Developing a Trade Policy Based on Rules: The Japanese Experience (5)

By Sakamoto Yoshihiro

Competition Policy Film Dispute

Let me cite the film dispute as the final example of trade friction between Japan and the United States. This is — in my opinion — a very interesting case in that it set a precedent in the sense that the relationship between business practices in private firms and international trade was taken up as a government-to-government problem.

In May of 1995, Kodak requested that the Office of the U.S. Trade Representative investigate the Japanese photographic film market based on Section 301 of the Trade Act. This prompted the United States to raise what they thought in their judgment to be problems with the Japanese photographic film market.

The nucleus of the Kodak claim presented to the USTR was: since Japanese manufacturers — especially Fuji Film — have built an anti-competitive distribution system in the Japanese photographic film market by controlling the activities of certain wholesalers, and that the Government of Japan tolerates such anti-competitive practices, this has blocked the ability of foreign marketers to secure access to the distribution channels necessary to effectively market foreign-made film products in Japan.

In the United States, the provisions relating to Section 301 of the Trade Act have been recently amended. A new provision has been added to the effect that "when a foreign government tolerates systematic anti-competitive activities," the United States shall recognize that there is an unreasonable governmental practice in the said foreign government. From the beginning, the government of Japan has viewed the Section 301 provision as a problematic measure from the viewpoint of international rules, as it leads to unilateral sanctions. This added provision increased the problem even more — since it states that the United States can unilaterally recognize such absence of positive action as "toleration" by a foreign government as "unreasonable." Kodak's claim was the first case seeking an application of this newly amended provision.

As trade barriers by "formal" measures such as tariffs and import regulations have been substantially reduced in recent years all over the world, perceptions and concerns about the influences of private sector business practices on trade have become more serious. Within the WTO and the OECD this has been a growing concern. Discussions over this issue under the theme of "Trade and Competition" have begun to gain momentum. In this sense, the film case was spotlighted internationally as a trade dispute that focused specifically on private business practices.

In response to the Kodak claim, the United States decided to initiate investigations and sought to negotiate with the Japanese government. Our response was as follows:

First, we told them that we could not negotiate under the proceedings of a Section 301 application since this procedure was problematic under the WTO Agreement. This was the same stance and policy that the Japanese government had consistently taken in the automotive dispute or other negotiations in recent years.

Second, since the issues raised by Kodak were related to the application of the Japanese Antimonopoly Act, it was improper to negotiate these problems on a government-to-government level. We pointed out that it would be possible — and appropriate — for Kodak to report its allegations to the Fair Trade Commission of Japan. To verify the Kodak claim, it would be necessary to document the kind of activities that Japanese firms — such as Fuji Film — were undertaking in the Japanese market, and to further evaluate whether such activities did in fact impede competition in the Japanese market. This should be Japanese legal evaluation based upon objective rules; specifically, the Antimonopoly Act of Japan. This type of fact-finding and legal evaluation cannot be accomplished by U.S. trade officers, nor can it be determined by negotiations between

the governments of Japan and the United States. In essence, we emphasized our belief that no other agency but the Fair Trade Commission of Japan could fulfill such responsibilities.

The United States was not, however, satisfied with this reaction and persistently demanded government-to-government negotiations between the Japanese and U.S. trade administration agencies, namely, MITI and the Office of the USTR.

To study this issue, we conducted a survey on film markets in other countries. We learned that Kodak held a dominant share of the U.S. film market — approximately 70% — which was approximately equal to what Fuji Film held in Japan. Moreover, the U.S. Department of Justice itself had been pointing out that Kodak's activities in the U.S. market were "anti-competitive." Typically, film markets are an oligopoly - where a few major manufacturers compete for a larger slice of the pie. We found that consumers of film products were relatively unmotivated to try new brands. Consequently, the Japanese and the United States markets can both be characterized by the dominant presence of one domestic manufacturer, i.e., Fuji Film in Japan and Kodak in the U.S. Furthermore, it was revealed that the single brand distribution system, which the United States had attacked as unfair, is not specifically characteristic of Japan — but is a common practice in film markets all over the world — including the United States itself.

Therefore, besides reiterating our position to the United States, we thought it would be useful to compare the film markets of the United States and Japan, and possibly European countries, within an appropriate multilateral forum. Specifically, we thought it would be useful in coping with this film problem — and helpful to encourage a calm discussion as to what kind of practices should be found "anti-competitive," by comparing the markets in major countries. This would serve to promote transparency and to determine which practices can serve as impediments to trade. Therefore, we proposed to undertake a "case study" to compare the film markets of Japan, the United States and Europe at an OECD committee which dealt with issues relating to "Trade and Competition." However, this proposal was not realized as the United States would not give its consent.

Photo: AP/WWP

The Japanese Ambassador of Trade and the Deputy U.S. Trade Representative shake hands on their arrival at the WTO headquarters in Geneva, July, 1996

The Fair Trade Commission of Japan did, however, begin conducting a survey on the Japanese film market in the spring of 1996 and published its results in July 1997. The survey concluded that no violations of the Antimonopoly Act had been found.

Following that decision, the United States recognized the Japanese government's practices as "unreasonable" at the conclusion of their Section 301 investigation in June 1996. They requested that consultations be held under the dispute settlement system of the WTO. Japan accepted this U.S. request, since these consultations would be held in accordance with WTO rules and procedures.

The WTO dispute settlement system is intended to examine whether governmental measures are appropriate or consistent with the WTO Agreement, including the GATT.

According to the United States, the Japanese government had been taking various measures — not simply the kind of passive acceptance intimated by the word "tolerate," but active measures, since the 1960s — to build an anti-competitive and closed distribution structure in the film market.

We challenged this allegation with an all-out counter-argument. Recently a final report was issued by the WTO Panel. It rejected the U.S. claims that the measures of the Japanese Government were inconsistent with WTO rules.

As I have mentioned, although governmental measures were highlighted at the WTO proceedings during the resolution of the film issue, the core of the original argument presented by the U.S. focused on business practices and the distribution structure in the

Japanese film market. It is foreseen that trade disputes in the future will involve private business practices as their primary point of contention.

International rules that can be used to settle these types of disputes are still in an embryonic state. It is strongly hoped that the discussions on the theme of "Trade and Competition" that are currently being conducted at the WTO and the OECD will help to develop additional rules and procedures to deal with these emerging issues. My own view is that each country should make every effort to strengthen its own competition policies and increase the transparency surrounding such initiatives. This is essential to promote market-based competition. International cooperation should also be employed to promote the convergence, harmonization and emergence of substantive rules, wherever and whenever possible.

Government Role in Trade Frictions

Finally, based on the five cases of trade friction presented here, I would like to examine the general role of governments in trade frictions.

The WTO was founded in January 1995. Drawing upon its multilateral focus, the role of government can be seen as one that is based on "external contribution and internal reformation." "External contribution" envisions the natural observation of WTO rules as a top priority. It is essential that government provide information on trade policies and that measures of other countries be corrected and improved to incorporate "rule-based criteria" which are in harmony with internationally accepted norms and principles. It is also necessary for government to actively encourage transparency and take part in international rule-making efforts. "Internal reformation" is equally critical, focusing on the reformation and harmonization of domestic economic systems so that we can better cope with, and benefit from, the accelerated globalization of the world economy.

Admittedly, the observance of international trade rules may sometimes run counter to the short-term interests of domestic industries. The Japan-U.S. automobile negotiations are a good example. We were afraid that part of our automotive industry's interest might be sacrificed if a 100% tarrif was imposed on Japanese cars alone. Our refusal to accept the U.S. demand for a numerical target could potentially have led to virtual prohibition on a significant portion of Japanese automotive exports to the United States. It was, however, imperative for us to show an unfaltering attitude in order to maintain the reliability of the multilateral trade system.

I'd also like to remind you that rules are always exposed to the risk of being abused. I have already discussed AD measures in detail, but there is an argument, for example, about the eco-labeling system, which grants the use of eco-labels for what are termed "green products" that have been produced in consideration of the environment. Many analysts believe that this system has the risk of substantially impeding trade. It should therefore be reviewed in connection with the Technical Barriers to Trade Agreement (TBT) that defines international rules for criteria and certification systems. It is also important to secure transparency for the eco-labeling system in the light of the TBT Agreement. Necessary steps should be taken to prevent criteria and certification systems from exerting an impeding effect. This will entail firm measures when it has been judged that such matters are being used as a hiding place for protectionism. Otherwise, the international economic order could be plunged into serious chaos.

When rules are virtually non-existent or insufficient, it is also necessary to define — and to develop — additional rules. If unilateral sanctions should be taken due to the non-existence of rules, the reliability of even existing rules would be weakened. This must be absolutely avoided.

Besides the observance of existing rules, it is extremely important to actively participate in rule-making endeavors — preferably on a self-regulating basis. As a result of several round negotiations, including the Uruguay Round, the so-called "waterfront barriers" — such as customs duties and tariffs have been significantly reduced. Enhanced attention has also been paid to "internal barriers" and "post-trade-liberalization issues" in individual countries. These include government regulations and anti-competitive business practices. The discussions that I have mentioned concerning the themes of "Trade and Competition" and "Trade and Investment" — which were deemed to be major trade issues after the Uruguay Round — have become increasingly important and now demand our enhanced attention. It is also important to realize the necessity of harmonizing internal policies and systems, in addition to trade policies. Arguments about "regulatory system reformation" are now being made at the OECD. New international rules are usually exposed to domestic opposition, as each country has its own specific circumstances and interests. To overcome this problem, it is vital to build a consensus that the credibility of the multilateral trade system is worth more than the promotion and protection of any one country's interests. Therefore, we should be prepared to accept universal rules with the recognition that opposition should not be allowed on account of individual circumstances. It is essential to respect the conclusions issued within the framework of the dispute settlement system of the WTO — even if they should be rigorous ones and seen as disadvantageous within our own national context. JJTI

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