pickens claims that "Toyota receives a hidden dividend [from Koito] which, of course, is not realized by the other Koito shareholders." *Id.* at 57.

To prove his allegations, Pickens filed a lawsuit in the Eighth Department of the Civil Division of the Tokyo District Court and demanded that Koito open for inspection its corporate accounts and documents concerning certain business arrangements with Toyota. Pickens claimed he filed the lawsuit to shed light on Koito's "illegal business relationship with Toyota." *Pickens Asks, supra* note 26. On July 25, 1990, Boone Co. obtained documents showing that representatives of Toyota and Koito in fact met in Washington at least twice in May 1990, apparently to develop a strategy to deny Pickens representation on Koito's board. *Document Links Toyota with Koito*, PR Newswire, July 25, 1990 (LEXIS, Nexis library, prnews file).

board of directors.[33] As a result, Toyota, which controls only nineteen percent of the stock of Koito, exercises virtual control over the firm.[34]

In response to Pickens' charges, Koito counters that Boone Co.'s stock acquisition is nothing more than a greenmail attempt, as evidenced by Pickens' secret relationship with Kitaro Watanabe, who twice tried to greenmail the company in 1988.[35] Further, Koito argues that if such prominent United States companies as Gulf Oil, Unocal, and Phillips Petroleum could reject Pickens' earlier bids, so too can Koito.[36] A Koito spokesperson stated that Pickens was not entitled automatically to seats on the company's board simply because he had purchased the single

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33. *Antitrust Hearings, supra* note 32, at 56-67. Koito and its attorneys insist that Koito's board includes no current Toyota employees. *See Anti-Japan Telegrams Flood USTR, Toyota, Japanese Embassy in Call for Fair Trade*, Int'l Trade Rep. (BNA) No. 39, at 1510 (Oct. 3, 1990). Though Pickens since has conceded this fact, he argues that the distinction between current and former Toyota employees is trivial since "[t]hese three officers and directors had served a total of almost 70 years with Toyota prior to assuming their responsibilities at Koito." *Antitrust Hearings, supra* note 32, at 57. Pickens also notes that Toyota recently moved a comptroller from Toyota to Koito and that a vice president of planning for Koito came from Toyota. *Id.* Koito's President, Takao Matsuura, has countered that Japanese companies like Koito must consider the interests of their employees, shareholders, clients, and local communities when choosing board members. Matsuura asserts that Koito "is not part of the Toyota group," and that "Toyota Motor is a blue-ribbon client and major shareholder, nothing more." Matsuura, *supra* note 21, at C5.

34. *Antitrust Hearings, supra* note 32, at 54 (statement of T. Boone Pickens Jr.).

35. A new disclosure law went into effect in Japan on December 1, 1990 compelling investors with stakes of 5% or greater in a public company to make certain disclosures. *See Pickens Tells, supra* note 25, at D2, col. 2. This law is modeled after section 13D of the United States Securities Exchange Act of 1934, 15 U.S.C. § 78m(d) (1988). Thomson, *Japanese Speculative Reveal All*, Fin. Times, Dec. 14, 1990, at 27, col. 3. This law required Pickens to admit that Boone Co.'s Koito stock certificates were being held by Kitaro Watanabe as collateral for a loan from the Japanese real estate developer's company, Azabu Building Company. *See Pickens Pledged Koito Stake*, N.Y. Times, Dec. 19, 1990, at D2, col. 5. The irony for Pickens is that this new disclosure law arose largely as a concession to United States pressure that Japanese companies make public any cross-shareholding arrangements between companies, such as Pickens claims exists between Toyota and Koito. *See* Gillespie, *His 'Victory' in Japan Has Been No Boon for Pickens*, L.A. Times, Dec. 18, 1990, at B7, col. 4.

36. *See* Makihara, *T. Boone's Tokyo Campaign*, TIME, July 10, 1989, at 45. Pickens has responded that although he was the largest shareholder in these other firms, he never offered to sit on these companies' boards of directors while promising not to make a tender offer to their shareholders. By contrast, Pickens has proposed to Koito an "anti-greenmail" provision to prove his claim that he does not intend to greenmail the firm. *See* Sterngold, *A Pickens Drama, Far From Texas*, N.Y. Times, June 29, 1990, at D1, col. 3.

largest stake in the firm.[37] Indeed, under Japan's commercial law, a company is not obliged to give a shareholder seats on its board, regardless of the size of the ownership stake.[38]

Twice, Pickens has failed to win seats on Koito's board of directors when a majority of shareholders rejected his demand at their annual June meeting. In a dramatic episode last summer, Pickens and the thirty-two other United States holders of Koito shares stormed out of the annual meeting in disgust after enduring the repeated heckling of *sokaiya*.[39]

Despite Pickens' statements that he intends to buy additional Koito shares, Tokyo financial analysts believe Pickens stands little chance of gaining majority control of the firm because "stable shareholders," such as Toyota, hold more than sixty percent of Koito's equity.[40] Experts believe that Koito can rely on these supportive shareholders not to sell shares to Pickens at higher prices.[41] Nonetheless, Pickens continues to characterize his contest for Koito as a test case of the openness of Japanese business, and he had vowed he would not walk away from this fight.[42]

The most recent wrinkle in Pickens' Koito campaign is his announcement in February 1991 that he would abandon his battle for representation on Koito's board of directors and sell his shares if Koito agreed to appoint four independent United States citizens to its board of direc-

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37. *See Pickens Won't Get Board Seats Automatically, Koito Says*, Reuters, Sept. 25, 1989, (LEXIS, Nexis library, busrpt file).

38. In Japan, board seats generally are decided at shareholders meetings following board recommendations. *Id.* As noted by Peter Tasker, a senior analyst at Kleinwort Benson International, Inc., however, Pickens is supposed to be entitled to certain rights because he is the holder of the largest equity stake in Koito. *Pickens Tells, supra* note 25, at D2, col. 2.

39. Mizuno, *Sokaiya Send Pickens Packing*, JAPAN ECON. J., July 7, 1990, at 6. Among other nefarious acts, *sokaiya* are paid to bully and silence dissident shareholders, such as Pickens, at shareholder meetings. *See* Ames, *Buying a Piece of Japan, Inc.: Foreign Acquisitions in Japan*, 21 HARV. INT'L L.J. 541, 553 (1986). At this meeting, the *sokaiya* shouted insults at Pickens and his entourage such as "Yankee go home," "We won the economic war," "Remember Pearl Harbor," and "America lost because it's stupid." Mizuno, *supra*, at 6.

40. *See* Jameson, *supra* note 22, at D8, col. 2. After Boone Co. and Toyota's holdings, the remaining 62% of Koito's shares are owned by institutions, banks, or companies closely related to either Koito or Toyota. *See Tokyo Report: Cross Shareholdings Brewing Another Friction*, JiJi Press Ltd., Aug. 9, 1989 (LEXIS, Nexis library, jiji file) [hereinafter *Tokyo Report*].

41. *See* Kynge, *supra* note 23.

42. Mizuno, *supra* note 39, at 6.

tors.[43] Pickens denies that this change in strategy signals his capitulation to Koito.[44] Nonetheless, some Japanese analysts note that Pickens may be unable to continue his battle much longer because of cost increases and continuing financial difficulties in the United States with Mesa Petroleum.[45]

Regardless of the outcome of Pickens' bid for Koito, his campaign has attracted considerable public attention in the United States not only because of his request for board seats, but also because of broader United States-Japan trade and investment issues. Pickens successfully has portrayed his experiences with Koito as a symbol of Japanese discrimination against United States trade and investment. On a positive note, Pickens' persistence has generated a recent flurry of political activity in both Washington and Tokyo addressing the problem of anti-competitive Japanese *keiretsu* practices.

Nonetheless, by complaining that Koito has denied him board representation solely because he is an American, Pickens has capitalized on and contributed to the growing anti-Japanese sentiment in this country. Oversimplifying a complex issue,[46] Pickens' rhetoric obscures the fact that foreign direct investment in Japan is growing more rapidly than ever. Pickens also ignores the recent efforts by the United States and Japan to reduce investment imbalances under the recently completed SII. Moreover, Pickens' large ownership stake in Koito itself suggests that traditional Japanese barriers to foreign investment are crumbling.[47] Despite this increasing openness of Japan's borders to foreign direct investment, Japan remains a difficult market for foreign entry as a result of a variety of legal and nonlegal impediments.

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43. *See* Akiyama, *Pickens Changes Strategy, but Japan Battle May Be Lost*, Reuters, Feb. 15, 1991 (LEXIS, Nexis library, reuter file). Koito officials currently do not know who these four Americans are or if they have experience in the auto industry. *Id.*

44. *See id.* According to Pickens, "[w]e're frustrated . . . . We've tried to play within the system but we're not planning to get out at this point." *Id.*

45. *See id.* In February 1991, Pickens was attempting to raise $616 million to pay down Mesa's $900 million bank debt, much of which matures during the next five years. Moreover, the value of Pickens' 4.5% stake in Mesa has dropped significantly. Currently, Pickens will receive no salary from Mesa until common dividends resume. Zellner, *T. Boone Pickens is Down, But He Swears He Isn't Out,* BUSINESS WEEK, Feb. 18, 1991, at 114.

46. *See* Miller, *T. Boone Defense Shows Why Japan is Winning*, Crain's Chi. Bus., July 9, 1990, at 15.

47. *See* Kurtenbach, *In Tokyo, Not Many Rockefeller Centers Are Up For Sale*, A.P., Nov. 13, 1989 (LEXIS, Nexis library, ap file) (comments by Howard Chao, an attorney with the Tokyo Office of O'Melveny & Meyers).

III. LEGAL AND REGULATORY BARRIERS TO FOREIGN DIRECT INVESTMENT IN JAPAN

Japanese investments in the United States have grown more than any other country's in the past several years. In 1989, Japan surpassed the Netherlands as the second largest foreign investor in the United States, and in the 1990s, it may pass Britain as the largest.[48] Japanese enterprises completed a record 404 mergers and acquisitions abroad in 1989, increasing by twenty-two percent from 1988.[49] Financial analysts attribute the rising number of Japanese acquisitions on foreign soil largely to the strength of the yen and the attempts to integrate the European market by 1992.[50]

At the same time, there were just fifteen foreign takeovers of Japanese firms in 1989, down from seventeen such acquisitions in 1988 and twenty-two in 1987.[51] Excluding the acquisition by Polly Peck International (Polly Peck) of the troubled yet public Sansui Electric Co. (Sansui),[52] those acquisitions have been entirely of private and ailing Japanese firms.[53] Although high share prices, the high price of land, and the strong yen are major factors accounting for the lack of foreign acquisitions in Japan, the most significant barriers preventing an open Japanese market result from a combination of restrictions imposed by the Japanese government on foreign direct investment and from policies firmly established in Japanese political, social, and cultural institutions.

A. *The Foreign Exchange and Foreign Trade Control Law*

1. Pre-1979 Foreign Investment Climate

Until 1979, the Foreign Investment Law of 1950 (1950 FIL)[54] and the Foreign Exchange and Foreign Trade Control Law of 1949 (1949 FECL)[55] formed the primary regulatory barriers to foreign investment

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48. Carraro, Don't Let U.S.-Japan Relations Deteriorate, Christian Sci. Monitor, Nov. 27, 1989, opinion sec., at 19, col. 3.

49. *See Mergers and Acquisition Activity Up in '89*, Kyodo News Services, Jan. 9, 1990, (LEXIS, Nexis library, jen file).

50. "As the integrated European market is expected to become the largest [economic and trading] market in the world, Japanese investors have been focusing more of their [merger and acquisition] attention on Europe." *Id.* In 1989, European companies acquired by Japanese firms totaled 101, as compared with only 52 in 1988. *Id.*

51. *See id.*; *see also* Perger, *supra* note 15, at C1, col. 2.

52. *See infra* Part V.B.

53. Lee, *Polly Peck Picks a Surprise*, EUROMONEY, Dec. 1989, at 51.

54. Foreign Investment Law, Law No. 163 of 1950 [hereinafter 1950 FIL].

55. Foreign Exchange and Foreign Trade Control Law, Law No. 228 of 1949 [here-

in Japan. Japan enacted both laws as legal obstacles to foreign corporate control largely to avoid a United States economic takeover of Japan after World War II.[56] These laws were intended to rebuild the devastated post-war economy of Japan through "efficient trade promotion . . . and an encouragement of an inflow of selected foreign capital and technology."[57] To achieve these objectives, all foreign investments in Japan were prohibited in principle, although exceptions were made with the approval of the Japanese government.[58]

Through a system of stringent governmental screening, the Ministry of Finance (MOF) and the Ministry of International Trade and Industry (MITI) retained broad discretionary power to restrict foreign investment.[59] The Japanese government, however, incorporated into the 1949 FECL a pledge that controls eventually would be abandoned because the government believed that any protracted tight control on foreign investment would be detrimental to the economy.[60]

2. The Revised Foreign Exchange and Foreign Trade Control Law

As Japan's economy and trade surpluses began to soar in the 1960s and 1970s, so too did international criticism of Japanese restrictions on foreign investments. Partly in response to pressures from the United States and the European Community[61] to liberalize the foreign exchange and foreign investment restrictions, Japan decided in 1979 to amend its foreign investment regulations by incorporating the provisions of the 1950 FIL into the revised Foreign Exchange and Foreign Trade Control Act (1979 FECL).[62] The 1979 FECL changed the screening system for

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inafter 1949 FECL].

56. *See* Reynolds, *Foreign Investment in Japan: The Legal and Social Climate,* 18 TEX. INT'L L.J. 175, 182 (1983).

57. 6 Z. KITAGAWA, *supra* note 18, § 4.01[2][b].

58. *See id.* § 4.01[1].

59. *See* Birenbaum & Zackula, *Foreign Investment in Japan: Current Limits and Restrictions,* E. ASIAN EXEC. REP., Oct. 15, 1988, at 9; *see also* 6 Z. KITAGAWA, *supra* note 18, § 4.01[1].

60. 6 Z. KITAGAWA, *supra* note 18, § 4.01[2][b]. "Accordingly, the Japanese government gradually liberalized the foreign exchange and foreign investment restrictions, reflecting the recovery of the post-war Japanese economy." *Id.*

61. *See* Crabb, *The Reality of Extralegal Barriers to Mergers and Acquisitions in Japan,* 21 INT'L LAW. 97, 101-102 (1987) ("The basis for Americans' contention was the U.S.-Japan Friendship, Commerce and Navigation Treaty (FCN Treaty), signed by the two nations in 1957, with its reciprocal grant of most-favored-nation status. The Americans claimed, moreover, that the continuation of post-occupation controls was no longer necessary." (footnotes omitted)).

62. 1979 FECL, *supra* note 18. The bill to amend the FECL was submitted to the

governmental approval to a prior notification system so that foreign investments were permitted freely in almost all industries.[63] For this reason, the 1979 FECL sometimes has been proclaimed as full liberalization.[64] Nevertheless, the Japanese government still may invoke significant controls to block foreign transactions.

a. Pre-Notification Requirements for Foreign Direct Investment

Under the 1979 FECL, a foreign investor[65] seeking to make a direct domestic investment[66] who acquires stock in a listed company[67] amount-

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87th Ordinary Session of the Diet in May 1979 after the United States-Japan consultations in January 1978 and the EC-Japan consultations in March 1978, *see* 6 Z. KITAGAWA, *supra* note 18, § 4.01[2][b] & n.12, was passed on December 11, 1979, and became effective on December 1, 1980, *see id.* § 4.01[2][a]. "With this revision, the FI[L]'s provisions were merged into the revised FEC[L] and constitute Chapter V of the Revised FEC[L]. The [FIL lost] its separate existence when the [1979 FECL became] effective [on December 1, 1980]." *Id.*

63. *See* Reynolds, *supra* note 56, at 195 ("The new law establishes the principle that capital transactions, including investments, are 'free in principle.' This contrasts sharply with previous statutory schemes that forbade all capital transactions unless permitted by administrative validation after a case-by-case review.").

64. *See* Crampe & Benes, *Majority Ownership Strategies for Japan,* 1 UCLA PAC. BASIN L.J. 41, 43 (1982).

65. "Foreign investor" includes four classifications of persons: (1) a natural person who is a nonresident of Japan; (2) a juridical person or other organization established under foreign law, or having its main office in a foreign country; (3) a Japanese company in which a foreign individual or organizational investor directly or indirectly holds 50% or more of the shares or share equivalents of the company or 50% or more of the total capital contribution owned by that company; (4) juridical persons, not mentioned above, in which a majority of directors or officers having power of representation are nonresident natural persons. 1979 FECL, *supra* note 18, ch. 5, art. 26, para. 2; *see also* Crampe & Benes, *supra* note 64, at 43-44.

66. "Direct domestic investment" is defined as follows:

> (1) acquisition or transfer of shares or contribution of shares of any company, other than those listed on the stock exchange; (2) acquisition of shares in a listed corporation, where after the transaction the acquirer's holdings, plus the holdings of another juridical person(s) who stands in a "special relationship" to the acquirer, equal 10% or more of the total outstanding shares of the listed corporation; (3) establishment of a branch office in Japan, or substantial alteration of the type or the business objective of an existing branch in Japan.

1979 FECL, *supra* note 18, ch. 5, art. 26, para. 2; *see also* Crampe & Benes, *supra* note 64, at 43-44.

67. Companies listed on a stock exchange are defined in Securities and Exchange Act, Law No. 25 of 1948 [hereinafter SEA], art. 2, para. 11. For discussion of the SEA and trading in listed securities, see 6 Z. KITAGAWA, *supra* note 18, § 3.04[1].

ing to ten percent or more of the total outstanding shares[68] must file a pre-notification report with the MOF and the Minister in charge of the relevant industry (Minister in charge).[69] Among other things, this report must disclose the purpose of the business relating to the investment, the amount of the investment, and the time of execution.[70] In contrast, when the foreign investor's acquisition occurs incidentally, such as through inheritance, testamentary bequest, merger, or consolidation, pre-notification is not required.[71]

b. The Waiting Period

After notification, a waiting period of thirty days is imposed on the transaction.[72] The MOF and the Minister in charge either may shorten this period when appropriate[73] or may extend it to a maximum of five months in extraordinary circumstances.[74] The waiting period provides the Ministers in charge with an opportunity to investigate the proposed transaction for potential adverse consequences. In determining whether to investigate, the ministers must consider whether the proposed investment could endanger national security,[75] hinder the maintenance of public order or the protection of public safety,[76] or adversely impact the activities of Japanese companies engaged in similar activities or the

68. 1979 FECL, *supra* note 18, ch. 5, art. 27, para. 2(3).

69. *Id.* ch. 5, art. 26, para. 3. There is no pre-notification requirement for foreign share acquisitions made through designated securities companies of less than 10% of outstanding shares. *Id.* ch. 4, art. 22, para. 1.

70. *Id.* ch. 5, art. 26, para. 3; *see* Note, *Prying Open the Japanese Market: Tender Offers and the Legal System in Japan*, 11 LOY. L.A. INT'L & COMP. L.J. 579, 584 (1989).

71. 1979 FECL, *supra* note 18, ch. 5, art. 26, para. 3; *see also* 6 Z. KITAGAWA, *supra* note 18, § 4.10[2][a].

72. 1979 FECL, *supra* note 18, ch. 5, art. 26, para. 4.

73. *Id.*; *see* Note, *supra* note 70, at 585. Because domestic investors are required to file a notice only 10 days before a proposed transaction, it is theoretically possible that foreign investors who are granted a shorter waiting period may initiate an acquisition as quickly as Japanese investors. *Id.*

74. 1979 FECL, *supra* note 18, ch. 5, art. 27, paras. 1 & 3; *see* Note, *supra* note 70, at 586.

75. 1979 FECL, *supra* note 18, ch. 5, art. 27, para. 1(1); *see* 6 Z. KITAGAWA, *supra* note 18, § 4.10[2][a](1) & n.25 ("Foreign direct investment which might endanger the national security would include investments in the industries of aircraft, weapons, arms, atomic energy, or space development.").

76. 1979 FECL, *supra* note 18, ch. 5, art. 27, para. 1(1); *see* 6 Z. KITAGAWA, *supra* note 18, § 4.10[2][a](1) & n.26 ("A foreign investment which might disturb the safety of the general public would include the manufacturing of drugs, security devices, etc.").

"smooth operation" of the Japanese economy.[77] If the MOF and the Minister in charge find that the proposed investment could have an adverse effect, then the ministers will submit, after obtaining the opinion of the Committee on Foreign Exchange, a recommendation to the investor that the investment be altered or suspended.[78]

Within ten days of receipt of the ministers' recommendation, the foreign investor must notify the MOF and the Minister in charge of impending compliance with the conditions of the recommendation.[79] If the investor accepts the recommendation, the modified transaction may proceed immediately before the lapse of the statutory waiting period.[80] If, however, the foreign investor either contests or ignores the recommended changes, then the MOF and the Minister in charge may order the alteration or suspension of the investment.[81] The investor may challenge this order by filing a complaint with the competent minister.[82] If the minister rejects the complaint, the investor may bring legal action seeking the reversal of the minister's order.[83]

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77. 1979 FECL, *supra* note 18, ch. 5, art. 27, para. 1(2); *see* 6 Z. KITAGAWA, *supra* note 18, § 4.10[2][a](2) & n.27 ("A foreign investment which might have a serious adverse impact on the healthy operations of the Japanese economy would include investments in the industries of agriculture, forestry, fishery, mining, petroleum, and leather.").

78. 1979 FECL, *supra* note 18, ch. 5, art. 27, paras. 2-3; *see* 6 Z. KITIGAWA, *supra* note 18, § 4.10[2][b]. Although the Foreign Exchange Council is an auxiliary of the MOF and is subject to the MOF's opinions, *see* Note, *supra* note 70, at 586 & n.55, under the 1979 FECL there is considerable discretion available to the Committee on Foreign Exchange to scrutinize and obstruct all genuinely competitive foreign entries, *see* Henderson, *Access to the Japanese Market: Some Aspects of Foreign Exchange Controls and Banking Law*, in LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES 131, 143 (G. Saxonhouse & K. Yamamura eds. 1986) [hereinafter LAW AND TRADE ISSUES].

79. 1979 FECL, *supra* note 18, ch. 5, art. 27, para. 4.

80. *Id.* para. 6.

81. *Id.* para. 7. One commentator has noted that what constitutes an "alteration of the particulars" is unclear and promotes a manipulative use of recommendations by the Ministers against competitive foreign investors who "have no choice but to accept" the Ministries' quasi-regulatory guidance. Note, *supra* note 70, at 586.

82. 1979 FECL, *supra* note 18, ch. 7, art. 56, para. 1; *see also* 6 Z. KITAGAWA, *supra* note 18, § 4.10[2][c].

83. 1979 FECL, *supra* note 18, ch. 7, art. 57; *see also* 6 Z. KITAGAWA, *supra* note 18, § 4.10[2][c].

c. Aggregation of Stock Purchases by Foreign Investors

Under the 1979 FECL, ministers retain, by cabinet order,[84] the right to regulate the acquisition of stocks by foreign investors in certain designated companies.[85] This restriction applies only when all the aggregate foreign holdings exceed twenty-five percent of the total outstanding shares. This cabinet order comes into effect even if no single foreign investor possesses the ten percent required to trigger the pre-notification requirements of the 1979 FECL.[86] Investors who intend to acquire the stocks of designated companies must notify the MOF and the competent Ministers at least forty-five days prior to purchase.[87] By doing so, the foreign investor may receive confirmation from the MOF that the total foreign holdings in a company in the restricted industries, including those contemplated for purchase by the investor, do not exceed the twenty-five percent threshold.[88]

d. Acquisition of New Shares

The 1979 FECL eliminates any ceiling on the percentage of shares that may be acquired in newly established companies. In principle, the ministers will give automatic approval for up to one hundred percent ownership.[89] In the case of an existing company, however, automatic approval for the purchase of shares up to one hundred percent of the company's shares will be given only if the target company consents to the proposed acquisition.[90] Further, the Japanese Commercial Code

84. Foreign Investment Cabinet Order of 1980, *cited in* 6 Z. KITAGAWA, *supra* note 18, § 4.13[6].

85. *See* 6 Z. KITAGAWA, *supra* note 18, § 4.13[6][a] ("The designated company must be listed in the official publication (Kanpō) under its name and location of headquarters.").

86. *See* Henderson, *supra* note 78, at 153. It follows that "three foreign investors who are not related to each other could each independently acquire 8 percent of the total outstanding shares, an aggregated total foreign acquisition amounting to 24 percent. Such acquisitions would not fall under the definition of 'foreign direct investments. . . .' " 6 Z. KITAGAWA, *supra* note 18, § 4.13[6].

87. *See* 6 Z. KITAGAWA, *supra* note 18, § 4.13[6][b].

88. FECL Supplementary Provision, art. 3, para. 2 and Foreign Investment Cabinet Order, art. 8, para. 5, *cited in* 6 Z. KITAGAWA, *supra* note 18, § 4.13[6][b] & n.44.

89. *See* 6 Z. KITAGAWA, *supra* note 18, § 4.04[6][b][i][A] ("Approval is normally given within one month after an application is filed with the Bank of Japan, unless the competent minister gives a contrary notice.").

90. *See id.* § 4.04[6][b][B] ("Consent can be established by, for example, minutes from a meeting of the Board of Directors or a notice from the company in the case of an allocation of newly issued stocks or shares.").

(Shōhō)[91] and securities exchange law (Shōken Torihiki Ho)[92] still require shareholder approval when new shares of an existing corporation are issued at a price that is believed "specifically favorable."[93]

B. *The Japanese Antimonopoly Law*

The presumption is misplaced that Japan has no antitrust laws or that they are completely inadequate.[94] This impression is a result of what has come to be weak enforcement of once strict antitrust laws. In 1947, the Antimonopoly and Fair Trade Maintenance Act[95] (Antimonopoly Act) was enacted under the direct urging of United States occupation authorities.[96] The motivating rationale of the legislation was to establish rules of competition "to promote free and fair competition [and] the democratic and healthy development of the national economy."[97] Among other things, the Antimonopoly Act prohibited monopolization,[98] unfair business practices,[99] and unreasonable restraint on trade[100] by businesses attempting either to fix prices or to limit customers, production technology, or suppliers in any field.[101]

Although modeled after antitrust legislation in the United States,[102] the 1947 Antimonopoly Act was much stricter than its United States

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91. *Shōhō* (Commercial Code), Law No. 42 of 1868 (as amended), *cited in* Crabb, *supra* note 75, at 102.

92. *Shōhō Torihiki Ho* (Securities Code), Law No. 25 of 1948 (as amended), *cited in* Crabb, *supra* note 61, at 102.

93. Crabb, *supra* note 61, at 102 ("In such a situation, at least two-thirds of the shareholders present at a meeting of shareholders at which more than one-half of the total shares are represented must approve of the sale.").

94. *See* E. HAHN, *supra* note 10, at 131. Many United States investors view Japan as having a loose antitrust policy because the original Antimonopoly Act of 1947 eliminated the "*per se* illegality of cartels." *Id.* at 136. For a historic overview of antitrust law in Japan, see D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN: LAWS AND POLICIES 149-54 (1973).

95. Antimonopoly Act, *supra* note 19.

96. *See* First, *Japan's Antitrust Policy: Impact on Import Competition,* in FRAGILE INTERDEPENDENCE: ECONOMIC ISSUES IN U.S.-JAPANESE TRADE AND INVESTMENT 63 (T. Pugel ed. 1986).

97. Antimonopoly Act, *supra* note 19, art. 1.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* arts. 1 & 2(6).

102. *See* Hiroshi, *Antitrust and Industrial Policy in Japan: Competition and Cooperation,* in LAW AND TRADE ISSUES, *supra* note 78, at 56. The original Antimonopoly Act was modeled after provisions of such United States antitrust statutes as the Sherman, Clayton, and Federal Trade Commission Acts. *See* E. HAHN, *supra* note 10, at 132.

counterpart.[103] Detailed rules governed mergers, interlocking directorates, and intercorporate shareholdings to prevent the occurrence of monopolies and the reoccurrence of the prewar *zaibatsu* conglomerates.[104] Yet, the severity of the 1947 Act led many Japanese business executives to view the law as presenting serious barriers to economic reconstruction efforts.[105] As a result, amendments enacted in 1949[106] and 1953[107] substantially weakened the original provisions of the Antimonopoly Act[108] and brought Japan's antitrust law closer to United States doctrine.[109] Current Japanese antitrust law consists largely of the 1953 amendments and extensive revisions in 1977,[110] which strengthened the previous law by expanding the injunctive powers of the Japan Fair Trade Commission (JFTC)[111] to prevent and discourage monopolies and illegal

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103. *See* D. HENDERSON, *supra* note 94, at 149; *see also* Ames, *supra* note 39, at 549 ("[O]n paper, [the 1947 Antimonopoly Act] is one of the strictest in the world.").

104. E. HAHN, *supra* note 10, at 132. Just after World War II, Japan took a major step in making the Japanese market structure more competitive by dissolving the *zaibatsu*—family-controlled holding companies that dominated the major portion of prewar industries—into smaller independent companies. *See* 5 Z. KITAGAWA, *supra* note 18, § 1.02[1]. Many United States economists and trade officials, however, contend that Japan's insular *keiretsu* system is simply the prewar *zaibatsu* reincarnated. *See* Yates, *Japan's Markets Still Monopolistic Maze For Foreign Firms*, Chicago Trib., Jan. 14, 1991, at § 4, p. 1, col. 1. For a more detailed description of "*zaibatsu*-derived" *keiretsu*, see D. HENDERSON, *supra* note 94, at 131.

105. *See* 5 Z. KITAGAWA, *supra* note 18, § 1.02[2][a].

106. Law No. 214 of 1949; *see* E. HAHN, *supra* note 10, at 133 (Under the 1949 amendment "[i]ntercorporate stock ownership which had previously been made illegal . . . was made legal, the rules on mergers and acquisitions were eased, and restrictions on interlocking directorates were relaxed. In addition, the [Japan Fair Trade Commission's] permission power over mergers was lessened to a prior reporting requirement.").

107. Law No. 259 of 1953. The 1953 amendment deleted certain provisions that prohibited concerted activities related to price fixing, eliminated corporate breakup over unreasonable disparities in bargaining power, and legalized the formation of certain types of cartels. *See* 5 Z. KITAGAWA, *supra* note 18, § 1.2[2][b].

108. *See* E. HAHN, *supra* note 10, at 133.

109. *See* D. HENDERSON, *supra* note 94, at 150; *see also* Ramseyer, *Takeovers in Japan: Opportunism, Ideology and Corporate Control*, 35 UCLA L. REV. 1, 37 (1987) ("As different as the statute may occasionally be from American antitrust law, the Japanese statute is hardly so onerous as to deter acquirors more than its American counterpart.").

110. *See* 5 Z. KITAGAWA, *supra* note 18, §§ 1.02[2][e], 1.03[6][f]; *see also* E. HAHN, *supra* note 10, at 133-34.

111. The JFTC was established in 1947 to enforce the provisions of Japan's Antimonopoly Act. Functioning much like the United States Federal Trade Commission, the JFTC investigates reports of antitrust violations, issues recommendation findings to violators indicating that voluntary steps may be taken to remedy violative behavior, and acts as a tribunal that issues formal decisions after hearing oral arguments from defend-

cartels.[112]

Japan's traditionally lax enforcement of its antitrust laws has rendered the legislation far less restrictive than its United States counterpart. This enforcement problem can be traced, at least in part, to the confrontational relationship between the JFTC and MITI over relaxation of the Antimonopoly Act.[113] The JFTC, which has primary jurisdiction over Japanese antitrust laws, frequently has been opposed to the historically anticompetitive, but more influential industrial policy[114] of MITI, which governs commerce, manufacturing, and mining.[115] As a result, the JFTC's record in enforcing Japan's Antimonopoly Act often reflects acquiescence to MITI's restrictive stance against both domestic and foreign competition.[116] Thus, despite its greater role in approving

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ants who fail to follow the JFTC's recommendation findings. *See* E. HAHN, *supra* note 10, at 134.

112. 5 Z. KITAGAWA, *supra* note 18, § 1.02[2][e].

113. *See* D. HENDERSON, *supra* note 94, at 150. Antitrust law in Japan has a dual purpose that tends to fall within the jurisdiction of both the JFTC and MITI. Although the JFTC regulates "monopolization," "unreasonable restraint of trade," and "unfair business practices," MITI is responsible for promoting enterprises and developing the national economy. "[T]hese two agencies have often opposed each other on policy issues stemming from their differences of perspective and function." *Id.*

114. *See* Hiroshi, *supra* note 102, at 56.

> As a rule, the ministries of the Japanese government responsible for industrial policy [MITI, for example] are organized by industry, while individual sections or bureaus exercising jurisdiction over particular industries or lines of commerce. Because the objective of each of these ministries is to protect, modernize, and promote the development of Japanese industry as a whole, their programs and policies tend to further industrial cooperation and concentration and to focus on trade associations and major enterprises rather than fostering competition.

Id.

115. MITI's industrial policy can be traced through several phases of confrontation with the JFTC over the enforcement of the Antimonopoly Act. During the 1950s, MITI attempted to weaken the Antimonopoly Act and eliminate excessive competition through legislation and administrative guidance. During the 1960s, MITI encouraged "rationalization cartels" through merger activity. Since the 1970s, however, MITI has shifted its industrial policy to support, in principle, the operation of market forces. This shift in policy does not mark the end of MITI's efforts to restrict competition. Rather, MITI necessarily has become more flexible to meet foreign criticism, the greater independence of Japanese firms, and the influence of the JFTC's antitrust policies. *See generally id.*

116. The JFTC is an independent, administrative, and quasi-judicial body responsible directly to the Prime Minister, but, unlike MITI, the JFTC does not have cabinet rank. Consequently, most Japanese do not consider the JFTC to be as powerful as MITI. *See* E. HAHN, *supra* note 10, at 132. *See generally* Oda, *An Outline of the Japanese Anti-Monopoly Law*, in JAPANESE BANKING, SECURITIES AND ANTI-MONOPOLY LAW 113, 115-124 (H. Oda & R. Grice eds. 1988).

foreign investments since the 1977 Amendment to the Antimonopoly Act, the JFTC "may well be more susceptible to domestic pressures [when reviewing a proposed foreign investment] than those agencies that have come to accept the need for more liberalization."[117]

During recent follow-up meetings to the officially concluded SII talks, the United States pressured Japan to punish cartels and accelerate its efforts to enforce antitrust laws.[118] A major problem facing the United States, however, is the general reluctance of the Japanese to initiate private antitrust suits.[119] Two reasons for the virtual absence of antitrust litigation in Japan are the exorbitant filing fees[120] and the relatively low damages associated with Japanese private antitrust actions.[121] The JFTC's recent proposal to triple the current maximum fine on illegal

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117. Reynolds, *supra* note 56, at 196, 197.

> The new activism of the [J]FTC may bode ill for those who expect significant liberalization. Administrative guidance from the [J]FTC would be clothed in language less obviously objectionable to international observers, while at the same time indirectly attaining the same restrictive goals. A switch to [J]FTC guidance, away from the previous [MITI] locus, also increases the lobbying power of the insular domestic interests that have been the biggest opponents of liberalized foreign investment.

Id.

118. *See* Chipello & Brauchli, *U.S. Officials Pressure Japan on Cartels, Markets*, Wall St. J., Jan. 21, 1991, at A7, col. 6.

119. *See* Yates, *supra* note 104, § 4, p. 4, col. 2 ("Last year in the U.S., between 800 and 900 private antitrust suits were filed, according to one U.S. trade official. In Japan there were just six."). An Assistant United States Attorney for the Antitrust Division stated recently that "[t]here hasn't been a criminal case brought under the Japanese Anti-Monopoly Law in 16 years" since a 1974 case involving an oil price cartel. *USTR Eyes Japan for Sherman Anti-Trust Law*, Reuters, Jan. 21, 1991 (LEXIS, Nexis library, busrpt file) [hereinafter *USTR Eyes*]. Nevertheless, the JFTC reported 270 antitrust violations cases in 1990, up from 180 in the previous year. *FTC Reports Another Record Number of Mergers in '89*, Kyodo News Service, Dec. 14, 1990 (LEXIS, Nexis library, omni file).

120. *See* Yates, *supra* note 104, § 4, at 4, col. 3 (" 'The Japanese take pride in the fact that their society is not inherently litigious,' said a [United States] trade official. 'Okay, we accept that. But if that's the case, then why not remove the enormous financial barriers to private antitrust litigation? Could it be that the average Japanese isn't repelled by litigation as some in Japan think?' "). According to United States officials, reducing the filing fees for private Anitrust actions also would endow Japanese shareholders with a greater voice in corporate decisionmaking and would help dismantle the *keiretsu* system. *Id.*

121. *See* First, *supra* note 96, at 66 (Whereas in the United States victorious private plaintiffs are entitled to treble damages, the remedy for private antitrust suits in Japan is only single damages and requires prior action by the JFTC.); *see also* E. HAHN, *supra* note 10, at 132 & n.16.

cartels to six percent of illegal profits has been criticized by the United States as an ineffective deterrent against antimonopoly violations and well below the surcharges adopted in the United States and the European Community.[122] To eliminate the differences in antimonopoly law enforcement between the United States and Japan, the United States Department of Justice is considering the possibility of extending the scope of the United States Sherman Antitrust Act to include Japanese cartels.[123] Another solution, currently under study, is the development of a more effective international antitrust law to govern all major trading nations and to help equalize competition between Japanese and foreign firms.[124]

C. *Administrative Guidance: The Relationship Between Japanese Government and Business*

The foreign investor seeking to enter the Japanese market must be aware of the close relationship between Japanese government and Japanese business that frustrates both foreign and domestic businesses alike. This relationship blossomed early in the postwar period when the Japanese government actively stimulated domestic industry in an attempt to

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122. *See* Chipello & Brauchli, *supra* note 118, at A7, col. 6; *see also* Yates, *supra* note 104, at § 4, p. 4, col. 2. Whereas antitrust violations in Japan currently are punished by fines ranging from 1.5% to 2% of relevant sales, United States guidelines call for fines of 30% to 50% of affected sales. The first 10% recovers the illicit gain and the additional 20% to 40% is considered a penalty. *Id.*

123. *See USTR Eyes, supra* note 119. Though United States Deputy Trade Representative Linn Williams stated that "[w]e are particularly concerned about applying . . . [the Sherman Antitrust Act] to Japan," James Rill, United States Assistant Attorney General for Antitrust, denied that the Sherman Antitrust Act was "targeted at Japan or any particular nation." *Id.* According to Rill, the legislation would be directed more generally at violations by foreign companies that occur outside the United States, but affect the United States market. *Id.*

124. *See Questions on U.S. Competitiveness Blurred by Increasing Globalization of Corporations*, 8 Int'l Trade Rep. (BNA) No. 4, at 126 (Jan. 23, 1991). As Robert Lawrence, a senior fellow in The Brookings Institution's economic studies program, stated recently "[t]here is a fundamental contradiction between a global economy and a system of national [antitrust] rules." *Id.* According to Lawrence, a good international model might be the European Community's new merger law, "which combines a system of national enforcement—aimed at smaller mergers—with an international system of review for large transactions affecting the Community as a whole." *Id.*; *see also ABA Section Forms International Committee Aimed at Creating Antitrust Harmonization*, 8 Int'l Trade Rep. (BNA) No. 1, at 29 (Jan. 2, 1991). Recently, the American Bar Association's section of Antitrust Law announced the formation of an international committee that will study ways to close the gaps in worldwide antitrust enforcement. *Id.*

compete with industry in Western Europe and the United States.[125] Validating this tradition of government influence over private industry in Japan, the 1979 FECL retains broad informal regulatory barriers known as *gyōsei Shōhō* (administrative guidance).[126] Under this regime, Japanese bureaucrats, often without public disclosure, informally[127] interpret statutes, advise companies whether actions are allowed under Japanese law,[128] and encourage either private parties or whole industry groups to take certain actions toward administrative objectives.[129] This advice has no legally binding force on the regulated parties, yet compliance with government recommendations generally is assured[130] because

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125. *See generally* Hiroshi, *supra* note 102, at 59-61 (tracing Japan's close relationship between business and government from its roots in the Meiji period (1867-1911) through the industrial ministries' postwar reform to its present restriction on competitive activity). One commentator has remarked that "Japan's export-led growth policy was not only defensible but sensible as well in the early postwar period. . . . [T]he government stayed with it long after huge trade surpluses set off warning signals all over the world." Smith, *supra* note 2, at 51.

126. For a detailed commentary of administrative guidance, see Smith, *The Japanese Foreign Exchange and Foreign Trade Control Law and Administrative Guidance: The Labyrinth and the Castle*, 16 LAW & POL'Y INT'L BUS. 417 (1984).

127. Not only is administrative guidance informal, but it is also generally oral. "There are no publicly available official records of the content of administrative guidance." *Id.* at 418 n.6. Rather than "writing a legalistic letter, [ministry officials] make requests and exhortations for compliance on the phone or over a cup of tea." Schoenberger, *Information-Rich Japan Feels Pressure to Lift Veil of Secrecy from Government*, L.A. Times, Nov. 5, 1990, at A14, col. 1.

128. Significantly, administrative guidance confers extensive law-making powers on Japans bureaucrats because Japanese laws, which originate in the ministries, generally are drafted in abstract terms, leaving many questions to be settled by subsequent ministerial regulation. *See* D. HENDERSON, *supra* note 94, at 200. Charles Stevens, head of the Tokyo office of Coudert Brothers, comments:

> Basically, the law is written so you cannot understand it . . . . A typical statute will say you cannot do something except in circumstances prescribed in a certain cabinet order. The cabinet order says you cannot do it except in circumstances prescribed by a ministerial ordinance. In effect the law is designed so you have to ask the [competent ministry] what it means.

Fingleton, *The Gaijin and Gyosei Shido*, INSTITUTIONAL INVESTOR, Oct. 1990 at 71 (int'l ed.).

129. *See* Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 923 (1984).

130. *See* Smith, *supra* note 126, at 426; *see also* Hiroshi, *supra* note 102, at 71 ("Although compliance is technically voluntary, guidance often becomes compulsory because of the substantial power wielded by the administrative authorities behind it."); *see also* Note, *supra* note 70, at 586 (" '[A]dministrative guidance'. . . is an unfortunate label because the plain meaning of 'guidance' implies an option to reject a recommenda-

any regulated party that fails to cooperate with ministry guidance may be treated adversely in future situations through "indirect, but often painful sanctions."[131] In addition, the secrecy surrounding much of the guidance process endows Japanese bureaucrats with great flexibility to favor "those players whose activities are deemed particularly beneficial to Japanese industrial policy."[132] Significantly, Japanese courts are extremely deferential to the "bureaucracy's sense of the need for flexibility in fulfilling important administrative tasks" and, therefore, are hesitant "to intrude too quickly to overturn administrative action."[133]

Foreigners unfamiliar with the prevalence of bureaucratic rulemaking in Japan's private sector are likely to find much of the administrative guidance process unfair and contradictory to Western notions of separation of powers.[134] A growing number of Japanese advocates also are questioning Japan's bureaucratic regime and calling for reform of the ministries' archaic information disclosure system.[135] Nonetheless, most

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tion. Investors, however, have no choice but to accept administrative guidance."). *But see* Smith, *supra* note 2, at 53. Though "[g]overnment planners try to figure out which industries will grow fastest . . . stimulat[ing] investment with tax or fiscal incentives . . . . [B]usiness listens only when it is convenient. Mitsubishi bought 51% of the Rockefeller Group despite a Ministry of Finance warning not to irritate Americans by acquiring showy landmarks." *Id.*

131. Inoue, *Tougher FTC may Strengthen MITI*, Nihon Keizai Shimbun, July 7, 1990 (LEXIS, Nexis library, jej file). "One type of sanction is a formal negative disposition of a party's official submission of an application for a particular transaction. Informal sanctions include future noncooperation by a ministry with a party of negative dispositions in other transactions that a party might pursue." Smith, *supra* note 126, at 426. *But see* Haley, *Administrative Guidance Versus Formal Regulation: Resolving the Paradox of Industrial Policy*, in LAW AND TRADE ISSUES, *supra* note 78, at 107, 122 (Because administrative guidance takes the form of advice and wishes, absent formal controls, ministerial guidance leaves room for manipulation by those who are regulated.).

132. Fingleton, *supra* note 128, at 71. "[S]ecrecy is essential to the *gyosei shido* process because it facilitates selectivity . . . . If it becomes known what the MOF has told a particular bank in a particular case, others can use that as a precedent . . . . The bureaucrats would quickly lose most of their room to maneuver." *Id.*

133. Young, *supra* note 129, at 924. Although Japan instituted a cabinet, law courts, and a parliament between 1870 and 1890, "it was always understood that these institutions were subordinate to the will of the bureaucrats, who were entrusted by the nation with no-questions-asked powers to regulate the economy virtually free from interference from the courts, politicians or the press." Fingleton, *supra* note 128, at 71.

134. *See* D. HENDERSON, *supra* note 94, at 204.

135. Commenting on the secrecy of Japanese administrative procedures, Yoriaki Narita, a Yokohama National University professor, stated recently, "[t]he heavier a subject is, the farther away from people the discussion gets and the fewer records are left." Schoenberger, *supra* note 127, at A14, col. 1. Professor Narita continued, "Our corporate management may be a model for the 21st Century, but Japan's administrative pro-

Japanese welcome the notion of ministerial guidance as a reasonable and effective regulator of private affairs.[136]

The United States government recently demanded that the Japanese enact legislation[137] to implement its commitments under the SII report that would make its government-business relationship "more transparent and pro-competitive."[138] Japanese commitments include efforts to disclose administrative guidance reports, except where national security is concerned, and to prohibit the use of ministry "visions" to favor certain companies.[139] The United States government is also concerned that Japanese bureaucrats currently are projecting their industrial policy abroad to the detriment of United States businesses.[140] In response, some observers in the United States are advocating commensurate regulatory strategies over private industry in this country for the benefit of United States firms.[141]

IV. Extralegal Barriers in Japan

A. *Affiliated Corporate Groupings*

In addition to barriers imposed by Japanese governmental entities, Japanese culture imposes substantial structural restrictions on foreign investment. One example of such structural restrictions is collusive business practices of insular corporate groups known as *keiretsu.* The *keiretsu* system, which has its origins in part in Japan's prewar *zaibatsu*,[142] is comprised of families of firms that are bound by cross-

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cedures are still in the late 1800s. When it comes to politics, we're still in feudal times." *Id.*

136. *See* Reynolds, *supra* note 56, at 198. "The Japanese business community embraces administrative guidance as a necessary and respected regulator . . . . The homogeneous and nonlitigiousness of Japanese society further encourages cooperation and concerted effort between government and industry." *Id.* 6 Z. Kitagawa, *supra* note 18, § 1.14[1][b].

137. *See U.S. Officials Call For Higher Fines on Cartels*, Kyodo News Service, Jan. 10, 1991 (Lexis, Nexis library, omni file).

138. *See U.S.-Japan Releases Final Report on SII Following Extended Negotiations*, 59 Antitrust & Trade Reg. Rep. (BNA) No. 1473, at 26 (July 5, 1990).

139. *Id.*

140. *See* Fingleton, *supra* note 128, at 71.

141. According to Clyde Prestowitz Jr., a former official with the United States Department of Commerce, "[b]ecause we do not have an industrial policy in America, Japanese policy prevails by default . . . . If the Japanese government is working to make its banks preeminent, we have to respond with a strategy that aims to achieve symmetry." *Id.*

142. *See Japan's Industrial Structure; Inside the Charmed Circle*, Economist, Jan. 5, 1991, at 54 (U.K. ed.) [hereinafter *Charmed Circle*].

shareholding, interlocking directorates, and other financial ties and that cooperate with each other to enhance the group's economic power, to limit competition from outside companies, and to protect the members of the group from hostile mergers or acquisitions. Japan's six largest *keiretsu*[143] control over twelve thousand firms with their total sales equivalent to one-quarter of the Japanese gross national product.[144] Among other things, Japan's *keiretsu* system provides its members with the benefits of board representation as well as group coordination in marketing efforts, investment plans, employment practices, research and development, and even political donations.[145] The importance of these *keiretsu* families is so great that a member of a *keiretsu* first will consult with other members before beginning any important venture.[146]

Typically, a Japanese *keiretsu* includes a cohesive vertical chain of manufacturers, their suppliers, and their banks,[147] all joined inextricably by common ownership, management, exclusionary distribution networks, and friendships.[148] In the Japanese auto manufacturing industry, for ex-

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> The origins of the *keiretsu* go back to the rise of Japan's great banking families in the 19th century. . . . The old-style conglomerates based around a bank which emerged from the pre-war *zaibatsu* differ markedly from newer groups that have sprung up since the second world war. The former . . . tend to be more loosely affiliated and more diversified. The latter are more specialised, and usually based on a single large manufacturer.

Id.

143. The six most prominent Japanese *keiretsu* are the Mitsui, Mitsubishi, and Sumitomo trading groups and the Fuji, Sanwa, and Dai-Ichi Kangyo banking empires. *Id.* As of 1987, these six groups "command[ed] over 40 percent of the total capital employed by Japan and 30 percent of the total assets." Crabb, *supra* note 61, at 107 n.69. In addition, "[t]here are seven *keiretsu* organized around large manufacturers (and one railroad): the Nippon Steel, Toshiba, Hitachi, Toyota, Nissan, Matsushita, and Tokyo groups." Crampe & Benes, *supra* note 64, at 69 n.133.

144. *See Charmed Circle, supra* note 142, at 54. Seven companies in Mitsubishi's forty-two member group appear in the top 100 of Business Week's "Global 1000" ranking of international companies. *See* Cross, *Corporate Profile: Americans Tackle an Old Corporate Enemy in Japan*, The Independent, Mar. 26, 1990, at 23. "These seven, if combined, would be worth nearly $150 [billion], or three times that of General Electric, the most valuable company in the U.S." *Id.*

145. *See* Reynolds, *supra* note 56, at 176; *see also Charmed Circle, supra* note 142, at 54.

146. *See* D. HENDERSON, *supra* note 94, at 130.

147. *Keiretsu* groups frequently include a lead bank for the other members of the group. As a result, Japanese companies can take financial risks that often are not available to foreign firms doing business in Japan. *See* J. ABEGGLEN & G. STALK JR., KAISHA, THE JAPANESE CORPORATION 61-62 (1985).

148. A *keiretsu* trading company, for example, will provide members of the group with insurance, warehousing, transportation, and financial services. *See* Reynolds, *supra*

ample, each major automaker serves as a *keiretsu* parent for parts suppliers that work almost exclusively for that automaker and, therefore, have an advantage over outside firms for future business with the automaker.[149] Under the Toyota *keiretsu* umbrella, for instance, is a tightly knit pyramid of subcontractors and component suppliers, including Koito.[150] This vertical distribution organization, according to United States officials, not only limits competition from both within Japan and abroad, but also benefits management more than shareholders and forces the Japanese to pay much more for goods than consumers in other major trading nations.[151] Deprived of access to the *keiretsu*'s distribution network, foreign companies must build alternative support systems to enter and remain successful in Japanese markets.[152]

Recently, the United States, as part of SII, has taken a much tougher position to break up Japan's *keiretsu* system. The United States has requested that Japanese firms which are members of "business groups" publish the minutes of their monthly meetings with corporate chief executives.[153] Moreover, United States business executives have complained to Congress not only that the *keiretsu* system excludes United States competitors from Japan's markets, but also that it is currently being transplanted into the United States auto and electronics industries.[154]

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note 56, at 176.

149. *See* Risen, *FTC Probing Japanese Auto Firms, Suppliers*, L.A. Times, June 13, 1990, at D1, col. 6. United States negotiators "charge that the *keiretsu* system thus effectively blocks American auto parts firms from competing in Japan." *Id.*

150. *See Charmed Circle*, *supra* note 142, at 54.

151. *See* Yates, *supra* note 104, § 4, at 4, col. 1.

152. *See* Reynolds, *supra* note 56, at 176; *see also* Yates, *Japan's 'Keiretsu' Keeps Out U.S. Investors*, Chicago Trib., Feb. 24, 1991, § 7, at 1, col. 3. According to one United States trade official, "Japanese companies can go to the U.S. and buy our biggest and smallest companies and plug immediately into distribution networks and start turning a profit, but American companies simply cannot do the same thing in Japan." *Id.* at 2, col. 3.

153. *See* Cross, *supra* note 5, at 25. According to the Japanese, this request amounts to a demand to stop such meetings. *Id.*

154. *See, e.g.*, *Antitrust Hearings*, *supra* note 32, at 52 (statement of R. Terren Dunlap, Chief Executive Officer, Go-Video, Inc.).

> Keiretsu's bottom line toll on our industry may be summarized by, (1) the ten-fold growth in the US-Japan auto parts trade deficit in the 1980s, (2) the less than one percent US penetration of Japan's $65 billion plus auto parts markets, (3) Japanese control of roughly 50 percent of the content of all cars sold in America, and (4) 23,000 net US supplier jobs lost in 1988 alone, attributed by GAO solely to Big Three car production, with 88 percent of U.S. source parts being displaced by transplant assemblers using over 60 percent imported parts.

Id. at 62 (statement of Julian C. Morris, President, Automotive Parts & Accessories

Pickens has been the most persistent of these executives. Testifying before a Senate subcommittee, Pickens noted that the actions of Japan's auto manufacturing *keiretsu*, "both in Japan and in the United States, raise antitrust concerns."[155] As a result, the United States Federal Trade Commission (FTC) agreed last year to investigate the *keiretsu* system for alleged anticompetitive practices in the United States automotive industry.[156]

Nevertheless, defenders of the *keiretsu* argue that most are not as exclusive as United States critics allege.[157] According to one commentator, many Japanese *keiretsu* are no different than large vertically integrated corporations in the West such as Ford, General Electric, Daimler-Benz, Siemens, or Philips.[158] Furthermore, many Japanese view the United States growing criticism of the *keiretsu* system as a broader attack on Japanese culture.[159]

Even so, some Japanese citizens are beginning to question the cross-shareholding *keiretsu* policy.[160] One private survey of 2500 Japanese suppliers revealed their general unhappiness with the *keiretsu* system.[161] Despite the growing public sentiment against Japanese corporate grouping both in Japan and the United States, the prospects for dismantling

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Assoc.).

155. *Id.* at 59 (statement of T. Boone Pickens).

156. *See* Chappell, Keiretsu *Gives Suppliers Part-Ache*, AUTOMOTIVE NEWS, June 11, 1990, at 24.

157. *See Charmed Circle*, *supra* note 142, at 54. According to Kenichi Imai, an industrial policy expert at Hitotsubashi University in Tokyo, much of the criticism and generalizations regarding *keiretsu* "as a group, makes little sense" because "the term keiretsu is used to refer to so many different kinds of industrial groups in Japan." *Id.*

158. *See id.*; *see also* Crabb, *supra* note 61, at 107 ("To a certain extent of course, personal relationships and ownership ties are not unique to Japan; such relationships are common among United States companies and their subsidiaries. In Japan, however, the groups tend to have a broader base and the ties between the companies within the group tend to be more functional.").

159. *See* Cross, *supra* note 5, at 25. *But see U.S. Investor Pickens Calls Keiretsu Dangerous, Says They Should Be Outlawed*, 7 INT'L TRADE REP. (BNA) No. 26, at 967 (June 27, 1990) (quoting Pickens' statement that *keiretsu* are cartels and not a legitimate part of Japanese culture).

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> Mr. Imai questions whether keiretsu companies really need to hold such large quantities of each other's shares. Nor, says Mr. Imai, should they be allowed to write off the exorbitant sums they spend on promoting group-wide harmony. The 5 trillion yen ($35 billion) that managers in Japanese companies spend annually on entertaining one another is more than they pay out between them in dividends.

Charmed Circle, *supra* note 142, at 54.

161. Chappell, *supra* note 156, at 24.

the *keiretsu* system in the near future appear slim.[162]

B. *Cross-Shareholding*

One of the byproducts of affiliated corporate groupings in Japan is that *keiretsu* members frequently hold the shares of other members, including banks, insurance companies, and other affiliated firms.[163] This system of cross-shareholding reduces the shares available for purchase on the market by investors outside of the circle of the *keiretsu*, including potential foreign purchasers.[164] In 1990, for example, "[l]argely because of the elaborate network of cross-shareholding arrangements among Japan's listed companies, only about a third of the shares of the Tokyo Stock Exchange" were traded actively.[165]

One reason for the emergence of cross-shareholding is the restriction, under Japanese law, against companies buying back their own shares as a defense against hostile or unwelcome takeovers.[166] As an alternative, managers of Japanese targets will appeal to, or have a prior understanding with, their stable or friendly shareholders either to maintain or to increase their ownership stake to prevent a takeover bid.[167] By doing so, the target can force the unwanted acquirer to pay inflated prices for any additional stock.[168] Moreover, there will be a reluctance by a *keiretsu*

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162. One commentator noted that perhaps the best alternative for the short term would be to put "more teeth into Japan's antitrust laws [that] would at least force the firms to pay a higher price for continuing their exclusive corporate tie-ins." Yates, *supra* note 104, § 7, at 4, col. 1.

163. *See supra* notes 40-41 and accompanying text.

164. *See Tokyo Report, supra* note 40.

165. Chandler, *supra* note 11, at R7, col. 6. Whereas all of the shares traded on the New York Stock Exchange are estimated to change hands every three years, over 70% of the equity in nearly 2000 firms listed on the Japanese stock exchange is owned by stable institutional shareholders and virtually never is traded. *See* Jameson, *supra* note 22, at D1, col. 3. This figure consists of approximately 45.6% ownership by financial institutions and 24.9% by business firms. *See Tokyo Report, supra* note 40.

166. *See* Sieg, *Japan Firms Want Stronger Defense Against Unwelcome Investors*, Reuters, Dec. 13, 1990 (LEXIS, Nexis library, reuter file). According to a report released by the Japan Federation of Economic Organizations (*Keidanren*) in 1990, "[t]he practice of mutual shareholding serves much the same purpose as the acquisition by U.S. corporations of their own shares and the existence of the holding company in the U.S., both prohibited in Japan, by allowing companies to defend themselves against hostile M & A's and to maintain security in business management . . . ." *Id.*

167. *See id.* For example, Honshu Paper Co., Ltd. recently made such a plea to its friendly shareholders to insure that Oei Hong Leong, an investor from Singapore who then had options on enough Honshu shares to become the firm's major shareholder, could not buy more shares. *Id.*

168. *See* Ramseyer, *supra* note 109, at 22. By issuing even small blocks of shares to

member company that owns shares in a target company to sell to a hostile bidder when the *keiretsu* member may need similar protection from a hostile bidder in the future.[169]

One recent example of protection within *keiretsu* is Orix Corporation, Japan's largest leasing firm, which announced in January 1990 that it would purchase all the remaining outstanding shares of its financially troubled subsidiary Orix Ichoika Corporation to transform it into a wholly-owned subsidiary.[170] Orix's stock purchases were motivated by a fear that its subsidiary would be "carved up piece by piece" by outside acquirers.[171] According to Orix President, Yoshihiko Miyauchi, "[i]f a subsidiary needs financing, its parent company should extend help to it."[172]

Generally, the practice of cross-shareholding in Japan is not for investment purposes because its occurrence is pervasive even though stock dividends are small. Rather, *keiretsu* members will hold shares in other member companies to secure relations and future business among the group. By holding a nineteen percent interest in Koito, for example, Toyota maintains a dependable supply of auto parts at reportedly preferred prices.[173] These low prices apparently bestow upon Toyota "hidden dividends" from Koito despite the plunge in the firm's stock value since 1989.[174] In addition, banks use financing of companies in which they own shares to recover profits, and life insurance companies will use their privileges as stockholders to acquire large group insurance contracts.[175]

Recently, the level of cross-shareholding in Japan has begun to decline as a result of efforts to review the practice under SII and increased fund raising through the Japanese stock market.[176] Moreover, a new Japanese disclosure regulation modeled after Section 13D of the United States Securities and Exchange Act of 1934, which many believe was adopted because of widespread disapproval of Pickens' controversial stake in Koito, has increased the visibility of Japan's complex cross-ownership

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friendly institutional shareholders, the target company can manipulate stock prices and discourage unfriendly acquisitions. *See Tokyo Report, supra* note 40.

169. *See* Crabb, *supra* note 61, at 108; *see also* Ramseyer *supra* note 124, at 23.

170. *Investor Awareness, M & A Worries Put Firms on Guard*, Nihon Keizai Shimbun, June 16, 1990, (LEXIS, Nexis, jej file) [hereinafter *M & A Worries*].

171. *Id.* at col. 3.

172. *Id.*

173. *See supra* note 32 and accompanying text.

174. *See Antitrust Hearings, supra* note 32, at 57.

175. *See M & A Worries, supra* note 170.

176. *See Tokyo Report, supra* note 40.

system.[177] Nevertheless, in the majority of Japanese companies, the practice of cross-shareholding prevails in large part as a result of both the growing number of firms in financial crisis and the need to protect against increasingly common corporate takeovers in Japan.

C. *Use of Debt Financing*

Penetration of the Japanese market by potential foreign acquirers is made difficult by the extensive use of debt financing by Japanese companies. United States firms generally are able to obtain half of their financing through debt,[178] but Japanese firms, on average, have twice as much debt as equity.[179] This indicates that Japanese lenders are willing to bear more risk than United States banks, and this in turn provides Japanese firms with greater access to financing without surrendering control through the sale of equity.[180]

Ordinarily, the Japanese firm finds protection from unwanted investors in its financial lender,[181] which often is both one of its shareholders and the principal bank for other affiliated companies.[182] This credit financing arrangement has two principal effects on the potential Japanese target company. First, the debt structure of Japanese firms provides many lenders with substantial control over their corporate clients' managerial decisions. Naturally, Japanese lenders will find it advantageous to block takeover bids by foreigners who threaten to introduce their "own

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177. *See* Thomson, *supra* note 35, at 27, col. 3. *But see* Gillespie, *supra* note 35, at 87, col. 4 (noting that the new disclosure law arose more generally as a concession to United States pressure that Japanese companies make public their cross-shareholding arrangements). Within a week after the new disclosure law went into effect, the MOF learned of previously unknown holdings by widely ranging entities such as the conservative Matsushita group and underworld speculator groups. Thomson, *supra* note 35, at 27, col. 3.

178. *See* McNees, *Financial Market Structure: Implications of Regulations for Competitiveness,* 14 ISSUES IN BANK REGULATION 2, 12 (Fall 1990) (United States firms generally have a debt-to-equity ratio of 1:1.).

179. This is a debt-to-equity ratio of 2:1. This figure has been estimated as high as 85% debt. *See* D. HENDERSON, *supra* note 94, at 241; *see also* Note, *supra* note 70, at 606 n.176 (Japan's banks provide more than 80% of the financing for Japanese companies.).

180. *See generally* J. WESTON & E. BRIGHAM, ESSENTIALS OF MANAGERIAL FINANCE 290-92 (8th ed. 1990).

181. *See* D. HENDERSON, *supra* note 94, at 241.

182. Though the amended Antimonopoly Act, *supra* note 19, prohibits banks from acquiring more than 5% of another company, banks still wield considerable power over Japanese companies, *see* Crabb, *supra* note 61, at 112.

supply of capital and . . . agenda."[183]

Second, Japanese firms can take financial risks that generally are not available to foreign firms trying to compete in Japan because of the relationships Japanese companies have with their lenders.[184] These lenders reduce corporate risks "by establishing close relationships with their clients through shareholdings and access to better [financial] information,"[185] which are "reinforced by continuous financial dealings."[186] Western companies, lacking ties to these financial institutions, generally must look to banking sources in the United States for raising capital, which generally will not provide such advantageous treatment. Nevertheless, there are signs that Japanese companies are beginning to lower their debt levels and to rely increasingly on holdings of cash and bank deposits for financing.[187] This weakening of the financial link between banks and their clients may result in an increased willingness by banks to tender their stock holdings in their clients to outside investors.[188]

D. *Corporate Ownership*

As a matter of commercial law, a Japanese company belongs to its shareholders who provide the capital, but in reality, Japanese companies often "become the property of workers, managers, and the community."[189] Whereas in Western companies ownership of a substantial equity stake will generally bestow control over the firm, "the Japanese management system appears to be relatively free from shareholder interference."[190] Japanese companies tend instead "to engage in closed-door management"[191] in which the shareholder often is disenfranchised.[192] It

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183. *Id.* at 113. Alternatively, banks might bargain with an acquiror for a large share of any potential gain from a successful takeover bid. *See* Ramseyer, *supra* note 109, at 27-28.

184. J. ABEGGLEN & G. STALK JR., *supra* note 147, at 161.

185. *Id.*

186. *Id.* at 166.

187. *See id.* at 151; *see also* Sterngold, *Hanwa Suffers a Debt Hangover*, N.Y. Times, Oct. 24, 1990, at D12, col. 3 (Hanwa Co., a Japanese steel-trading firm, pushed its debt-to-equity ratio to 1474% in 1990—up from 540% five years earlier—before higher interest rates and the plunge in the stock market forced the company to turn to equity for financing.).

188. *See* Ames, *supra* note 39, at 552.

189. *Shareholders, Environment Have Low Priority*, The Nihon Keizai Shimbun, Sept. 15, 1990 (LEXIS, Nexis library, omni file) [hereinafter *Low Priority*]; *see also* J. ABEGGLEN & G. STALK JR., *supra* note 147, at 183.

190. Crabb, *supra* note 61, at 111.

191. *Low Priority*, *supra* note 189.

192. *See Ames, supra* note 39, at 552 ("In many Japanese companies, nonsharehold-

is typical for a Japanese company to attach more importance to social responsibilities, the welfare of its workers, and profit savings for business expansion than to its return to shareholders.[193] Because Japan's corporate structure has no outside director system,[194] directors are very loyal to management and will resist unwanted takeover bids either by adopting protective provisions to the company's by-laws or by issuing additional shares to allies without shareholder approval.[195] Further, Japanese law traditionally has required minimal disclosure from companies concerning either their share exchanges or financial status. Therefore, both Japanese and foreign investors frequently have had little "rational basis for selecting [or selling] stocks."[196] Nevertheless, the barrier of management control in Japan gradually has weakened as the normally passive shareholder is replaced by shareholders, like T. Boone Pickens Jr., who want to participate actively in the management of the firms.[197]

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ers or holders of only a few shares exercise an inordinate degree of control . . . . Many companies are controlled by other companies that own minimal stock or none at all, through 'old boys' (alumni) placed in key positions on the board of directors or as president."). This situation has prompted T. Boone Pickens to liken Japan's corporate culture to "a club and cartel" that resembles the trusts which controlled United States firms 100 years ago. Sieg, *T. Boone Pickens Takes on Japan's Corporate Culture*, Reuters, June 28, 1989 (LEXIS, Nexis library, busrpt file).

193. A Nihon Keizai Shimbun survey of corporate presidents received the following responses as their company's highest priority: "Profit accumulation for business expansion, 38.2%; contribution to society, 23.6%; life and welfare of worker, 16.4%; returns to shareholders, 3.6%; environmental considerations, 0%". *Low Priority*, *supra* note 189; *see also* J. ABEGGLEN & G. STALK JR., *supra* note 147, at 187 ("Dividend yields as a percent of market value of Japanese shares are low, typically one to two percent.").

194. *See* Ames, *supra* note 39, at 551 ("Directors do not come from the outside to represent shareholder interests, but rise from within the company, and are essentially equal to management."); *see also* Crabb *supra* note 61, at 110-11 ("Directors are chosen by top management from the ranks of corporate executives . . . . The directors are not likely to vote in favor of any proposition that will eliminate themselves from the company or betray the officers who appointed them.").

195. Crabb, *supra* note 61, at 111.

196. Sterngold, *Veil of Corporate Secrecy is Lifted Somewhat in Japan*, N.Y. Times, Dec. 28, 1990, at D1, col. 1. Significantly, Japan's recent adoption of a new disclosure law, which will oblige investors to report holdings of 5% or more in a company, also will require companies to report accurately their portfolio gains and losses. As a result, shareholders now will be better equipped to "calculate the real net worth of a . . . company." *Id.*

197. *See infra* notes 222-28 and accompanying text (discussing Shigeru Kobayashi's attempts to perform a hostile takeover of two mid-size Japanese supermarket chains).

E. *The Employment System*

The Japanese system of employment is another factor that traditionally has hindered foreign acquisitions of Japanese companies.[198] Unlike their Western counterparts, Japanese employees are enticed by the systems of lifetime employment as well as promotion and pay by seniority[199] and typically expect to work for one company for life.[200] Japanese employees generally develop an extreme loyalty to management, placing the interests of the company above personal goals.[201] Further, because the Japanese view the company more like family[202] than simply a means to earn a living, the sale of a Japanese firm, particularly to foreigners, is troubling and connotes risk and job insecurity.[203]

There is recent evidence, however, that the Japanese employment system is changing. Companies have reduced their enthusiasm for new graduates for career employment, and are looking for more experienced employees from other firms.[204] At the same time, Japan is experiencing an increasing labor shortage.[205] As a result, Japanese employees increas-

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198. Approximately 30% of Japanese employees have lifetime jobs; most of these are white-collar workers. *Lifetime Employment in its Death Throes?*, Nihon Keizai Shimbun, Mar. 24, 1990, at 27 (LEXIS, Nexis library, omni file) [hereinafter *Death Throes*].

199. For discussions of the genesis and several pitfalls of Japan's promotion and pay by seniority system, *see* J. ABEGGLEN & G. STALK, JR., *supra* note 147, at 210; Crabb, *supra* note 61, at 114.

200. *See* Note, *supra* note 70, at 581.

201. One reason for employee loyalty in Japan is that Japanese firms "draw no sharp distinction between managers and employees." Reich, *Labor Law, Reform, and the Japanese Model* (Book Review), 98 HARV. L. REV. 697, 706 (1985); *see* Ames, *supra* note 39, at 551 ("Corporate management in Japan is not considered a different species from labor; in fact, the term for managers is 'workers who manage' (*kanri rodosha*).")

202. Ames, *supra* note 39, at 551 (The Japanese view their companies as "organic collections of people, almost families, rather than as collections of physical assets or as shares of stock.").

203. Interestingly, Japanese employees will view the sale of a company suspiciously even when the sale promises greater opportunities. This is the case because "the Japanese system of employment is a trade-off of opportunity for security. It provides security above all, at the loss of opportunity for unusually high reward." J. ABEGGLEN & G. STALK JR., *supra* note 147, at 209-10.

204. *See Death Throes, supra* note 198, at 27.

205. According to one commentator, the biggest challenge for Japan in the 1990s "could be a critical shortage of labour." Wagstyl, *Economic Costs of the Human Factor*, Fin. Times, Feb. 20, 1991, § 1, at 14 col. 3 [hereinafter *Economic Costs*]. This shortage is the result of a combination of factors including Japan's current economic expansion and a decline in the birth rate. *Id.*

ingly are changing jobs,[206] viewing companies as fungible, and placing personal interests before the company.[207] Moreover, a new generation of Japanese youth, referred to as *shinjihrui* or the "new race," display new individualistic attitudes and greater interest in making more money with less work.[208] These changes in thinking could create greater access to foreign firms that, compared to their Japanese counterparts, offer higher wages, longer vacations, and shorter work hours.[209]

F. *Unions*

Because Japanese unions are aligned with companies, rather than crafts or industries,[210] they share common objectives with management, making foreign takeovers difficult.[211] Japanese unions include both blue and white collar employees,[212] and a large percentage of company directors are former union members.[213] Management "held earnest discussions with labor unions and directed vigorous communication activities toward individual employees" at the end of World War II when labor-management relations were in disarray.[214] Significantly, Japanese company executives receive much lower salaries than executives in the

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206. *See Death Throes, supra* note 198, at 27. "A Labor Ministry survey on employment trends in Japan showed that some 2,483,000 workers switched jobs in 1988, a 50% increase over five years earlier." *Id.* Though this number seems high, it may be deceptive because "only 3.5 percent of workers in 1989-90 switched companies." *Economic Costs, supra* note 205, § 1, at 14, col. 3.

207. *See Death Throes, supra* note 198, at 27. Almost unthinkable several years ago, "moonlighting" by Japanese employees now is more common. *See id.*

208. Kotkin, *Those Lazy Japanese; The New Salaryman May Care More About Himself Than Work,* Wash. Post, Dec. 30, 1990, at C3, col. 1. A survey of students by the Economic Planning Agency found that only 15% "planned to follow the traditional pattern of taking a job with a company after college and sticking with it for life." *Id.* at C3, col. 3.

209. *See* Elemans, *The Gift Economy; Access to Japan,* Whole Earth Review, Dec. 22, 1990 (Winter) (LEXIS, Nexis library, omni file).

210. *See* Crabb, *supra* note 61, at 114; *see also* Reich, *supra* note 201, at 706; J. ABEGGLEN & G. STALK JR., *supra* note 147, at 205.

211. Reich, *supra* note 201, at 706; *see also* Moffett, *Japan's Kamikaze Businessmen are Working Themselves to Death,* Reuters, Mar. 12, 1991 (LEXIS, Nexis library, reuters file).

212. Crabb, *supra* note 61, at 114; *see also* Reich, *supra* note 201, at 706; J. ABEGGLEN & G. STALK JR., *supra* note 147, at 205.

213. *See* Crabb, *supra* note 61, at 114; Reich, *supra* note 201, at 706; J. ABEGGLEN & G. STALK JR., *supra* note 147, at 205. ("Nearly one in six of the major [firm] executives have been executives of the company's union.").

214. Murabe, *Internal Communication in Japan,* COMMUNICATION WORLD, Dec. 1990, at 44 (LEXIS, Nexis library, omni file).

United States, creating a stronger link with labor.[215] Faced with takeover threats, unions in Japan typically will side with management rather than jeopardize the firm's financial status. Pickens encountered such company loyalty when Koito's 3600 union employees voted unanimously against giving Pickens seats on the firm's board of directors.[216] Japanese unions, however, soon might welcome foreign takeovers as more union members express their disapproval of their unions' apathy toward increasing accounts of work-related stress and diseases.[217]

V. Moving Toward Reciprocity

Japanese attitudes towards mergers and acquisitions appear to be changing.[218] In 1989, for example, there were 240 takeovers in Japan in which both parties were Japanese—more than double the number in 1985—with a value of over 1.5 billion dollars.[219] The Japanese now understand that mergers and acquisitions can be a strategic means of improving their global business position. A clear sign of such change was the establishment of Japan's first independent merger and acquisition "boutique," Recof, in October 1988.[220] Significantly, Recof administrators expect that the great majority of its business will involve merging Japanese companies, rather than locating foreign target firms.[221]

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215. Reich, *supra* note 201, at 706.

216. *See* Wakatsuki, *Union Employees Reject Pickens Management*, U.P.I., June 15, 1990 (Lexis, Nexis library, UPI file). According to the union's chairman, Hideki Yoshioka, "[t]he union [voted] against [Pickens'] proposals because they ignore[d] the company's responsibility to take care of its employees." *Union Assails Pickens Plan*, N.Y. Times, June 16, 1990; § 1, at 29, col. 5. Further, Pickens seven proposals "would [have] destabliz[ed] Koito employees' living conditions if they [were] approved." *Id.* at col. 6.

217. *See* Moffett, *supra* note 211. Aware of the problem, some unions, like the Japanese Federation of Employers' Associations, have expressed a willingness to trade a reduction in working hours for a substantial cut in wage growth rates. *Labor to Focus Demands on Shorter Work Hours*, Nihon Keizai Shimbun, Feb. 9, 1991, at 14 (Lexis, Nexis library, omni file).

218. An opinion poll conducted by the Nihon Keizai Shimbun Newspaper in the fall of 1988 showed that two-thirds of the 601 corporate managers interviewed were either "interested" or "very interested" in mergers and acquisitions. *See* Holloway, *Corporate Flirtations, Japanese Managers' Changing Attitudes to Takeovers*, Far. East. Econ. Rev., Jan. 26, 1989, at 72.

219. *See* Berger, *supra* note 15, at C1, col. 2. This figure was only a fraction of the estimated $300 billion in mergers and acquisitions performed in the United States in 1988. *Id.*

220. *See* Holloway, *supra* note 218, at 72.

221. *Id.*

A. *The* Shuwa Corporation *Case*

Perhaps a more significant symbol of changing attitudes toward mergers and acquisitions in Japan was a Tokyo district court decision in July 1989. This case held that real estate magnate Shigeru Kobayashi of Shuwa Corporation could block supermarket firms, Chujitsuya Company and Inageya Company, from dilutive crossholdings of each other's stocks.[222] For months, Kobayashi, who had no previous experience in the retail industry,[223] had been buying up shares in the two family-run supermarket chains. Chujitsuya and Inageya eventually became sufficiently alarmed that, in a common Japanese practice, they exchanged shares at below-market price.[224] Until the *Shuwa* decision, the practice of exchanging discounted shares had been upheld by sympathetic Japanese courts.[225] The *Shuwa* court, however, ruled that the plan of the two supermarket chains to issue shares at prices one-quarter to one-third below market levels amounted to illegal favors and was a violation of the Japanese commercial code.[226] Though some Japanese analysts predict that the *Shuwa* court's decision "will usher in an era of large scale M & A activity in Japan,"[227] others note that the ruling ironically could have the "reverse affect." Companies, for example, might consider increasing "the equity stock of 'stable' shareholders before an unfriendly figure casts a shadow over their operation."[228]

In response to the *Shuwa* decision, the Japanese Finance Ministry and the securities industry established a voluntary guideline to regulate offering prices of new shares to third parties.[229] The voluntary guideline

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222. *See Foreign Investors Seek Dismantling of Takeover Barriers*, Financial Regulation Report, Sept. 1989 (LEXIS, Nexis library, fintme file).

223. *See* Brown, *Stores Brood Over Big Ideas*, Fin. Times, Sept. 12, 1989, at 37.

224. *See* Klee, *Shigeru Kobayashi in the Catbird Seat*, INSTITUTIONAL INVESTOR, Sept. 1989 at 19 (int'l ed.). By that time, Kobayashi had acquired roughly 33.34% of Chujitsuya and 21.44% of Inageya, making him the largest shareholder in both firms. *See* Mitsusada, *Tokyo Court Ruling Leaves Takeover Try Alive*, JAPAN ECON. J., Aug. 5, 1989, at 4, col. 1.

225. *See* Klee, *supra* note 224, at 19.

226. *Popular Defence Invalidated*, Business Law Brief, Sept. 1989 (LEXIS, Nexis library, fintme file). Kobayashi eventually failed in his attempt to take over the supermarkets because of plunging share prices and surging interest rates. *Japan Realtor Fails in Bid to Restructure Retailer*, Reuters, Dec. 7, 1990 (LEXIS, Nexis library, reuters file).

227. Takahashi, *Japan Not Immune From Merger Mania*, JAPAN ECON. J., Aug. 12, 1989, at 1, col. 1 (statement of Yoichi Kuze, a partner of the accounting firm of Peat Marwick Minato).

228. Mitsusada, *supra* note 224, at 4, col. 1.

229. *See Guidelines Adopted on New Share Offerings*, Kyodo News Service, Aug. 3,

prohibits companies from offering new shares for third-party allotments at discounts of ten percent or greater below the average market price during the six months prior to the day before they decide on such offerings.[230] Like the *Shuwa* decision, however, this regulation does not necessarily put an end to third-party issues, which still may be used to prevent acquisition by the foreign investor.

B. *The Sansui Acquisition: A Model for Future Mergers and Acquisitions*

In October 1989, Polly Peck International (Polly Peck), a British-based fresh fruit and electronics multinational corporation, reached an agreement to acquire fifty-one percent of the common stock of the ailing Sansui Electric Company (sansui), a publicly listed Japanese consumer electronics corporation. No other Western corporation had achieved such a feat since Merck, a United States pharmaceutical company, purchased an interest in Banyu in 1984.[231] As financial analysts observed, the Polly Peck transaction was particularly significant because it signified a shift in the attitude of the Japanese bureaucracy toward foreign direct investment. Departing from their prior practices, neither the MOF nor MITI attempted to block the acquisition of Sansui. Moreover, unlike the other sixteen acquisitions of Japanese companies by foreign firms in 1989, Sansui was the only target listed on the first section of the Tokyo and Osaka Stock Exchanges.[232]

An analysis of the Sansui acquisition provides several insights for potential foreign acquirers of Japanese targets. First, despite Sansui's financial troubles at the time of Polly Peck's acquisition, Sansui was still considerably prestigious within Japan.[233] By acquiring an existing company rather than establishing a new concern, not only did Polly Peck avoid the problems of site location, rental costs, and hiring new employees, but it also gained a recognized consumer brand name, a broad customer base, a distribution network throughout Japan, access to electronic

1989 (LEXIS, Nexis library, omni file).

230. *Id.* Companies that violate these rules will be barred for two years from issuing new shares at market price, convertible bonds, or bonds with warrants. The new guidelines, however, still allow for third-party new share offerings at substantial discounts. It is possible, for example, that third-party offering prices will be well below the market price on a day when issuers decide on such offerings if the underlying stock sharply increases in value immediately afterwards. *Id.*

231. *See* Lee, *supra* note 53, at 51.

232. *Id.*

233. *Id.*

technology, and convenience in relations with banks, suppliers, and the government.[234] Thus, the Sansui acquisition dispels the belief that a foreign purchaser can achieve meaningful access into Japan's markets only by acquiring a financially sound target.

Second, Polly Peck's negotiations with Sansui were aided by the fact that Chico Ko, President of Polly Peck's Taiwan-based Capetronic division, is half-Japanese, was educated in Japan, and in 1972 opened a Capetronic office in Tokyo.[235] Moreover, when Ko approached Sansui, Polly Peck already had extensive experience purchasing branded products from the Japanese firm.[236] These two factors helped Polly Peck to achieve ready acceptance by Sansui's management. By contrast, the supermarket firms, Chujitsuya and Inageya, were unwilling to associate with Shigeru Kobayashi, who had no prior experience in the retail industry. Pickens has encountered similar resistance because of his inexperience in the auto industry and his unwillingness to work through a Japanese *nakodo* (go between or personal connection).[237]

Finally, early discussions in the Polly Peck acquisition were between the chief executive of Polly Peck's electronics division, on one side, and Ryosuke Ito, president of Sansui, on the other.[238] At these meetings, generally four or fewer persons were present, and legal and financial advisers were not involved until an informal understanding had been reached.[239] Further, the Japanese advisers never referred to the deal as an acquisition or a rescue, but proclaimed it to be Sansui's "renaissance."[240] In an effort not to embarrass current management, Sansui requested that Polly Peck chairman Nadir not assume chairmanship on the Sansui board.[241] All of these tactics were extremely important to Polly Peck's success and foreign acquirers should employ them to the extent possible to avoid embarrassing Japanese management before *keiretsu* group members, the Japanese government, and the public. This type of conciliatory behavior by Western acquirers should result in greater access for United States firms to Japan's markets.

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234. *Id.*

235. *Id.*

236. *Id.*

237. For a discussion of the role of the *nakodo* in a corporate merger in Japan, see Ames, *supra* note 39, at 556.

238. Lee, *supra* note 53, at 57.

239. *Id.* Polly Peck retained a securities adviser only after agreeing on an outline for the transaction. *Id.*

240. *Id.*

241. *Id.*

VI. Conclusion

Despite Japan's increasing interest in mergers and acquisitions in the past several years, potential foreign purchasers continue to encounter significant barriers to entry for legal, structural, and cultural reasons. Japan's recent promises to ease these restrictions are an important step toward the full liberalization of its foreign direct investment markets. Even so, Japan's promises alone are inadequate; Japan must make more of an effort to implement its commitments under SII to create reciprocal opportunities for foreign companies in Japan. At the same time, United States investors will achieve greater success in Japan by recognizing the complexity of differences between the Japanese and American cultures and avoiding prejudicial attitudes. The more successful United States response will be one that uses the mutual understanding recently achieved under SII, but also employs a more aggressive congressional agenda to convince the Japanese that it is in their best interests to reciprocate. Because of his tactics, T. Boone Pickens Jr.'s bid for representation on the Koito board of directors likely will not be the test case for the openness of Japan's investment markets. Despite successfully bringing to the attention of both Congress and the United States public the unfairness of the United States investors' experiences in Japan, Pickens' confrontational approach and unwillingness to work within the Japanese system has alienated him from the persons whom he claims he wants to represent.

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