Trade and Competition at the WTO: Domestic Regulation and Competition Policy for Market Access Development

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I. Introduction

Globalization brings with it many new challenges, and in the field of world trade, the challenge of gaining market access in the new global economy calls for a consistent rethinking of strategy. In free market economies, the respective agencies advocate measures to improve the conditions for its nation's exports and investment in third world countries' markets. For developing countries, market access has been associated with large foreign multinational firms attempting to break through the door to the domestic market, yet we see how market access is becoming more and more essential to all developing and industrialized players of global trade. It is now time to take stock of the progress that has been made in implementing market access strategy, controlling restrictive business practices, and enforcing and maintaining free and fair competition. Despite the unfruitful WTO Ministerial Conference in Seattle, globalization continues at a perpetual increasing pace. Market Access invariably will be considered as a possible issue to be raised at the next round of talks. This paper seeks to review the elements of competition enforcement in Japan and identify the critical points to how wide the doors to the market can be opened. A proposal to address better market access development will precede the conclusion.

II. Market Access as a Trade Issue?

A student of Japanese trade and competition policy is most familiar with cases in Japan where stronger legal actions could have been but were not adopted. The failure to utilize fully available resources to its full potential seems to be a major problem. On the other hand, in the field of global competition, there are cases where available legal actions

have been examined and applied, yet, the core issue itself was not adequately addressed. In other words, the problem is not only in the questionable application of the law or the absence of it, but in the depth and the effectiveness of a law or regulation in addressing an issue, and in this case the issue of market access. The US Japan Film case is an example of a case where unanswered questions of trade and competition remain after a decision reached at the WTO.

In order to promote free trade and the market access, GATT removed tariffs and non-tariff regulations to the bare minimum. Non-tariff regulations are strongly related to the legal system of one country and the accessibility of the market[1]. The regulations are basically divided into two categories: government regualtions and private business practices.

The first is a barrier resulting from a government regulation that restricts the number of new entry into the market. The key in this situation is that the restrictions must be a "government" regulation in order to be resolved by the WTO. This is the generally termed ***non-tariff barrier***. The second is a barrier created or formed by the actions of private industry or non-government related organizations. These may occur easily as a result or under the influence of a government measure but are basically the actions of private businesses alone.

Since the WTO rules cover only government regulations, the WTO is not the venue for nations wishing to raise complaints regarding private restrictive business practices. And cases arise where the origin of certain practices, either government or private industry, is not definitively clear. In the ***Fuji-Kodak Film***[2] case, the US based their arguments in the film case on the claim that the Japanese government

collaborated with private businesses to implement their measures in order for the private restrictive business practices to be considered at the WTO. In other words, for market access issues, the WTO deals only with government measures. At present non-government measures do not fall within its jurisdiction. In order to make a case against certain actions of private businesses at the WTO, the direct relationship between the government and the competition restrictive actions must be established.

In the US Japan Film Case, the panel ruled in favor of Japan, but left many issues to be resolved. Mainly, should actions of private businesses that hinder market access fall within the jurisdiction of the WTO? If not, how should these actions that contribute to denying market access be addressed? This problem is a source of concern for trade and competition.

In addition to the appeal at the WTO, the US also submitted a case under section 301 of the US Trade Act against Japan. Moreover, Kodak's appeal to the Japan Fair Trade Commission further shows the seriousness, with which the US considered the problems of competition conditions and the closed nature of Japan's market. The failure of the US Japan Film case's decision to deal squarely and thoroughly with trade and competition issues exposes a limitation of the WTO and leaves behind a necessary debate on to what extent the organization seeks to improve market access for the purpose of free trade.

The Film case shows WTO ability to deal with market access is limited to government measures. The ability of the WTO to resolve market access barriers that are not of government origin is extremely limited. When measures are not technically authored by the government but are tolerated or even encouraged by the government, it becomes a matter of deciding whether or not a measure is a government measure. The attention misleadingly turns to the job of determining the identity of a measure. The burden of the aggrieved party to provide enough

evidence to establish the direct relationship between the government and the measure is great if a measure is not an official administrative measure. Should a panel decide that certain measures are not government actions, but the actions of private businesses, or a type ***administrative guidance***, the issue no longer falls within the scope of the WTO panel, and the WTO reaches the limit of what it can do. Yet the unfavorable market access conditions remain. The WTO looks at non-tariff measures affecting market access to determine first whether it is a government measure or not, but existing restrictive practices of the private businesses are not being addressed. This is an issue that is in need for a solution. If no resolutions are reached, this will negatively affect WTO's image as a non-partisan trade organizaiton that is committed to removing trade barriers and to reach its objective of free trade and competition.

III. Antimonopoly Issues Affecting Market Access in Japan

The ***Fuji-Kodak film*** case gives an impression of a tight working relationship between the Japanese government and the private industry. And without the jurisdiction of restrictive business practices, the WTO cannot do much to alleviate the situation. Yet the multilateral agreement is not the only means to treat market access issues. A look at the history of Japanese competition law shows that the enforcement of Japanese Antimonopoly Law against cartels, boycotts, and trade association contributes to market accessibility.

The history of the provisions of Unreasonable Restraint of Trade[3] and Trade Association[4] indicates that they have been effective to a certain degree towards actions that limit competition among competitors but have not been fully implemented towards market barriers and such attempts. Yet free market access is an essential element and the foundation of antimonopoly laws[5].

In Japan rules regulating and limiting cartels, boycotts, and trade association activities are spelled out respectively in articles III, VIII, and XIX of the antimonopoly law. Though one would not say there are a large number of cases that set precedents and clarify the articles, guidelines compliment the law and make up the shortage of these cases.

A cartel is prohibited by the latter part of Article III of the Antimonopoly Law[6] (AML) as an "unreasonable restraint of trade." Article II.6 of the AML defines an "unreasonable restraint of trade" as

> Such business activity, in which enterprises by contract, agreement, or any other concerted activity mutually restrict or conduct their business activities in such a manner as to fix, maintain, or increase prices, to limit production technology, products, facilities, customers, or suppliers, thereby causing, contrary to the public interest, a substantial restraint of competition in a particular field of trade[7].

One of the major problems concerning this act was whether or not it was applicable only to concerted activities among directly competing enterprises or to concerted activities among non-competing enterprises as well; and this problem is in fact directly related to the interpretation of the term "a particular field of trade."

Cartels are prohibited as a form of unreasonable restraint of trade, but there is dispute among legal specialists as to whether or not vertical agreements are subsumed under the Unreasonable Restraint of Trade Act. The JFTC position regarding this issue still remains unclear. How vertical restraints will be interpreted, whether as a restraint of trade or not, is important for it affects the enforcement of cartels.

Cartel regulation overall has carried out its function within antimonopoly law objectives, however, if other business restrictive practices are not controlled, even the strictest enforcement against cartels will not produce significant positive competition effects. If the regulation of boycotts is not strictly enforced, market access problems will still remain. A strong enforcement against cartels while allowing boycott activities is not only counterproductive but severely detrimental for market access.

In Japan, a boycott violates Article XIX of the Antimonopoly Law[8], which prohibits firms from engaging in "unfair trade practices". Though there have been very few instances where boycotts were regulated directly as boycotts, since the conclusion of the 1990 Structural Impediments Initiative SII[9], Japan has made effort to strengthen the enforcement of the AML, especially boycotts. As a result, among other measures, the JFTC released a guideline in 1991 entitled the Antimonopoly Act Guidelines Concerning Distribution Systems and Business Practices[10] (Guidelines).

In addition, the JFTC made it clear that boycotts among competitors, trading partners, or boycotts by trade associations would be subject to the application of Article III as an "unreasonable restraints on trade", if "substantial restraint on competition" was evident. The guideline suggests that the JFTC is determined to strengthen its enforcement against boycotts as they recognize how boycotts can significantly impede the market access of new firms. However, an issue yet to be addressed is that the JFTC seems to consider the total business capacity as an important factor in unreasonable restraint of trade cases. It appears that the JFTC is more likely to enforce the law in cases involving major large enterprises that have the capacity to cause substantial restraints on competition.

Article VIII of the AML regulates the activities of trade associations and it has been applied to cartels and boycotts that are engaged through trade associations. Although this kind of enforcement may seem practical considering the important role trade associations play in the Japanese economy, questions on the enforcement's effectiveness in terms of ensuring free market access still exist. In Japan, a trade association is seen as an independent legal entity distinct from the members that of which the association is composed, and the application of the AML is said to be lenient against trade associations compared to that involving an individual enterprise. Since the trade association is deemed as an independent legal entity, its activities will always be regulated as a group activity. Even though each individual member should be punished in cases involving concerted actions among the individual members, Article III is not applied which means that surcharges based on article VII.2 can not be imposed and the deterrent against such violations is significantly weakened[11]. Other problems of regulating trade associations include the conception that many foreign companies have that the JFTC does not really wish to adopt effective regulation towards trade associations given the opportunities to do so. However, many of the trade associations and their activities such as opening dialogue with consumers and setting safety standards do promote competition and abide by competition law.

Though the antimonopoly law of Japan itself is as strong and strict as that of the US, the enforcement or lack of it allows the undesirable circumstances to continue. In contrast to the ***film*** case where the advocate of fair competition, WTO, lacked jurisdiction over restrictive business practices, the case here is not the problem of the law but relatively weak enforcement of the law. With increase tenacity in antimonopoly enforcement by the JFTC and jurisdiction over private restrictive business practices of a multilateral organization, market access issues can be better addressed. It is becoming obvious that the

solution lies not in one particular but instead a combination of unilateral, bilateral, and multilateral agreements to reach the objectives of free and fair trade, which without market access would not be considered obtainable.

IV. International Efforts on Market Access

The limitation of the GATT and the GATS with respect to market access is due to their limited scope in addressing private restrictive business practices. Bilateral and other efforts have been made but international efforts have been substantially weakened by the lack of progress at the multilateral level such as the WTO. The next parts describe some of the international efforts in competition law enforcement and a brief description of their endeavors is provided. But these efforts as well have yet to assure market access. WTO effort would be a necessary supplement to the international framework in creating and protecting market access.

There are several ways to deal with the issue mentioned above through the domestic law of the WTO Member Nations such as to seek application of domestic law and the appropriate enforcement, to call for the non-discriminatory and transparent application of the domestic law, to establish a required minimum rule, to reach the unification and harmonization of each Member Nation's Substantive law.

An example of the application of domestic law and the Obligation to Enforcement is the tacit approval of Restrictive Business Practices addressed by Article 301 of the US Trade Act[12]. This was an approach taken in the early stage of the US Japan Film Case. The impartial and transparent application of the domestic law is particularly effective against cases where foreign companies try to obtain stock shares in domestic distributing companies. Even though domestic companies are able to acquire stock shares of the distributors, attempts by foreign companies have been thwarted due to extremely strict standards and

investigations. It is also effective against obviously discriminatory cases where stricter conditions and investigations are set for the distribution system of import goods, and against cases where the respective domestic competition law agencies are much more lenient towards the systemization of distribution for domestic versus foreign industries.

The obligatory minimum rule include the system for competition law in Chapter 15 of the North America Free Trade Agreement, the OECD Recommendation for Hardcore Cartels (1998), the WTO Reference Paper on Basic_Telecommunications, the EC Experts Group (1995), and the EC Board Advisory, etc. The European Competition Law; a transnational standardized application and enforcement of competition law, is an ideal solution for unifying and harmonizing a nation's substantive law. However, there are countries that still lack competition laws and even among countries that have developed competition laws, the standards vary. At this point, it is not a realistic alternative to consider.

Another approach to deal with competition issues is through the respective agencies of the member nations. At present, the most widely used approach towards competition is the common application of competition law created through bilateral agreements. Since the United States EC Agreement of 1991, we have seen the increase of US centered bilateral agreements. With the objective of preventing trade frictions outside of a nation's territory, Bilateral agreements have been reached, i.e. the 1976 US Germany Agreement, the 1982 US Australia Agreement, and the 1995 US Canada Agreement. Recently the 1991 US EC Agreement and the 1995 US Canada Agreements have place a special emphasis on the cooperation in the effective enforcement of competition law. Within bilateral agreements, there are a number of stipulations such as the Negative Comity, the Positive Comity, and Enforcement Cooperation.

Negative Comity is the case when investigations of an apparent violation and its impending results negatively influence benefits that are

important to that country. It is in short a method of avoiding conflict. It is directly related to debate on the application of law outside a nation's territory, extraterritoriality. Positive Comity is the case when anticompetitive practice is damaging to one party and a request for enforcement is submitted through the respective agencies of the second party. With Positive Comity signatories may share information leading to a single investigation to be carried out rather than two separate ones based on each countries differing laws on competition[13]. The necessity of cooperation is seen in positive comity, particularly in regards to the treatment of confidential information. The publication of such confidential information is strictly prohibited; however, according to the 1994 IAEAA[14], information gathered through investigations according to a bilateral agreement may be made available to foreign agencies[15].

As mentioned in the above section, bilateral agreements though commonly used have their limitations in that the policies of the nations are likely to be different and the anticompetitive behavior being controlled or limited will also affect each nation differently. And when disputes are not resolved, retaliatory actions or the threat of them, such as the luxury tax on import autos between the US and Japan 1995, could be detrimental to both parties. The multilateral solution might be the future development of competition law.

Perhaps the most significant step in addressing international antitrust problems multilaterally was taken by the OECD. The OECD promotes a three step process based upon "notification, consultations, and exchange of information,"[16] which helps foreign enforcement officials to

gather information required to determine whether a violation has occurred. The principle virtue of the OECD trade and competition policy "appears to be that through notification and consultation…countries [are] allowed to discuss problems in their incipiency before conflicts and costs escalate." [17] Yet multilateral agreements are by their nature more complex than bilateral agreements because there are greater and wider interests involved depending on the number of nations taken into consideration. And needless to say interests differ between developing and developed nations, but globalization has increased the need for standardization of rules governing competition.

In addition to the varying interests involved when negotiating a multilateral treaty, pre-existing bilateral agreements can also pose as a barrier in multilateral talks. Recent examples of international trade accords include the North America Free Trade Agreement (NAFTA) [18] and the GATT. But despite these problems, efforts are being made to reach a consensus on the international aspects of trade.

As a part of the framework of the GATT, the International Antitrust Code Working Group has proposed a draft international antirust code[19]. Although the implementation of an international code is considered by many to be years away, proposed codes has started the process of international analysis and debate that could lead to a common code or at least to more uniformed provisions in each nation's code.

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makes transparent the approach of each country towards competition is of great value. What is effective is not the abstract reports and reviews of trade policy but tangible and specific exchange of information.

V. GATS Agreement.

The objective of obtaining market access, as suggested from the previous two parts, can be better served through jurisprudence over restrictive business practices and other anticompetitive behavior at a multilateral organization, and through stronger enforcement by the domestic agency in the case of the Japanese AML. There are multilateral agreements that seek to address problems of competition. As we take a close look at the articles of the General Agreement on Trade in Services (GATS), we see that it has a slight head start over the GATT regarding the previously mentioned problem area[20]. Yet, if the degree to which these two agreements tackle competition issues differ, we need to examine why the disparity exists. Competition should be an agenda for not only trade in services but for trade in goods as well. The argument pushing for the uniformed treatment of market access denying and other restrictive business practices via the GATS and the GATT at the WTO will be advanced.

The GATS contains articles that are related to competition law. They are the Domestic Regulation (Article VI), Recognition (Article VII), Monopolies and Exclusive Service Suppliers (Article VIII), Business Practices (Article IX), General Exceptions (Article XIV), and the Security Exception of (Article14.2 in Part II[21].) Market Access is found in Article XVI and National Treatment of Article XVII in Part III. Although GATS stands for the General Agreement of Trade in Services, it is more a matter of regulation and deregulation. In other words, GATS has a focus on competition. The many articles that are related to competition show that the components of competition law are important and

indispensable in the area of service.

The ultimate purpose of competition law is to distinguish what is competitive from what is not to prevent the restriction of competition by enterprises. It should also be a component of the GATT as well. Discussion on issues related to competition law especially on market access at the GATT should seriously be considered

The purpose of GATS is to liberalize and to magnify service trade by creating an international framework of regulation. The GATS is a remarkable multilateral agreement to provide enforceable rules for trade in all services. However, at this stage of its development, it is quite a challenge for the present GATS to achieve its purpose because the liberalization and magnification of service trade without market access is unthinkable [22]. Clearly the components of competition law are essential to facilitate the efforts to reach the agreement's objectives. It is similar to the situation with the GATT. In other words, the idea of market entry of competition law is essential and necessary to secure the freedom of market entry and exit to reach GATS' objectives.

In order to secure the freedom of market entry and exit in GATS, it is necessary to implement the character components of competition law and its understanding and interpretation to the term "business practice" of article IX. We should determined whether certain terms are indeed components of competition law. Left ambiguous, these terms such as "certain business practice" will be used at each party's discretion to meet its own needs such as the antidumping case. The ultimate purpose of competition law is to distinguish what is competitive from what is not to prevent the restriction of competition by enterprises. How GATS contains parts on market access and other elements of competition law is a fact that cannot be ignored when considering a discussion of competition law related issues at the GATT. It is also worthy to note that there are other agreements in addition to the GATS that contain the competition issue.

In the TRIPS agreement[23], elements of competition appear under Section 8 on the ***Control of Anti-competitive Practices in Contractual Licenses***. Article XXXX.1 states that some licensing practices or conditions pertaining to intellectual property rights "which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology[24]." Article XXXX.2 provides that Members may "adopt…appropriate measures to prevent or control such practices[25]." That competition related issues are portrayed in the GATS and TRIPS begs the question of the need to treat competition separately for the GATT. Market Access and other competition issues included in the trade in goods agreement have the potential to increase the ability to reach the agreement's objectives.

VI. Proposal for the WTO

The future and direction of the topic of Trade and Competition at the WTO is currently the subject of much heated debate[26]. There are several issues within trade and competition that the WTO is not equipped to handle but are nonetheless within the organization's framework. These issues are close to reaching the limits of what the international society permits. In the Film case, the US alleged that Japan allowed problems of competition to exist thereby denying access to its market. However, the US came to the conclusion that it would be extremely difficult to bring such an allegation before the WTO and that solving the problems bilaterally would be more effective. Thus, the debate on competition policy was not brought to the WTO. If the debate on competition policy does not occur at multi-lateral forum, the problem of one-sided standards would become greater.

The WTO needs to promote the creation of a category to deal with trade and competition in a way beneficial to both advanced and developing countries. However, even among advanced nations, the views towards various behaviors addressed by competition policies are not the same. Among developing nations, many lack competition law, and if a set of rules were not agreed upon, it would be difficult for a panel to settle a dispute. But that being the case does not mean that problems of competition should not be handled by the WTO. This is an unresolved question left after the Film case and is also a question to be addressed when we consider a country with a large market such as that of China. The minimum the WTO can do is more than raising the awareness of competition law but ensuring the transparency of various business practices of different countries.

Even though a consensus may not be reached, an organization that makes transparent the approach of each country towards competition is of great value in terms of market access. What is effective is not the abstract reports with review on trade policy but something more tangible with specific exchange of information. One idea is to setup a "Competition" monitoring committee to handle initially a dispute before the case reaches the level of the WTO dispute panel. It would require the person representing a country's competition policy to explain and provide an outline of the competition policy of that country. It would allow countries without competition law to have a venue to correct problems of trade and competition. For countries with competition law, there would be a place to address market access issues, and for those without competition law, the sacrifice of anticompetitive behavior is off set by the merit of having a multilateral committee watched by the world. Realistically, without a minimum standard approved by all, the competition monitoring committee would not have any enforcement and binding power, but it is way of investigating how a particular case is handled by a country. Pressure from an international watchdog overseeing competition when there is no standard competition policy would be considered effective. And together with multilateral and other approaches to competition, it would create an effective interim system.

Through the exchange of information among the respective authorities of member nations and the competition monitoring committee and their cooperation is in line with the objectives of harmonizing competition policy in future forums.

Another way would be to examine whether each country's competition policy is inline with the WTO interest in a specific case of dispute. It would allow the representative of a country to be able to explain what measures or what specific kind of exploitive anticompetitive practices are taking place within their jurisdiction. In this exchange of information with the required explanations mentioned above, the question of whether one party has competition law within its system becomes irrelevant. In this way, behavior that restricts competition related to market access would be brought to the center of attention at the WTO. And it would be ideal that the attention brought by WTO regarding the matter would apply pressure in a positive way to prevent the adoption of such practices. This would raise the consciousness of the need to debate trade and competition issues

GATT/WTO contributes a lot to the protection of the export market of its member nations. If the present system that continues to function with government measures as a stipulation, in other words, only handling those measures created by the government and not those of non-government organizations, we would lose sight of the most important goal of enlarging the world markets through free trade. We need to stress again the importance of returning to the original goal that is to ensure that the means to create access and to open the markets of countries remain available.

It is important to point out how export markets have been protected is directly linked to the effective system of penalties. The opening and globalization of the market is not only the wish of advanced nations but the hope of developing nations as well. The reduction of tariff barriers and the elimination of non-tariff barriers are for no other purpose than to create an open accessible market. Within multi-lateral agreements, the rules of the WTO apply only towards Government Measures, but a

consensus to strive to prevent non-government measures involving restrictive business practices from interfering market access is naturally to be expected. However, the lack of agreement regarding this is due to the fact that the debates on competition policy have been led by advanced nations. In other words, not all nations have a sufficient understanding of this goal. If more countries can grasp the understanding of the new role of competition policy in representing the interests of both developing and developed countries, perhaps progress in the discussion will not stall.

VII. Conclusion

Though progress on market access issues has been delayed due the failure of the WTO Ministerial Conference in 1999, the extra time allows a more in depth analysis of market access issue before the next round of talks. Though most experts would agree that a variety of approaches in treating market access issues offers the most flexible and available means conducive to each countries' needs, whether that range of options should be increased to allow multilateral organizations such as the WTO to have authority over private restrictive business practices, in addition to its authority over government measures, and other trade and competition issues is a subject that requires further discussion and debate. When options through the unilateral and bilateral agreements have been exhausted, the availability of a third multilateral world organization and a capacity to settle disputes would allow a more effective way to solve problems. The addition of a committee set up to review the unique circumstances of each country would eliminate the fear of an inundation of cases that could potentially be filed. How the treatment of anticompetitive issues are treated in the GATS and TRIPS agreements but not in the GATT begs further examination for the development of the topic of market access.