SPECIAL ARTICLE

Developing a Trade Policy Based on Rules: The Japanese Experience (3)

by Sakamoto Yoshihiro

Intellectual Property Rights Talks

Next, I would like to talk about rules governing intellectual property rights.

The international system to protect intellectual property rights has two institutional frameworks with distinct economic ramifications. The first framework seeks to recognize intellectual and economic contributions by providing those who have developed and created intellectual property with exclusive and monopolistic rights such as patent rights and copyrights. This is designed to encourage intellectual creativity, and the effective use of resources in order to promote research and development, new technologies and the general accumulation of knowledge. The second framework aims to maintain business credibility and fair competition in the marketplace, by protecting trademarks and geographical indications for goods and services.

In an increasingly information-driven globalized economy, the implications of insufficient or inappropriate intellectual property protection measures can be enormous. Over time, a lack of adequate protection can unbalance trade flows and lead to severe trade distortions.

More specifically, insufficient protection of intellectual property will facilitate the ability of unethical marketers to manufacture and distribute "pirated" or "fake" goods, that possess copied trademarks and designs that infringe upon patent rights. Markets might become overrun with pirated goods and the owners of patent rights would not receive the compensation they rightly deserve. This would discourage additional investments in technology. New product development would also be impeded and cross-border investments and technology transfers would become far more complex and difficult to initiate. This would not only retard technology development in the country where intellectual property rights are inadequately protected, but it would also negatively affect its trading partners and the overall global economy.

If protection systems differ substantially between countries, they will not run properly. Extra costs and time would be required to acquire, exercise and ultimately to protect intellectual assets. This would dramatically reduce economic efficiency and the free flow of trade and services around the world.

Let me emphasize, once again, that protection of intellectual property rights is indispensable to facilitate the healthy development of free trade and sustainable economic growth. Each country must make every effort to improve and strengthen its own system to protect intellectual property rights. In addition, it is critical that an international framework be established that can effectively protect intellectual property rights on the global level.

International agreements that define how intellectual property rights are to be protected include the Paris Convention of 1883, which defines the protection of patents and industrial property rights, such as trademarks, and the Berne Convention of 1886, which defines the protection of copyrights that are already in existence. To address new developments in information technology and their implications for intellectual property issues, negotiations are already underway at the WIPO (World Intellectual Property Organization). Their objective is to review and to make necessary revisions to existing rules in order to maintain the integrity of the rule-making process and to ensure the protection of intellectual property in the emerging information age.

The increased supply of fake goods, manufactured and distributed under "pirated" trademarks, has also become an increasingly important issue, along with problems that arise due to national differences between intellectual property protection systems. The recognition that it is critical to build an international consensus on the issue of intellectual property protection has gathered momentum within the arena of the GATT. From this standpoint, the TRIPS (Trade-Related Aspects of Intellectual Property Rights) negotiations have been placed on the formal agenda. After extensive negotiations were conducted between underdeveloped countries and developing countries, as well as among developed countries, the TRIPS Agreement which is based on discussions that have been initiated in recent years on how intellectual property rights can be maintained without impeding the free flow of trade, has been established as a new comprehensive framework dedicated to the protection of intellectual property around the world.

We can cite four significant points from the TRIPS Agreement. First, the whole scope of issues pertaining to intellectual property rights protection, including patents, designs, trademarks, copyrights, certification of origin, non-disclosure information and other intellectual properties and protection measures such as circuit diagrams of semiconductor integrated circuits, have been incorporated enmasse within a single agreement. Second, in principle, the level of protection that has been granted has been raised from what is granted in existing agreements, such as the Paris Convention and Berne Convention. WTO member countries

are obligated to abide by the provisions of these existing agreements — even if they are not signatories to these agreements themselves. Third, enforcement (exercise of rights) proceedings have been mandated on the domestic level in each country to provide a real level of protection for intellectual content and to allow the tangible realization of intellectual property rights in general. Finally, dispute settlement proceedings have been incorporated into the agreement. The introduction of dispute settlement proceedings bears special emphasis. Previous agreements to protect intellectual property rights have lacked an effective means to enforce the provisions designed to prevent infringements. It is important to note that the TRIPS Agreement has now made it possible to initiate sanctions — including such cross-retaliation sanctions as the revocation of duty grants — to protect against the violation of obligations that are contained within the agreement. By incorporating a mechanism for dispute settlement proceedings within the WTO itself, it is now possible to effectively enforce the measures that have been designed to protect intellectual property rights all over the world.

The practice of using WTO dispute settlement proceedings to settle disputes concerning the violation of intellectual property rights disputes has other implications as well. One extremely important point is that the application of this "rule-based" approach will severely restrict the ability of the United States to apply unilateral sanctions such as those incorporated under Section 301 of the Trade Act.

The TRIPS Agreement came into effect on January 1, 1995. The developed countries were obligated to fulfill this agreement as of January 1996. In Geneva, work that aims to confirm each member country's achievements in fulfilling this agreement is now in progress. Developing countries must be ready to fulfill this agreement by 2000, while underdeveloped countries have until 2006. It is expected that domestic statutes will be strengthened and implemented smoothly in current member counties in order to make this transition.

Although institutional harmonization between countries has, to an extent, been achieved by the TRIPS Agreement, there are still many issues that require further harmonization, even in advanced countries. For example, there are still problematic areas not only in Japan, but in the U.S. as well, where the first-to-invent system should be changed into a first-to-apply system and an accelerated publication system should be introduced. Regarding the WIPO's proposed Patent Harmonization Agreement, at the present moment it is unclear as to when the WIPO will begin the necessary examinations. This indicates that the harmonization of patent systems among advanced countries will take more time than expected. In this regard, the agreement reached between Japan and the U.S. following the Framework Talks that started in 1993, to more fully harmonize their patent systems through direct negotiations between the Patent Offices of both countries, can be seen as a truly positive development. which will help to harmonize patent systems among advanced countries.

Under this agreement, Japan has already agreed to accept patent applications in English and to revise its opposition system, while the United States has rationalized its patent application system, which has now been changed to 20 years from the date of application.

Even though efforts to integrate intellectual property protection systems have been made for more than 100 years, we still have a long path to tread until we are able to realize a globally integrated system. This is due to differing economic situations and different domestic and judicial systems in each country. It is essential, however, to continue to examine how to minimize, and hopefully eliminate, the differences between systems in order to facilitate worldwide economic development. It is also vital that we take steps to establish and update rules in order to protect intellectual property rights in rapidly expanding and increasingly important areas, such as information and biotechnology. This is vital to enhance their continued development. Finally, it is hoped that governments will make every effort to draft and implement internationally acceptable and uniform rules to facilitate the protection of intellectual property throughout the global economy.

Section 301: Automotive and Automotive Parts Dispute

The third example that I would like to discuss is the Japan-U.S. automotive dispute of 1995, which evoked global attention.

Japanese automobile manufacturers had acquired a U.S. market share of approximately 5% by the early 1970s, following their entry into the U.S. automotive market in the late 1950s. Small, compact cars exported from Japan and Europe commanded only an insignificant portion of the U.S. car market, where larger, 5,000 cc-class cars were dominant. However, the two oil shocks that hit the U.S. in 1973 and 1979 dramatically changed this situation. During the second oil crisis, in particular, gasoline prices more than doubled in only two years. This precipitated a dramatic change in consumer behavior. Suddenly Japanese compact cars, boasting low prices, low fuel consumption and high quality, were in demand. Medium and large-sized automobiles, which had occupied more than 60% of the U.S. auto market in the early 1970s, occupied only about 30% by the 1980s. Japanese cars, on the other hand, increased their market share to more than 20%.

The resulting damage to the Big Three U.S. automobile manufacturers was significant. Their business performance deteriorated — sales and profits declined dramatically — and ultimately they were forced to lay off 250,000 workers. Overly-dependent on large-sized cars, the Big Three viewed the oil shocks as a temporary phenomenon and failed to adapt themselves effectively and sufficiently to the demand for smaller, compact vehicles. The corresponding rise in exports by Japanese automobile manufacturers into the U.S. market

developed into a major political problem between the two countries.

Government-to-government negotiations were held between the two countries during which appeals were filed to the ITC (International Trade Commission) by the United Auto Workers (UAW) and Ford Motor Co. in 1980-81, based on their claims against skyrocketing imports of Japanese cars to the U.S. market in accordance with Section 301 of the Trade Act. To minimize the resulting political pressures and strain on the bilateral relationship, the Japanese Government decided to impose Voluntary Export Restraints (VER) on the number of Japanese automobiles exported to the U.S. market. In May, 1981, it agreed to restrict the number of Japanese automobiles exported to the United States to 1,680,000 a year. This VER frame continued to exist until 1993, with yearly fluctuations in the number of cars allowed.

At the same time, Japanese auto manufacturers began to formulate feasibility plans that envisioned the production of Japanese-brand vehicles in the U.S. After 1983, Japanese car manufacturers began, one after another, to establish U.S. facilities, and to engage in local production.

While U.S. car manufacturers were eagerly seeking to recover their competitiveness, the U.S. Government, under increasing pressure to deal with a high U.S. unemployment rate, demanded that Japanese car manufacturers drastically increase their purchases of U.S.-made auto parts. Consequently, this led to the start of the Market-Oriented Sector Selective talks (MOSS) in 1986, which concerned the purchase of U.S. auto parts by Japanese firms. In the following year, 1987, Japan agreed to report data on its procurement of U.S.-made parts to the U.S. side on a periodic basis through JAMA (Japan Automobiles Manufacturing Association). It was further agreed to improve the business environment to help expand the quantity of U.S.-made parts purchased by Japanese firms. Bilateral consultations between the two countries continued intermittently until 1991, to follow up on what had been mutually agreed upon by both parties.

In January, 1992, President Bush visited Japan, facing huge pressures to do something about the high trade deficit the U.S. had been registering there. His visit coincided with the announcement of a Voluntary Plan by Japanese auto manufacturers aimed at increasing purchases of U.S.-made auto parts to $19 billion in 1994. However, the U.S. Government and Congress regarded the voluntary plan as a commitment and strongly pressed Japan to completely fulfill this objective — threatening the initiation of Section 301 sanctions if it was not achieved. Although Japan noted that it was not a commitment, the division of opinions between the two countries was carried over to the arena of the Japan-U.S. Framework Talks for further discussions while the gap was left unfilled.

During the summit meeting held between the Japanese prime minister and the U.S. President in July, 1993, the two countries agreed that automobiles and auto parts should be treated as one of the three priority sectors to be discussed during the upcoming sessions of the Framework Talks. Also, it was agreed that "objective criteria" would be introduced, to evaluate the implementation and achievements of the measures and policies, which would be agreed upon by both countries.

During the intensive negotiations conducted between the two countries after September of that year, the United States maintained its strong stance, demanding that Japanese automobile manufacturers significantly increase their procurement of foreign-made auto parts. Simultaneously, it asked Japan to increase its imports of foreign-made automobiles. Because of the determination of the U.S. to incorporate objective criteria in the form of numerical targets, the bilateral negotiations faced rough going. Ultimately, no agreement was reached — even at the summit meeting between former Prime Minister Hosokawa and President Clinton, held in February, 1994.

The Framework Talks resumed in May that same year. Prior to their resumption, however, the Japanese government insisted — and it was agreed to by both the U.S. and Japan — that discussions concerning the automotive sector should take place under the condition that the objective criteria that were to be agreed upon should not take the form of numerical targets. The consultations should seek to focus — and be restricted to — only those areas that fell under the reach and responsibility of government, rather than those which are best determined by the private sector.

In the subsequent negotiations, the United States made further demands, including drastic deregulation in Japan under the Road Vehicles Act. This included regulations that targeted vehicle repair and maintenance shops — on the grounds that the sale of foreign-made auto parts had been unduly impeded. In addition, the U.S. made a de facto request for additional procurements of foreign-made auto parts through revisions in the Voluntary Plan. It was, however, ultimately agreed that the Voluntary Plan should be excluded from these negotiations, as it recognized that the quantity of foreign-made auto parts purchased by Japanese firms should be determined by the business managers of auto companies. In respect to the regulations relating to Japanese auto repair parts, however, the United States decided to commence investigations in October, 1994 under Section 301 of the Trade Act. This provides that the U.S. Government has the right to initiate unilateral sanctions when no desired agreement is secured.

Japan decided to discontinue the auto and auto parts consultations — declaring the two could not accept consultations based on Section 301 of the Trade Act because the law, aiming at unilateral measures, was in disharmony with the spirit of the WHO. Later on, in December of that year, we agreed to reopen the consultations on the condition that the relaxation of Japanese regulations for auto repair parts should be discussed at the sessions of the Framework Talks — but not under Section 301 of the Trade Act.

Summary of Geneva Joint Declaration Related to Automobile Negotiations

Joint Announcement Regarding Dealerships and the Japanese Auto Companies' Plans
By Hashimoto Ryutaro, former Minister of International Trade and Industry and Michael Kantor, former United States Trade Representative

Joint Announcement on Dealerships

1. The U.S. Government expects that the combination of implementing the Measures under the automotive Framework and the intensified efforts of the U.S. vehicle manufacturers will lead to a significant increase in the sales opportunities for U.S. vehicle manufacturers in Japan. Specifically, the U.S. Government envisions an increase of direct franchise agreements between U.S. vehicle manufacturers and Japanese dealers that will result in approximately 200 new sales outlets by the end of 1996 and increasing to a total of approximately 1,000 new sales outlets by the end of 2000.

2. Mr. Hashimoto said that the Government of Japan has had no involvement in this forecast because it is beyond the scope and responsibility of government. Mr. Hashimoto said that these forecasts are solely those of the U.S. Government

Joint Announcement Regarding The Japanese Auto Companies' Plans

1. Mr. Kantor has estimated, on the basis of these individual company plans, the following with regard to the North American market:
(1) U.S. parts purchases will increase by $6.75 billion by 1998.
(2) The companies will increase production of vehicles in U.S. from 2.1 million to 2.65 million by 1998.

Mr. Kantor also estimates an increase of $6 billion in foreign parts purchases by the companies for use in Japan by 1998.

2. Mr. Hashimoto said the Government of Japan has had no involvement in this calculation because it is beyond the scope and responsibility of government. He said that the USTR's estimates are solely its own.

However, the Japan-U.S. consultations again went aground because the United States insisted that an added alternation of the Voluntary Plan is an indispensable ingredient for reaching an agreement on the consultations and bringing them to a close.

Additionally, in May, 1995, the U.S. Trade Representative stated at a press conference that his office had confirmed that U.S. business interests had been unduly restricted as a result of unfair Japanese practices and policies in the auto repair parts market. As a result of their investigations under Section 301 of the Trade Act, a 100% duty would be levied on Japanese luxury-class cars. The USTR also disclosed a list of other candidates targeted for unilateral sanctions. A time limit for the initiation of sanctions was set, with a June 28, 1995 deadline. To cope with this crisis, Japan decided to appeal this matter to the WTO on the grounds that the U.S. action —and U.S. sanctions — would violate the WTO rules that preclude unilateral sanctions, and that this would be a serious challenge to this newly established multilateral institution.

International society, including the European Committee, also raised an objection to the initiation of sanctions under Section 301 by the United States, declaring; "We are opposed to the unilateral sanctions by the United States Government." Fortunately, after a seven-day consultation in Geneva, this critical situation was finally resolved and settled during ministerial negotiations between the Minster of the International Trade and Industry (Hashimoto) and the Office of the U.S. Trade Representative (Kantor). Thus, a worst-case scenario was avoided. More specifically, it was agreed that the United States would withdraw its request to seek a numerical target from Japan and the United States would simply announce its own estimations, for which Japan would bear no responsibility. (See summary of the joint declaration.)

The whole world intently watched these trade negotiations — conducted between two economic super powers — under the newly-formed WTO system. Japan consistently voiced its belief that it was most important to maintain a transparent and fair international trade order based upon the WTO. We have continued to follow this policy up to the present day.

What we accomplished was the avoidance of unwarranted government intervention in private businesses, and to stand by our view that issues related to private business should not be bound by numerical targets negotiated between governments. JJTI

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