ESSAY, UNITED STATES-JAPAN TRADE ISSUES AND A POSSIBLE BILATERAL ANTITRUST AGREEMENT BETWEEN THE UNITED STATES AND JAPAN

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I. A HISTORY OF UNITED STATES-JAPAN TRADE ISSUES

Trade issues between the United States and Japan began in the 1950s as exemplified by "the one dollar blouse" issue. The period from the late 1960s through the end of the 1970s can be characterized by American industries' utilization of antidumping laws and other trade remedies in an attempt to ward off challenges by Japanese enterprises who export to the U.S. market. In the 1980s, there was an additional feature to the U.S. trade policy—the U.S. government claimed that there were structural impediments in the Japanese market which prevented U.S. enterprises from getting market access and that as a result, Japan should strengthen its Antimonopoly Law to remedy the situation. Accordingly, the Structural Impediment Initiative (SII) was initiated in 1989 and continued in 1990 in which the major issue was the strengthening of antimonopoly law enforcement in Japan. As well, the U.S. government utilized trade sanctions against Japan under Section 301.

In the three semiconductor cases in the 1980s, the Auto and Auto Parts case, which was resolved in 1995, and the Japan Film cases, in which the World Trade Organization (WTO) panel decided that the U.S had no grounds to petition, the major issue was the structural impediments in the Japanese market. At the center of these issues, there is an awareness on the part of the U.S. government that the cause of the problems are the anticompetitive practices of Japanese enterprises such as cartels, boycotts, and other restraints in distribution as well as governmental measures such as industrial policies to promote domestic industries, the technical barriers to trade, the Large-Scale Retail Stores Law, and the control of premium which tend to create trade impediments. The U.S. government claims that to cope with such anticompetitive conduct, it is essential that Japan strengthen the application of its Antimonopoly Law.

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II. EXTRATERRITORIAL APPLICATION OF COMPETITION LAW

There have been a number of cases in which U.S. antitrust laws were applied extraterritorially. They include such cases as the Japanese Electronics antitrust litigation, which lasted from 1970 to 1986, the Tanner Crab case in 1983, and more recently the Fax Paper case in 1997. Extraterritorial application is not limited to U.S. antitrust laws. In the European Union (EU) and Germany, competition laws are applied extraterritorially as exemplified by the Boeing/McDonnell Douglas Merger case. In Japan, Chapter 4 of the Antimonopoly Law was amended in 1998 so that the law would extend to mergers and acquisitions that occur abroad. It is reported that in the summer of 1998, the Japanese Fair Trade Commission (JFTC) applied the law to the conduct of a Canadian enterprise in Canada.

In the era of globalizing national economies, activities of enterprises are carried out across national boundaries and if the application of national competition laws were to be limited to activities within the territory, multinational enterprises would be able to utilize their international connections and easily escape the control of national competition laws. This would mean that multinational enterprises could operate in "the twilight zone" or "no man's land" without being affected by national competition laws. This would be an unbearable situation for the national authorities of competition laws. In light of this, it is unrealistic to state that there should be no extraterritorial application of competition laws.

III. COOPERATION IN THE ENFORCEMENT OF COMPETITION LAWS

However, extraterritorial application of national competition laws is often ineffective and creates conflict with other nations. This necessarily calls for some form of cooperation among the national authorities in order to effectuate the enforcement of laws against the transnational business activities.

There are three major types of cooperative arrangements among nations with regard to the enforcement of competition laws: a multilateral arrangement, a plurilateral arrangement, and a bilateral arrangement. In a multilateral arrangement, the majority of nations that have competition laws would join. This idea was proposed shortly after the end of World War II in the Havana Charter (Chapter V) which proposed that there should be a comprehensive competition code within the framework of the International Trade Organization. However, due to the fact that the Havana Charter was aborted, its Chapter V stayed in limbo. At present, a plan for such a multilateral arrangement is probably too premature.

A plurilateral arrangement is an arrangement in which a number of nations join on a voluntary basis. This is not as comprehensive as a multilateral

arrangement. An example of a plurilateral agreement is the agreements in Annex IV of the World Trade Organization (WTO) such as the Government Procurement Agreement. In the competition law area, the Munich Group proposed a plurilateral agreement on competition policy. Also, a group of experts commissioned by the European Community (EC) published a report on plurilateral competition agreements within the framework of the WTO. This idea is probably more feasible than a multilateral agreement.

IV. BILATERAL AGREEMENT

At present, a bilateral agreement on competition policy is perhaps the only possible form of agreement. There are a number of bilateral agreements on competition policy such as that between the United States and the EU, between Canada and the U.S., and between Australia and New Zealand.

The U.S.-EU agreement was first signed in 1991 and was amplified by the 1998 agreement. There are seven parts of the 1998 agreement, namely: (1) scope and purpose, (2) definition, (3) positive comity, (4) deferment or suspension of enforcement based on the enforcement of the requested party, (5) confidentiality of information and its use, (6) its relationship with the 1991 agreement, and (7) existing laws.

Article 3 of the agreement provides for positive comity in which one of the parties (the requesting party) can request the other (the requested party) to investigate and, where appropriate, take a measure to control anticompetitive conduct that occurs in the latter and adversely affects the former. If the requested party investigates and takes a necessary measure, the requesting party can, under certain conditions, defer or suspend the enforcement activity of its own against this conduct. Article 5 provides for the confidentiality of information and according to what confidential information is provided by one of the parties to the other, it can be used only for the purpose of enforcing this agreement. Finally, it should be pointed out that this agreement does not impose legal obligations on the parties and that parties do have a wide scope of discretion as to the enforcement of their own competition laws.

V. U.S.-JAPAN BILATERAL AGREEMENT

On September 22, 1998, the Japanese government (the Ministry of Foreign Affairs and the JFTC) published a statement stating that the Japanese government would be engaged in a negotiation with the U.S. government with the goal of concluding a bilateral agreement on competition policy. At this time, it is too early to predict the outcome of this negotiation. However, considering the importance of the matter, it is worthwhile to make a few observations. The most important points of this statement are the following:

> (1) To promote mutual notification with regard to the enforcement activities of the competition authorities, cooperate and adjust such activities, and establish the positive comity;
> (2) To strengthen the enforcement of the Antimonopoly Law on anticompetitive activities that cut across national boundaries, and to deal with the issues of extraterritorial application of the United States antitrust laws and the exercise of the enforcement powers of the United States authorities within the Japanese territory.

It is expected that a bilateral agreement between the United States and Japan with regard to competition policy is likely to be a non-binding (soft law) type of agreement. As indicated above, the most important points of this plan are: (1) cooperation in enforcement activities, and (2) the positive comity. These two aspects are discussed below in more detail.

Speaking on the cooperative relationship in enforcement activities, one of the important issues is that of investigating and exchanging confidential information with regard to a case. As far as an exchange of information between the two governments relates to nonconfidential and public information, no problem arises. However, officials of the JFTC are under the obligation of not disclosing any confidential information obtained through the official exercise of investigatory powers according to provisions of both the Antimonopoly Law and the Civil Service Law.

Article 26 of the Tax Treaty between the United States and Japan provides that both governments can exchange confidential information and that such information can be used only for the purpose of executing tax powers of the government. If a similar treaty were entered into between the government on competition matters, it would be possible to exchange confidential information. However, it seems that time is certainly not ripe for this yet. Nevertheless, an agreement containing a provision for the exchange of information on competition matters for the sake of promoting cooperative spirits among the enforcement agencies would be useful.

If positive comity is introduced and vigorously exercised, it would promote the enforcement of competition laws both in the United States and Japan. Also, it would help avoid issues of extraterritorial application of U.S. antitrust laws. In the Fax Paper case, Japanese paper manufacturers engaged in a price-fixing arrangement in Japan whereby the price of the product in the United States was fixed. They sold the product to exporters/trading companies with the condition that they maintain this price level with their U.S. subsidiaries. U.S. authority proceeded against this cartel in Japan. As well, Japanese authority was able to proceed against the cartel since it involved transactions between the manufacturers and exporters/trading companies in Japan. As a result, it effectively dealt with the issue at hand.

However, there is a limitation to the effectiveness of positive comity. Conduct that the U.S. government asks the Japanese government to prohibit may be exempted from the application of the Antimonopoly Law. For example, an export cartel is exempted from the application of the Antimonopoly Law under the Export and Import Transactions Law and even if the U.S. authority requests the JFTC to proceed against an export cartel, it may be outside the jurisdiction of the JFTC.

A reverse situation may also be true. In the United States, an export cartel is exempted from the application of the Sherman Act under the Webb-Pomerene Act and the Export Trading Company Act. A woodpulp cartel organized under the Webb-Pomerene Act may engage in fixing the export price and thereby harm importers of woodpulp in Japan. Even if the Japanese government requests the U.S. government to control this cartel, it may be outside the jurisdiction of the U.S. antitrust authority.

An important premise of the effectiveness of positive comity is that there be at least some minimum level of competition law principles that the parties share, and that those competition laws are, to a certain degree, harmonized. On the other hand, experiences under a bilateral agreement on competition law may prompt the parties to establish such a minimum requirement that, ultimately, harmonizes their domestic laws.