LEGAL BARRIERS TO U.S. FIRM PARTICIPATION IN THE JAPANESE CONSTRUCTION INDUSTRY

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1. INTRODUCTION

The United States' trade deficit has been a constant topic of political discussion in this country in recent years, despite disagreement among economists as to its real effect upon the economy. The trade deficit reached a record $152 billion in 1987, but has been declining slowly over the past few years, to an estimated $99 billion in 1990.\(^1\) Although the gap has been shrinking, the U.S. continues to record its highest trade deficit with any country with Japan—an approximately $41 billion shortfall in 1990.\(^2\)

Recent negotiations between Japan's Ministry of International Trade and Industry (MITI) and the Office of the United States Trade Representative (USTR) have focused on a significant portion of the trade shortfall: construction services. United States construction firms have historically performed very little work within Japan, and only recently have they begun to win any sizeable contracts at all. As of January 1991, only fourteen U.S. firms were licensed to perform construction work in Japan, and these firms collectively have been awarded

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\(^2\) OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 121 (1991) [hereinafter FOREIGN TRADE BARRIERS]. The 1990 U.S. trade deficit with Japan of $41.1 billion was a decrease from 1989's figure of $49.0 billion. See id.
only about $290 million worth of work over the past several years. Yet Japanese contractors have had a growing presence in the United States for many years now. In 1990, 22 Japanese firms were performing construction work in the United States, with contract volume totaling $3.3 billion, and growing.

Given the potential opening of the Japanese construction market, the opportunities available to U.S. contractors are significant. Construction is a far greater contributor to the economy of Japan (where it constitutes approximately 17% of gross national product), than it is to the U.S. economy (at about 8.4% of gross national product). Japan is the world leader in construction spending with approximately $510 billion in 1989, just ahead of the United States with an estimated $450 to $500 billion that year. It has been estimated that Japan will need to spend at least 1,000 trillion yen (approximately $7.7 trillion) on all types of construction activity between the years 1988 and 2000, with plans to spend at least 430 trillion yen (approximately $3.3 trillion) during the 1990s solely on infrastructure. Clearly, even obtaining a very small fraction of this amount could mean large revenues for U.S. construction firms and a significant reduction in the trade deficit between the two countries.

However, the road has not been well paved for those U.S. firms bidding on construction work in Japan. Despite the Major Projects Agreement (MPA) reached in 1988, very little progress has been achieved. Japan is one of the most protectionist nations in the industrialized world, and its construction industry is probably the least open of

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8 Id. at 130. As an example of the amount of work awarded to U.S. firms in the past, the sum total of all U.S. construction activity in Japan during 1986 was one Mrs. Fields cookie stand. Chalpin, Hostile Takeover—Japanese Style, 9 CONSTRUCTION LAW. 3, 3 (Jan. 1989).


7 Although fluctuating constantly, for convenience the exchange rate used throughout this Comment will be 130 yen to the dollar. For the twelve months ending September 30, 1991, the dollar traded from a high of 141.6 yen to a low of 124.3 yen and ended that period at 132.9 yen. See Markets Diary, Wall St. J., Oct. 1, 1991, at C1, col. 1.


10 See infra notes 88-97 and accompanying text.
its markets.\textsuperscript{11} Japanese trade representatives and government officials often claim that U.S. firms have failed to penetrate the Japanese construction industry because those firms have not “tried hard enough” and have not invested the time and effort required to understand Japan’s language, law, and culture.\textsuperscript{12} However, when the world’s largest exporter of construction services is not active in the world’s largest construction market, the focus for the resolution of this problem should be on the market rather than on the exporter.\textsuperscript{13}

This Comment will examine those legal, political, and cultural trade barriers which tend to discourage, if not prohibit, participation by foreign firms in the Japanese construction market; possible solutions available both to the U.S. government and to private construction contractors; and what progress has already been made in attempting to penetrate the Japanese construction market.

2. THE JAPANESE CONSTRUCTION INDUSTRY

2.1. History of Japanese Construction

To comprehend the unique alliance between the Japanese construction industry and the Japanese government, an understanding of their history and the development of their relationship is necessary.

There were no private “contractors” prior to the Edo Period (1603-1868) when all large construction projects were built under the direction of the emperors and shoguns. During the Edo Period, Japan’s capital city was relocated from Kyoto to Tokyo and the country witnessed the rapid development of cities, with Tokyo becoming the world’s largest city during the seventeenth century. As the urbanization of Japan continued, small carpenters gradually became contractors responsible for the performance of an entire project.\textsuperscript{14} During the Meiji Period (1868-1911), Western architecture and construction techniques began to have a significant influence within Japan, and the government began an aggressive program of funding construction and infrastructure im-

\begin{footnotesize}
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\item[\textsuperscript{12}] See Chalpin, \textit{supra} note 3, at 5.
\item[\textsuperscript{13}] See id. The Japanese government, however, has recently released what it terms the “five truths” of its construction market: (1) it is open to all foreign firms; (2) through the Major Projects Agreement, participation of U.S. firms has been effectively promoted; (3) every construction project not covered by the MPA is still open to foreign firms; (4) the U.S. public works market is not entirely open to Japanese firms; and (5) the efforts of U.S. firms have been insufficient to establish a foothold in the Japanese market. \textit{Japan Clears Air on Construction}, \textit{Engineering News-Record}, Apr. 15, 1991, at 10.
\item[\textsuperscript{14}] F. Hasegawa, \textit{supra} note 8, at 4.
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provements, with particular interest focused on the development of a national railroad. Initially, the government undertook many of these projects itself, but as the volume of construction expanded, the government began hiring contractors to perform the work. It was during the Meiji Period that today’s leading Japanese construction contractors began to grow in size and prosper due to the wealth of government funding.¹⁵

In the early 1930s, Japan’s construction activity became military in focus and government once again took the lead in planning, financing, designing, and building many of Japan’s largest construction projects. Contractors essentially took a subcontracting position to that of the government. The role of the construction firm during this period generally was limited to providing only the labor required on any project.¹⁶ Following World War II, Japanese contractors worked with the government on overseas reconstruction in the Far East and the Pacific, as part of its government’s reparations program, while the government created a Ministry of Construction in part to work with the private construction industry in rebuilding Japan’s infrastructure.¹⁷

During the 1960s and 1970s, new construction reached very high levels in Japan—as high as 20% of its gross national product in 1970.¹⁸ With increasing industrialization and a further concentration of Japan’s populace in its cities, its environment and infrastructure began to become overburdened. Government spending was channeled into new civil engineering projects aimed at improving the country’s air, water, and transportation resources. The largest firms during the late 1970s and early 1980s were focused on the domestic construction market, primarily on the improvement of Japan’s infrastructure.¹⁹

2.2. Current Construction Market

Although the Japanese construction industry is comprised of over 520,000 contractors, the vast majority of them are extremely small. Half of these firms are just one-person operations with no other employees, and nearly 90% are capitalized at less than 10 million yen (approximately $77,000).²⁰ The Japanese construction industry is dominated by just a half-dozen large general contractors²¹ known as the

¹⁵ Id. at 5.
¹⁶ S. LÉVY, supra note 5, at 37.
¹⁷ See id.
¹⁸ Id. at 38.
¹⁹ Id.
²⁰ F. HASEGAWA, supra note 8, at 3.
²¹ General contractors are known in Japan as zenecons. Id.
"Big Six," with combined international contract revenues approaching $88 billion in 1990.

The Ministry of Construction today operates not only as an overseer and regulator but mostly as a promoter of Japanese construction activity. The Ministry is a giant bureaucracy with over 26,000 employees which oversees the implementation of Japan’s various construction laws and regulations, licenses contractors, sets construction industry standards, and acts as an important sponsor of construction research and development programs. In 1986, more than half a million public construction projects were carried out, with the majority under the supervision of the Construction Ministry.

Government has played, and continues to play, a significant role in the Japanese construction industry. Public works projects account for over 40% of all construction activity in Japan, more than twice the percentage of government spending in the United States. These projects are also more sought after by contractors in Japan since 40% of the contracted amount of the project is paid by the government in advance, while the work of subcontractors is often paid for up to a year later.

Since Japanese contractors are much more dependent upon work from the government, far more so than contractors in the United States, their political power and influence are significantly greater. This makes it even more difficult for foreign firms, which lack the political connections developed over years of working with government agencies, to win construction contracts. Combined with the fact that Japan has historically been a very closed society and is extremely protective of its domes-

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22 S. Levy, supra note 5, at 3. The "Big Six" are Kajima Corp., Kumagai Gumi Co., Ohbayashi Corp., Shimizu Construction Co., Taisei Corp., and Takenaka Corp. Id.


24 S. Levy, supra note 5, at 340.


26 S. Levy, supra note 5, at 340. Various professional and trade groups, including the Architectural Institute of Japan, the Architectural Association of Japan, the Japan Architects Association, the Japan Society of Civil Engineers, and the Associated General Contractors of Japan help the Ministry determine such industry practices. Kashiwagi, Rubin & Harris, supra note 25, at 39.


28 The term "public works" as used throughout this Comment refers to all construction projects that are financed from government sources, and does not include privately-funded civil engineering projects.

29 See S. Levy, supra note 5, at 40.

30 K. van Wolferen, supra note 27, at 120.
tic markets, foreign firms will need patience, commitment, and a long-term strategy in order to have any chance at success.

3. JAPANESE CONSTRUCTION LAW AND REGULATION

3.1. Licensing

All contractors must obtain an official license from the government as required by the Construction Contractors Law. Licenses are obtained either from the local prefectural government if the contractor has only one office, or from the Ministry of Construction if the contractor has offices in two or more prefectures. There are two types of contractors' licenses: common construction business licenses and special construction business licenses. Large general contractors who wish to subcontract a significant portion of their work will usually need to obtain a special license, because they will be required to perform at a higher duty of support and guidance for their subcontractors since they are in a position to manipulate those subcontractors. Licenses are generally only valid for a period of three years, although under most circumstances they are renewable at the company's option.

Foreign firms are permitted to apply for and obtain construction licenses in Japan. However, they must satisfy the same requirements as domestic contractors, such as "ownership of a minimum amount of property and the employment of a minimum number of qualified construction engineers in Japan." In addition to such objective criteria, more subjective matters are examined for each applicant, including

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31 At least one study has determined that Japan is the most heavily protected market in the developed world. See Punke, Structural Impediments to United States-Japanese Trade: The Collision of Culture and Law, 23 CORNELL INT'L L.J. 55, 57 (1990). Actually, Japan has very low tariffs when compared to other industrialized nations. However, non-tariff barriers are used by Japan as the primary impediment to the importation of foreign goods and services. See id. at 57-58 & n.14. See also Choate, Political Advantage: Japan's Campaign for America, HARV. BUS. REV. 87, 90-91 (Sept.-Oct. 1990) (discussion of Japan's "six excuses" for why it must have a protectionist trade policy).
32 Curl, Opportunities for Foreign Construction and Design Firms in Japan, 10 BUS. L. REV. 128, 129 (May 1989).
33 A Japanese prefecture is analogous to a U.S. state.
34 Curl, supra note 32, at 129.
35 See S. LEVY, supra note 5, at 69.
36 Id. Contractors who will perform all of their own work can obtain a general license and contractors who plan to subcontract more than 10 million yen (approximately $77,000) worth of work need to obtain a special license. Id. at 69-70.
37 ASIAN PRODUCTIVITY ORG., THE CONSTRUCTION INDUSTRY IN ASIA: A SURVEY 58 (1983). One contractor cannot receive both a common and a special license for the same construction project. Id.
38 S. LEVY, supra note 5, at 70.
39 See F. HASEGAWA, supra note 8, at 6.
managing capability, technical staffing and capacity, and financial credibility and sincerity to contractees. All applications for construction licenses, whether made to the prefectural government or to the Ministry of Construction, must be made in Japanese. These requirements have presented a significant obstacle to non-Japanese contractors attempting to obtain a construction license.

Following the recent accord spelled out in the Major Projects Agreement, new regulations have been enacted to simplify the acquisition of Japanese construction licenses by foreign contractors. These rules require only that a foreign applicant must prove: (1) that it has a manager with construction experience and an engineer on staff with experience and the appropriate technical skills; (2) that it practices sound business principles; and (3) that it has successfully fulfilled all of its prior construction contract obligations.


3.2. Prequalification and Bidding

Contracting for public construction in Japan is done through a system of competitive bidding. Japanese law requires open competitive bidding on all public construction projects, although under certain circumstances designated competitive bidding or even negotiated contracts may be used. Under designated competitive bidding, bidders are selected by the government agency soliciting such bids based significantly upon the contractors' qualifications, and in practice this is the method predominantly used.

For private construction projects any method may be used, and the most common is through negotiated contracts—either with a single con-
tractor or with a small group of preselected contractors. However, for private companies engaged in public services, such as utilities, designated competitive bidding must be used.48

The process for bidding on private projects in Japan is thus similar to that in the United States. However, for public projects the designated competitive bidding system as it operates in Japan is vastly different.49 The Ministry of Construction compiles an annual ranking of contractors. Each firm’s rating is based upon a variety of factors—including financial condition and operating history—and that rating is critical in determining the firm’s position, if any, on the prequalified bidders list.50 In order to rank high on that list, a construction firm must show a successful work history of completed projects, and until recently, only those projects completed in Japan were allowed to count towards the rankings.51

This practice obviously created a tremendous disadvantage to any new foreign firms trying to enter the Japanese market. These firms could not receive high rankings until they had a proven track record of experience in Japan, but they could not get that experience without a sufficiently high ranking to win their first contract.52 However, this policy was changed when the Ministry of Construction granted a license to Overseas Bechtel, Inc. based upon construction work performed outside of Japan, and the Japanese government no longer requires U.S. firms to have prior experience in Japan before being licensed and prequalified on a particular project.53

In addition to the prequalification restriction, Japanese law provides that persons who have committed certain specified unfair or improper acts in connection with government contract work within the previous two years, and firms employing any such person as an agent, manager, or employee, may not compete in bidding. Other require-
ments for qualification may be made by the government agency, ministry, or official in charge of the particular contract.\textsuperscript{54}

When bidding for public works projects is done through open competitive bidding, public notice must first be given. Publication of notice can occur not less than ten days prior to the bidding date, but can be shortened to as few as five days prior to bidding in cases of urgency.\textsuperscript{56} This requirement obviously creates an inherent disadvantage to non-Japanese firms, who are generally dealing with foreign specifications, language, and law. However, under the Major Projects Agreement between Japan and the United States, bidders for certain identified projects which have been targeted for increased foreign participation will be allowed forty days after notification to place their bids.\textsuperscript{56}

On public projects, the contractor who submits the lowest bid is not guaranteed to receive the contract, even if it had been prequalified. The government agency or ministry soliciting the bid generally formulates its own estimate of the cost of the work, a certain range with a specified floor and ceiling, and “[i]f all bids received exceed [the] ceiling price, the project may be rebid with an entirely different group of contractors.”\textsuperscript{57} Any bid received which is markedly below the floor price may be deemed an attempt at “dumping.”\textsuperscript{58} Any such bid may be rejected by the government if, because of the low price, the contractor is determined to be “incapable of properly performing the contract,” or if it is “feared that accepting the bid will disturb the order of fair trade.”\textsuperscript{59} In such a case, the low bid will be disqualified and the next lowest bid which is within the acceptable range will be awarded the contract.\textsuperscript{60}

4. RESTRICTIONS OF TRADE AFFECTING FOREIGN FIRMS

While in theory the prequalification procedure would seem to have the effect of simplifying the bidding process by assuring that any low bidder would be qualified to perform the work, in practice it has led to collusive bidding, pre-bidding consultation, and price fixing among bidders.\textsuperscript{61} Bid rigging, generally known as dango, although ille-
gal, is an acknowledged practice among Japanese construction firms.62

The practice of dango, however, has been said to go well beyond mere collusion among bidders, and includes widespread government corruption. In order for a construction contractor to even obtain the right to bid for a public works project, it must generally obtain the influence of a politician or government official, and for very large projects a politician may receive a bribe of as high as 1 billion yen (approximately $7.7 million).63 Furthermore, a contract may often be awarded to that bidder on a project who intends to provide a retiring Construction Ministry official with a second, more lucrative, career.64

The Japanese construction industry is the largest single financial contributor to the Liberal Democratic Party (LDP), the ruling party of Japan. Its contributions have been estimated to make up anywhere from 10% to as high as 60% of the LDP’s total contributions.65 In addition, close personal and family ties exist between high-ranking members of the Japanese government and executives in the Japanese construction industry which lead to a further commonality of financial interest.66

Dango is illegal in Japan. The Criminal Code prohibits any activity where “persons participating in an auction or competitive bidding conspire together and, in order to cause a particular person among them to be the successful bidder, agree that the others shall not bid above or below specified prices.”67 Any activity deemed to be collusion in bidding for government contracts can be punished under the Criminal Code by a prison term not exceeding three years or a fine not ex-

62 Id. at 195.
63 K. van Wolferen, supra note 27, at 118. As an indicator of the Ministry of Construction’s influence, the post of construction minister is generally considered, for the purposes of gaining political power or campaign funds, to be a position of equal value to that of prime minister or secretary-general of the Liberal Democratic Party. Id.
64 Id.
65 See Punke, supra note 31, at 64 n.56 and accompanying text.
66 For example, the youngest daughter of former Prime Minister Noboru Takeshita is married to the son of the president of Takenaka Corp., a member of the “Big Six,” while his oldest daughter is married to the son of the leader of the Construction Zoku, an LDP policy group with close ties to the construction industry. Takeshita’s half-brother is married to a daughter of the founder of Fukuda Construction Co., while Deputy Cabinet Secretary Eichiro Ozawa is married to another daughter of Fukuda’s founder. The daughter of former Prime Minister Yasuhiro Nakasone is married to the heir apparent at Kajima Corp., another member of the “Big Six” and Japan’s largest construction firm. See Chalpin, supra note 3, at 4; Choate, supra note 31, at 92-93.
ceeding 1 million yen (approximately $7,700). The Anti-Monopoly Law, whose purpose is to prevent "private monopolization, undue restraint of trade, and unfair business practices, thereby preserving and promoting free and fair competition in business activities and promoting democratic and wholesome development of the national economy." Collusion in bidding on construction projects clearly comes under the definition of "undue restraint of trade." The Anti-Monopoly Law, like the Criminal Code, also makes collusive activity between bidders a criminal offense. Responsibility for policing dango falls to the Japan Fair Trade Commission (JFTC), which may "order any violator to file reports, to cease and desist from such acts, to divest himself of part of his business, or to take other necessary measures to eliminate such acts." Unlike the Criminal Code, whose provisions apply only to collusion during bidding for government construction, the Anti-Monopoly Law applies to bidding for private construction projects as well as public works projects.

In addition, dango is further prohibited by the Budget Order, which denies participation in competitive bidding for two years to persons or firms who have interfered with implementation of fair bidding, or who have combined with others to impair fair pricing or to acquire wrongful gain. The Budget Order, however, creates only an administrative sanction and carries no criminal penalties.

Despite all of these legal prohibitions on dango, it is still a routine and widely-accepted practice in Japan that is often called a "gentlemen's agreement." It is usually justified on the basis that it is a "leveling device" used to keep market forces in check, and to keep out other Asian contractors who utilize cheap labor and could destabilize domestic construction wages. The proponents of dango contend that because construction is largely a buyer's market, excess competition without

68 Id.
69 Anti-Monopoly and Fair Trade Maintenance Act, Law No. 54 (1947) [hereinafter Anti-Monopoly Law].
70 Z. Kitagawa, supra note 46, § 6.04[4][b].
71 Id. § 6.04[4][b][i].
72 S. Levy, supra note 5, at 195.
73 Z. Kitagawa, supra note 46, § 6.04[4][b][i].
74 Id.
75 Id. § 6.04[4][b].
76 Order Concerning Budgets, Settlement of Accounts, and Accounting, Imperial Order No. 165 (1947) [hereinafter Budget Order].
77 See Z. Kitagawa, supra note 46, § 6.04[4][c].
78 Punke, supra note 31, at 63.
79 S. Levy, supra note 5, at 195.
80 Due mostly to the tremendous number of firms in the industry and the signifi-
dango would lead to thinner profit margins and the bankruptcy of many construction firms.\textsuperscript{81}

Generally, dango occurs when those firms that have been pre-qualified for a public works project meet quietly to decide whose turn it is to win the contract, and to predetermine at what price the contract should be bid.\textsuperscript{82} Construction firms support dango because it guarantees that each firm involved will receive its "fair share" of an otherwise overcrowded and extremely competitive market. Any construction firm that failed to participate or attempted to cheat the system would be denied any new contracts.\textsuperscript{83} Politicians and other government officials tend to look the other way because their financial interests are tied to those of the construction industry.\textsuperscript{84} Dango is clearly one of the most formidable trade barriers against foreign participation in the Japanese public construction market.\textsuperscript{85}

"Relational contracting" is another practice which has the effect of keeping foreign firms out of Japan's private construction market. Large Japanese corporations tend to develop close, long-term business relationships with a small group of suppliers, including construction contractors. Rather than soliciting competitive bids from a large group of firms, an owner may repeatedly use the same contractor with whom the owner has experience and an existing business relationship, despite the possibility that competitive bidding could or would result in a lower price. While relational contracting occurs frequently in the United States, the Japanese place an especially high premium on mutual loyalty and long-term relationships. Japanese corporations are unlikely to sacrifice such a business relationship for an unknown foreign firm, even one offering a substantially lower price.\textsuperscript{86}

In addition, there is also the possibility for "blackballing" of subcontractors. Japanese general contractors have historically maintained very close relationships with certain subcontractors, and have used these relationships to threaten to blackball those firms who might perform work for foreign construction firms. Such a practice in Japan's closed construction industry would be financially devastating to a small subcontractor.\textsuperscript{87}

\textsuperscript{81} See Z. KITAGAWA, supra note 46, § 6.04[4].
\textsuperscript{82} Punke, supra note 31, at 63 n.52.
\textsuperscript{83} Id. at 63 n.53.
\textsuperscript{84} See supra notes 64-66 and accompanying text.
\textsuperscript{85} Punke, supra note 31, at 64.
\textsuperscript{86} See id. at 63.
\textsuperscript{87} Chalpin, supra note 3, at 3-4. For example, one foreign contractor owns land in Japan that has remained undeveloped because the firm is unable to hire any Japa-
5. POLITICAL RESPONSES TO JAPAN'S CLOSED CONSTRUCTION MARKET

5.1. Major Projects Agreement

Trade negotiations concerning the participation of foreign contractors in the Japanese construction industry occurred in late 1987 and culminated with an exchange of letters in early 1988 between the U.S. Secretary of Commerce, C. William Verity, and the Japanese Ambassador to the United States, Nobuo Matsunaga. These letters created the Major Projects Agreement (MPA) between the two nations that would allow and encourage bidding on certain Japanese public construction projects by foreign (i.e. non-Japanese) firms. The MPA provided for detailed bidding procedures to be followed on fourteen identified projects with a total construction value estimated at almost $17 billion over the subsequent ten to fifteen years.

The projects covered by the Agreement included not only public works, but also many so-called "third sector" (private or quasi-private) construction projects where the Japanese government would actively encourage corporations to make their procurement policies competitive for both domestic and foreign contractors without discrimination. Despite prior claims that such private construction contracts were beyond its control, the Japanese government said that it would require cooperation by owners on specific projects in situations where the owners have received a government subsidy or have been

See id. at 4.

See id. at 128.

See id. at 129.

FOREIGN TRADE BARRIERS, supra note 2, at 130. The MPA was amended July 31, 1991 to allow bidding on 23 additional projects. Project Pact Signed with Japan, But U.S. Wants Complete Access, ENGINEERING NEWS-RECORD, Aug. 12, 1991, at 7. Japan agreed to an expansion of the Agreement in response to the threat of U.S. trade sanctions, but agreed to less than the opening of all public works projects as was sought by the United States. See Chipello, U.S., Japan Set Pact on Opening Building Market, Wall St. J., Jun. 3, 1991, at A8, col. 1. In addition to the new projects, the MPA was amended to provide procedures to bring U.S. firms' complaints before an independent review board, certification of all bidders that they are not engaged in collusive activities, and procedures for increasing transparency for bidding on construction projects that have a design component. 8 INT'L TRADE REP. (BNA) 846 (Jun. 5, 1991).

See id. at 12.

See id. at 129.
given a government franchise. The steps that the Japanese government expects third sector owners to take include the "provision of technical information to foreign firms, giving foreign companies the opportunity to discuss technical requirements and allowing tenderers a reasonable time in which to submit their bids." In addition, the Ministry of Construction has informally requested Japanese contractors to "form partnerships and jointly participate in bidding" with foreign firms.

Although the Major Projects Agreement was an important first step, many in the United States felt that it did not go far enough. A spokesman for the U.S. National Constructors Association was concerned that the Agreement failed to deal with many informal barriers within the Japanese construction industry, such as dango, that were even more formidable than the official government barriers.

5.2. Brooks-Murkowski Amendments

The bilateral negotiations were begun, in part, because of initiatives in the U.S. Congress to limit Japanese participation in the U.S. public works market. Some observers feel that the only reason the Japanese were willing to negotiate at all was as a delaying tactic, and that they had no intention of ever opening the Japanese construction market.

An amendment co-sponsored by Senator Frank Murkowski (R-Alaska) and Representative Jack Brooks (D-Texas) to a continuing budget resolution in 1987 required that the U.S. Trade Representative investigate construction trade practices in Japan. Should discrimination be found to exist in their domestic construction market, then Japanese contractors would be banned from receiving any public works con-
tracts funded by the U.S. federal government during fiscal year 1988. The budget bill containing the so-called Brooks-Murkowski amendment was signed into law by President Reagan in late 1987.

During the Verity-Matsunaga negotiations, the Brooks-Murkowski amendment saw its first application in the nation's capital. In March 1988, the Washington Metropolitan Area Transit Authority (WMATA) rejected a bid for the construction of twin tunnels and a rail station received from a joint venture of Kajima Engineering and Construction, Inc. and Kiewit Construction Co. (of Omaha, Nebraska), even though it was the lowest bid. WMATA officials stated that the action was taken under the authority of the Brooks-Murkowski amendment, and that the project would be rebid.

Similar amendments were proposed for various spending bills in 1988, after the Major Projects Agreement was reached, but these were much broader in their application. Such an amendment would have applied to all foreign nations, not just Japan, that restricted access to their domestic markets, and would have applied to federal public works projects in fiscal year 1989. However, after pressure from the Japanese government, none of the numerous Brooks-Murkowski amendments became law that year. In a letter from Ambassador Matsunaga to Secretary Verity, he stated that the earlier Agreement, which waived the prior experience requirement for licensing and designated certain projects for foreign participation, would be suspended by the Japanese government "should limits on Japanese participation in U.S. public works be continued after September 30, 1988 [i.e. end of fiscal year 1988]. It is the wish of the Government of Japan that these limits will be lifted before that time."

However, Senator Murkowski has continued to seek equal access to international markets. He recently sponsored amendments to various appropriations bills that prohibit foreign companies whose countries discriminate against U.S. firms from receiving any public works contracts that are funded by those bills to which the amendments are attached. and to any joint ventures that include Japanese firms. See Dryden, Usui & Setzer, supra note 98, at 25.

101 The U.S. government fiscal year ends September 30 of the same numbered year. See id.

103 See id.


108 For a discussion of the tremendous effect that Japanese lobbyists have had in influencing U.S. policy-making on trade matters, see generally Choate, supra note 31.

109 See S. LEVY, supra note 5, at 398.
tached. Senator Murkowski has stated that there are "serious allegations that [the Major Projects Agreement] has been violated on the first major contract awarded under that Agreement," and he did not rule out the possibility of shutting out Japanese firms from all federally-funded construction projects in the future.

5.3. Legal Actions

More recently, the U.S. Justice Department, through its Antitrust Division, urged the Japanese government to enforce more strictly its own Anti-Monopoly Law, specifically with regard to the practice of dango in the construction industry. Japan has agreed to enhance the Anti-Monopoly Law by giving the Japan Fair Trade Commission (JFTC) broader investigatory powers, and by shifting its priorities from informal enforcement efforts to formal legal action, in an effort to restrain such anticompetitive activities as price-fixing, group boycotting, and bid-rigging. The JFTC has doubled its fine for those contractors caught bid-rigging, from 1.5% to 3%, and levied almost twice as much in fines in 1990, at $7 million, as it did the year before. However, U.S. officials have claimed that these fines were only a fraction of what needed to be imposed and that the proposed changes would be ineffective. In response to pressure from the United States, the Japanese Cabinet in February 1991 approved even higher penalties for illegal cartels amounting to 6% of sales during the period an illegal cartel is in force. The United States Justice Department is also considering a plan to extend its antitrust rules to foreign markets, although Japanese officials declared that such a decision should be made during multilateral negotiations.

Although rare, criminal prosecutions for dango do occur in Japan. Last year, executives of three construction firms were sentenced to eight months in prison after being convicted of bid-rigging on a river-dredging project. The sentences may be an indication that the Japanese government is becoming more likely to enforce its laws as they relate to

108 Id. The project referred to was the Kansai International Airport. Id.
109 7 Int'l Trade Rep. (BNA) 1803 (Nov. 28, 1990).
113 Id.
In addition, more than 100 Japanese construction firms recently paid over $33.2 million in fines to settle charges that bids were rigged on construction contracts for a U.S. Navy base in Yokosuka.


6.1. Joint Ventures

United States contractors who plan to seek construction work in Japan must also plan on the type of corporate structure that they will use. Although there are numerous vehicles for foreign entry, the two most common methods are as general contractor and as joint venturer. As the general contractor, the U.S. construction firm would enter into contracts with its Japanese clients either directly or through a wholly-owned foreign subsidiary. This approach is relatively simple, but would most likely be an unsuccessful one for entering such a "closed" construction market as Japan's.

As a joint venturer with a Japanese company, however, a U.S. contractor gains numerous benefits. By working in partnership with an established Japanese firm that has business and government contacts, knowledge of the local area, and familiarity with building codes, a foreign firm can obtain a valuable learning experience in a relatively short period of time. Joint venturing would also seem to be the best means for obtaining public construction contracts in the face of dango. In response to the Major Projects Agreement, the Ministry of Construction has encouraged Japanese firms to form partnerships with U.S. contractors and to jointly participate in bidding. Joint venturing appeals to the Japanese because it offers the political solution of allowing increased foreign participation in their domestic construction market while still retaining all the advantages of dango which accrue both to the contractors and to the politicians. Hajime Sako, president

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117 Including "Big Six" member Ohbayashi Corp. Id.
118 Id.
119 See generally Cruver, Penetrating the International Construction Market, 6 CONSTRUCTION LAW. 3 (Apr. 1986).
120 There are two types of joint ventures commonly used in Japan: an incorporated joint venture corporation or a joint venture operation without legal status. The latter generally takes the form of an agreement between legal entities, such as corporations, and is used most frequently by Japan's construction industry. PRICE WATERHOUSE, DOING BUSINESS IN JAPAN 69 (1990).
121 See S. Levy, supra note 5, at 397.
122 Usui, supra note 96, at 12.
123 See id.
of the Japan Federation of Construction Contractors (JFCC) and chairman of Taisei Corp., has said that U.S. construction firms are welcome to compete or cooperate, but they must accept certain fundamental rules, including Japan’s selective bidding system (i.e. dango). 124

United States contractors apparently agree that it is easier to work within the system than to change it. During the past several years, numerous partnerships and joint ventures have been created between U.S. and Japanese construction firms to pursue projects in both Japan and the United States, including agreements between Obayashi Corp. and Fluor Daniel, Inc.; Aoki Corp. and Tishman Realty and Construction Co.; 126 Toda Construction Corp. and Schal Associates, Inc.; Kumagai Gumi Co. and Turner Construction Co.; 126 Taisei Corp. and Bechtel Group, Inc.; 127 Shimizu Construction Co. and Parsons Corp.; 128 and Kawasaki Heavy Industries and the Austin Co. 129 Joint ventures and other cooperative arrangements will play an increasingly important role for U.S. and other foreign contractors seeking a foothold in the Japanese market.

6.2. Opportunities for New Technology

Although most of these partnership agreements are for general engineering and construction work, a few are more specific and deal with only one project or one type of project. For instance, Shimizu Corp. has an agreement with Houston-based Bell & Trotti, Inc. for long-term planning and construction of projects in space and on the moon. 130 Takenaka Corp., the only contractor among the “Big Six” lacking a general cooperation agreement with any foreign construction firm, will team up with foreign contractors only on a “technology-specific, project-by-project basis.” 131 These types of arrangements are precisely why U.S. firms should be attempting to penetrate the Japanese construction market: access to new technology.

The construction market in Japan is highly competitive, and profit


125 Id.

126 Usui, supra note 96, at 12.


130 Dryden, Usui & Setzer, supra note 98, at 25.

131 Usui, supra note 95, at 12.
margins on construction work are often far slimmer than in the United States. But Japanese contractors lead the world in construction research and development spending—at about 0.5% of firm revenues spent on research versus at most 0.05% in the United States—while combined spending on research for the "Big Six" alone was more than $500 million in 1990. Combined with the tremendous spending of the Ministry of Construction, Japanese industry has been in a position to develop many of the major innovations in construction equipment and materials in recent years, particularly in the areas of robotics and new concrete composite technology. Although the U.S. construction industry maintains a technology lead in certain areas, including computer automation, there is no industrywide commitment to substantial investment in research and development. Joint ventures with Japanese contractors offer U.S. firms the opportunity to share the wealth of this new technology before the Japanese use it to penetrate the U.S. construction market in force.

7. Negative Consequences of Opening the Japanese Market

7.1. Increased Japanese Activity in the United States

Despite the opportunities of opening up the Japanese construction market with regard to potential revenues and new technology, trade negotiators must be certain that they do not open a "Pandora's Box" of trouble for U.S. contractors, both in this country and in Japan. Already there are 22 Japanese firms performing construction work in the

Houston-based Brown & Root, Inc. gave up its Japanese construction license in June 1989 because it claimed that profits from public works and other construction jobs in that country were "slim." Int'l Trade Rep. (BNA) 603 (Apr. 25, 1990).


See generally S. Levy, supra note 5, at 283-302 (discussion of recent Japanese developments in the field of construction robotics).

See generally id. at 353-61 (discussion of the recent Japanese development of carbon fiber reinforced concrete (CFRC) and its various applications).


See generally S. Levy, supra note 5, at 340-53 (discussion of public and private research and development efforts in Japan); F. Hasegawa, supra note 8, at 160-73 (discussion of technology development as integral to the strategic planning of Japanese construction firms).
United States, with contract volume totaling $3.3 billion in 1990.\textsuperscript{138} That figure is up from only $700 million in 1984 and less than $50 million in 1981.\textsuperscript{139}

The increased Japanese investment in U.S. real estate over the past decade is not unrelated to the increased construction activity.\textsuperscript{140} Approximately two-thirds of all work performed by Japanese contractors in the United States is on Japanese-owned investment projects,\textsuperscript{141} and approximately 95% of all construction work for such projects is performed by Japanese firms.\textsuperscript{142} United States construction firms are finding it more and more difficult to be awarded contracts by Japanese owners in the United States.\textsuperscript{143}

With the Japanese making their own push to enter the U.S. construction market, U.S. trade negotiators should be mindful of the Japanese power to enter and dominate foreign markets and should be cautious of what is given up for the attainment of "free trade."

7.2. Increased Foreign Activity in Japan

The recent trade negotiations between the United States and Japan were not limited in their application to U.S. contractors, and apply equally to other foreign construction firms.\textsuperscript{144} South Korean firms are particularly well-suited, for numerous cultural, political, and geographic reasons, to take advantage of the new openings and to succeed in participating in the Japanese markets in a way that Western firms cannot.\textsuperscript{145} By 1990, when Bechtel became the first U.S. member of the Japan Federation of Construction Contractors (JFCC), there were already four Korean members of that organization,\textsuperscript{146} six Korean con-

\textsuperscript{141} Chalpin, \textit{supra} note 3, at 3.
\textsuperscript{142} \textit{See id.} at 7.
\textsuperscript{143} \textit{Id.} United States construction firms who until recently could submit bids in English for Japanese-owned projects in the United States must now submit those bids in Japanese. \textit{Id.}
\textsuperscript{144} Curl, \textit{supra} note 32, at 128.
\textsuperscript{145} \textit{Id.}

https://scholarship.law.upenn.edu/jil/vol12/iss4/8
tractors had been licensed (all without a Japanese partner), and one Korean firm had already won a contract for construction work in Japan. U.S. contractors should be concerned that the inroads created by their country's trade negotiators into the Japanese construction industry may be dominated by other Asian contractors before they have had a chance to attain any real progress of their own.

8. CONCLUSION

The progress made during the recent bilateral trade negotiations to improve U.S. firm access to the Japanese construction industry has been significant. More relaxed rules regarding licensing of contractors and advance notification of bidding may allow greater participation by firms previously unfamiliar and inexperienced with Japanese construction practices. Yet despite several high-profile Japanese construction contracts that were recently awarded to U.S. firms, there remains a great deal of room for improvement. Greater disincentives for the illegal but politically-accepted practice of *dango* need to be developed. Any pressure that the United States can exert during trade negotiations for the reform of certain Japanese business practices will certainly have a positive effect, but the change of an entire system of behavior built up over decades of practice cannot reasonably be expected to occur overnight.

In the meantime, U.S. contractors should take individual action to establish alliances or joint ventures with Japanese firms in order to prevent themselves from being completely shut out of the world's largest construction market. The U.S. construction industry must not follow the path of its automobile and steel industries. The benefits to be sought, through higher revenues and access to new technologies, are too great to ignore.

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147 Usui, *supra* note 95, at 12. The six firms were Daewoo, Hyundai, Miryung, Samsung, Samwhan, and Ssangyong. *Id.*

148 *Id.* The firm, Daewoo, was awarded a $5.5 million contract for sitework on a Korean embassy in Japan. *Id.*