

ANTI-COMPETITIVE PRACTICES AS TRADE BARRIERS USED BY KOREA AND JAPAN: FOCUSING ON SERVICE AND INVESTMENT MARKETS

*By Eun Sup Lee**

Introduction

The ultimate purpose of the international trade regime under the World Trade Organization (hereinafter WTO) is to level the frontiers among the trade partner countries by removing trade barriers in order to secure fair and free opportunities of competition for the member countries. However, unfair and anti-competitive practices in the domestic markets can provide a further means of protection in addition to frontier barriers. These anti-competitive practices in the domestic markets have been regarded as more important in the service and investment markets than in commodity markets due to their competition – distorting effects. As the multilateral negotiations under the GATT/WTO system have reduced the major frontier barriers to international trade among the member countries, there has been increasing worldwide interest in the anti-competitive practices in domestic markets, particularly in the service and investment markets,¹ under the GATT/WTO mechanism². In relation to these practices, Korea

* Professor of International Trade Law and Practice, Pusan National University, Pusan 609-735, Korea. The author wishes to thank the Korea Research Foundation for the Grant (KRF-2002-041-B00284).

1 The WTO provides little protection against weak national laws, under which an across-the board failure to enact strong competition laws is not an obvious breach of any obligation. Jason. E. Kearns, International Competition Policy and the GATS: A Proposal to Address Market Access Limitations in the Distribution Services Sector. 22 *U. Pa. J. Int'l Econ.* 293-294 (2001). The GATS addresses the problem of weak laws in the market access context, albeit in a fairly limited fashion, *Id.*, at 294. In addition to Article VIII and XI (*infra note 32*), Article VI requires members to ensure that “all measures ... affecting trade in services are administered in a reasonable, objective and impartial manner” GATS, *infra note 32*, art VI, cited by *Id.*, at 296. In addition, through the GATS framework, members have adopted more detailed commitments in specific sectors. For example, members, pursuant to a Telecommunications Reference Paper Regulatory Principles, have agreed to maintain appropriate measures to prevent suppliers in the telecommunications sector from engaging in anti-competitive practices. (Emphasis was added by the author) *Id.*, at 297.

2 Regarding the continuously emerging character of the new trade barriers, the following comment is notable: “As the trade barriers fall like a waterline, the low tide reveals rocks and shoals – which are the private restraints and uncaught government restraints. ... the freer trade engenders new, defensive restraints. Entrenched

and Japan have traditionally been the target of criticism from their trade partner countries³ because they have manipulated various kinds of anti-competitive practices to protect their domestic markets, particularly their service/investment markets, and because their restrictive competitive practices have not been properly regulated compared to their respective trade volume and market size.

This paper is a comparative study of the anti-competitive practices used by Korea and Japan. It analyzes their competition policies on their trade policies, and considers the growing interest in anti-competitive practices, particularly in service markets, and the criticism concentrated on these two countries. In this study, the term 'anti-competitive practices' includes private restrictive business practices and governmental regulations of such practices, which hamper the flow of trade and fair competition, and have been regarded as trade barriers.

This comparative study aims to examine the differences in regulating the anti-competitive practices of Korea and Japan, which implies direction for the coordination and establishment of common rules to regulate the practices of the two countries, in the service and investment markets. This analysis will also suggest the possibility of cooperation between the two countries at plurilateral or multilateral trade negotiations, and the possibility of establishing the legal environment in the field of trade and competition policy regarding the service and investment markets for a free trade area between the two countries in the near future.

Regulation of Anti-competitive Practices

Anti-competitive Practices as Trade Barriers

Out of the many international approaches to regulate the unfair and anti-competitive practices as trade barriers, one approach reconciles the conflicts between trade and competition policy.⁴ In this context, trade barrier means any

businesses, and nations themselves, face perverse incentives to rebuild border barriers for private and nationalistic ends, protecting the newly vulnerable national advantage... ... trade liberalization sets the stage for private and hybrid abuses, suggesting the need for a voice for free trade and competition in the world", Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 *Am. J. Int'l L.* 1, 3-4 (1997), cited by Jason E. Kearns, *supra* note 1, at 285.

3 For example, Japanese and Korean policies and practices related to market access have usually been discussed in the annual National Trade Estimate Report on Foreign Trade Barriers (hereinafter, NTE). This report is prepared by the United States Trade Representative (hereinafter, USTR) to identify policies and practices of U.S. trading partners that the USTR considers inconsistent with a legal obligation or otherwise unfair to U.S. industry. Frederick M. Abbott, *Prevention and Settlement of Economic Disputes between Japan and the United States*, 16 *Ariz. J. Int'l & Comp. Law*, at 190 (1999)

4 Over the last half-century, the members of the GATT/ WTO have accomplished much in the way of trade liberalization, however, they have not changed the relationship between trade laws and competition laws in a global economy. Terence P. Stewart,

kind of entry barrier to the importing country's domestic market which impedes the complete national treatment.

As shown through multinational discussions on trade and competition policies, entry barriers to the domestic market of importing countries are primarily a matter of competition policy. It can also be, however, understood to be a matter of trade policy from the viewpoint of the exporting country. In principle, the basic purpose of trade and competition policies is the same, that is, the improvement of economic efficiency and consumer's welfare-level.⁵ However, in the course of enforcing the two policies, conflicts can occur when different policies with conflicting priorities are imposed,⁶ and international concerns, particularly under the WTO Framework, have recently been concentrated on the effect of competition policy on trade policy.⁷

The main purpose of the international discussions on the effect of competition policy on international trade⁸, that is, on the anti-competitive practices as trade barriers, is to reduce the disparities between the markets of individual countries and to secure a fair and free domestic market structure for access to the domestic market⁹ under the precondition that the trade barriers between the frontiers should be eliminated completely.¹⁰ Thus, anti-competitive

U.S.-JAPAN Economic Disputes: The Role of Antidumping and Countervailing Duty Laws. *16 Ariz. J. Int'l & Comp. Law* 736 (1999)

5 Kevin C. Kennedy, Global Trade Issues in the New Millennium: Foreign Direct Investment and Competition Policy at World Trade Organization, *33 Geo. Wash. Int'l L. Rev.* 587(2001).

6 The different objectives of the trade laws and the competition laws in the United States, for example, have been indicated: "While the antitrust laws are intended to protect competition and, thereby, consumers, the trade laws ... to protect ... the positions of U.S. competitors" William H. Barringer, Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S. – JAPAN Film Dispute, *6 Geo. Mason L. Rev.* 462(1998).

7 Michael K. Young, Global Trade Issues in the New Millennium: Lessons from the Battle Fronts: U.S. – Japan Trade Wars and Their Impact on the Multilateral Trading System, *33 Geo. Wash. Int'l L.Rev.*756 (2001)

8 As now, it might be difficult to ascertain whether anti-competitive business practices have to any significant extent replaced formal barriers to trade as impediments to market access. Indeed, there is no mechanism for even beginning to explore this question much less resolving the problem if such practices actually have a significant impact on trade. William H. Barringer, *supra* note 6, at 477

9 It was indicated as part of the background for international cooperation in the competition policy being called for among the national authorities: In an era of globalizing national economies, international enterprises could operate in "a twilight zone" or "no man's land" without being affected by national competition causes. In such situations, extraterritorial application of national competition laws might be attempted, which, however, is often ineffective and creates conflicts among nations. Mitsuo Matsushita, Prevention and Settlement of Economic Disputes between Japan and the United States. *16 Ariz. J. Int'l & Comp. L.* 250 (1999).

10 In connection with the potential agreement on competition policy which is the end of international discussions, the arguments run that harmonization of national anti-

practices have been highlighted as one kind of trade barrier¹¹, which could, if not regulated appropriately, interrupt access to the domestic market of imported goods and services for foreign exporters.¹²

Since the attempt to establish international rule regulating restrictive business practices through the Havana Charter of the International Trade Organization in 1948 failed, multilateral or plurilateral efforts¹³ have been made in vain¹⁴ to regulate anti-competitive business practices.¹⁵ While those attempts¹⁶ have been failed,¹⁷ the issue of anti-competitive practices has been raised in recent

trust laws would have at least salutary benefits: “ i) a WTO competition policy agreement ... would provide a more predictable legal environment. ii) WTO-centered dispute settlement would reduce duplication of enforcement efforts ... iii) harmonization under WTO auspices would avoid conflicting jurisdictional disputes and potential conflicting decisions ...”. Kevin C. Kennedy, *supra* note 5, at 586.

- 11 As now, matters of domestic regulation as the anti-competitive practices should not be questioned through WTO dispute resolution mechanism absent strong proof of discrimination, nullification or impairment of trade benefits, or a violation of another WTO rule. James, D. Southwick, Operation of the WTO Agreements in the Context of Global Commerce and Competition, Investment and Labor Markets, *31 Law & Pol'y Int'l Bus.* 925 (2000)
- 12 The most visible and well documented instance of a cross border dispute regarding alleged restrictive business practices affecting trade would be the film dispute between the U.S. and Japan [Section 304 Determinations: Barriers to Access to the Japanese Market for Consumer Photographic Film and Paper, 61 Fed. Reg. 30, 929 (June 18, 1996)]. William H. Barringer, *supra* note 6, at 460
- 13 They are the International Trade Organization's (ITO) plan to regulate restrictive business practices in 1948; OECD guidelines for multinational enterprises in 1976; various attempts by the United Nations to regulate restrictive practices in the 1970 and 1980; a draft of the international antitrust code in 1993. See John H. Jackson, et al, Legal Problems of International Economic Relations. 1090 – 1102 (1995)
- 14 Even though the WTO mechanism strengthens the GATT system to the law-based framework, there are important gaps in the WTO rule system, one is the absence of minimum rules on the maintenance of competitive domestic markets. (The author has added underlining.) Frederick M. Abbott, *supra* note 3, at 185 (1999)
- 15 Three facts about domestic competition laws are indicated to add to the complexity of the international agreements on competition policy: “ First, many national competition laws reflect the fact that market concentration, and especially vertical restraints, are not necessarily inefficient. ... Second, although economic theory largely drives competition law and policy, culturally nuanced considerations of fairness also play an important role in many countries, unlike the fairly objective quality of efficiency, ...Finally ... similarity in law and difference in the application of the law suggest that the efforts to draft uniform international competition rules... Jason E. Kearns *supra* note 1, at 288-290.
- 16 Besides the above international attempts, there have been bilateral attempts to regulate anti-competitive practices. There are a number of bilateral agreements on competition policy, which, currently, may be only possible form of agreement. Mitsuo Matsushita, *supra* note 9, at 251.
- 17 According to the record to date, attempts to treat with anti-competitive practices and market structures, for example, in Japan, through GATT/WTO mechanisms have been

years in other GATT/WTO contexts,^{18 19} and there has been general consensus²⁰ that the interface between trade and competition policies has become more important.²¹

-
- completely unsuccessful: besides the film case (see *supra* note 12), the EC raised in 1983 a complaint under Article XXIII : I(c) of the GATT alleging that the “difficulty of penetrating the Japanese market” resulted from keiretsu structures, lost distribution systems, restrictive regulations for the introduction of new products or prices, and less visible barriers, but failed. James. D. Southwick, *supra* note 11, at 963-964.
- 18 A Ministerial Conference in Singapore in 1996 agreed to establish a working group to study issues relating to the interaction between trade and competition policy. WTO/Singapore Ministerial 1996 – Ministerial Declaration, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm (visited April 9, 2004). And Doha Declaration in 2001, instructed working group to focus on clarifying: “..., and provision on “hardcore” cartels (i.e. cartels that are formally set up); ways of handling voluntary cooperation on competition policy among WTO member governments; support for progressive reinforcement of competition institution” WTO/Doha declaration, http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (visited April 9, 2004)
- 19 At least, three WTO agreements speak directly to the issue of restrictive business practices: “i) Article 9 of the Agreement on Trade-Related Investment Measures (TRIMs Agreement) directs ... to consider ... provisions on investment and competition policy; ii) Articles 8, 31 and 40 of the TRIPS Agreement address ... anticompetitive practices in licensing agreements, the abuse of intellectual property right, and restrictions on compulsory licensing; iii) Articles VIII and IX of the GATS prohibit monopoly service suppliers from ... and obligate WTO members to enter into consultations ... on restrictive business practices ...”. Kevin C. Kennedy, *supra* note 5, at 602-603. However Article VIII does not apply if there is more than one supplier of a service in a sector, even if competition is nevertheless severely limited, and it only applies to the member’s commitments made in the scheduled sectors. And Article IX only obligates members to consult with one another “with a view to eliminating” restrictive business practices: no substantive commitments are included. Jason E. Kearns, *supra* note 1, at 294.
- 20 There have been discussions about a WTO Agreement on Competition designed to deal with market access problems caused by anti-competitive practices. So far, it has been suggested that a WTO Agreement on Competition could be limited to a Ministerial Declaration to facilitate the application of Article XXIII: 1(b) “Private anticompetitive practices can nullify and impair concession. The failure of a member to apply its national competition law to a private anticompetitive practice ... is a valid basis for complaint under Article XXIII: 1(b). Such a failure will be construed as an ‘application’ of a measure, as called for by Article XXIII: 1(b).” Hindly, *Competition Law and the WTO: Alternative Structures for Agreement on Fair Trade and Harmonization: Prerequisite for Free Trade*, cited by Jean-François Bellis, *Anti-competitive Practices and the WTO: The Elusive Search for New World Trade Rules*, *New Directions in International Economic Law* 365-366(2000)
- 21 This consensus was triggered by some factors, such as trends toward economic globalization, regional integration, the rebirth of capitalism in Eastern Europe, the Latin American economic reforms, the creation of the WTO, the new legal instruments for dealing with regulatory reform in open economics, and the growing number of

Besides the international attempts to address this matter,²² many developed countries have regulated various kinds of anti-competitive practices through the expansion and application of the concept of 'fair trade' provided in international or individual domestic trade laws, along with the extraterritorial application of their domestic competition laws²³ or positive comity.²⁴ For example, according to Section 301(d) of the *Trade Act* of 1974,^{25 26 27} government toleration of private and

competition case involving more than one country. See Kevin C. Kennedy, *supra* note 5, at 587

- 22 Trade disputes on the anti-competitive practices might in theory be resolved under a non-violation nullification or impairment action in the WTO Dispute Settlement Understanding. However, the lack of clarity of the WTO System in applying the non-violation rules makes such solutions problematic on all sides. Frederick M. Abbott, *supra* note 3, at 185. More troubling, however, is that the WTO at present lacks the competence and resources to address the problem of discriminatory enforcement of domestic competition laws, even if such a claim could be made under the GATT or GATS. The rule of reason, for example, would require a WTO panel to pore over the factual details of many cases before it could find discriminatory enforcement. At present, panels, the Appellate Body, and, generally, the WTO as an institution lack the resources, time, and evidentiary tools to do so. Jason E. Kearns, *supra* note 1, at 297.
- 23 For the cases relating to extraterritorial enforcement of the U.S. Antitrust Laws, see John H. Jackson, et al., *supra* note 13, at 1078-1089; Extraterritorial application of the United States anti-trust law could be the part way down the road to treat with the matter: "...U.S. antitrust law does reach anticompetitive restraints in foreign markets that harm U.S. export ... the availability of this tool will always hinge on meeting the evidentiary requirements of U.S. antitrust laws, as well as the willingness of foreign jurisdictions to cooperate with U.S. ... cooperation is not likely to be very good with respect to unilateral enforcement by the United States vis-a vis out bound trade. ... the effectiveness of unilateral antitrust tools for addressing market-blocking restraints in foreign markets is likely to remain limited." Merit E. Janow, Operation of the WTO Agreements in the Context of Global Commerce and Competition, Investment and Labor Markets: Panel IIB: Operation of the WTO Agreements in the Context of Varying Types of National Regulatory Systems: Public, Private and Hybrid Public/Private Restraints of Trade: What Role for the WTO?, *31 Law & Pol'y Int'l Bus.* 978- 979(2000)
- 24 Positive comity is regarded as an important development to substitute the extraterritorial application of the domestic anti-trust laws: "... The heart of positive comity is that one jurisdiction refers a matter to another, in the expectation that the receiving jurisdiction will investigate the claim and is better able to do so. The referring jurisdiction therefore will stay its hand, either by choice or because it really has no alternative. ... It requires ... that the referred jurisdiction has and will take a serious investigation. ... It does not, however, change the fundamental nature of the antitrust agency that is the recipient of the referral. ..." Merit E. Janow, *Id.*, at 979.
- 25 19 U.S.C.A §2411(d) Section 301 gives the United States President a broad authority to take all appropriate steps within his power to obtain the elimination of a transgression, if he determines that a foreign country has committed any one of several transgressions provided. Alan C. Swan, Prevention and Settlement of Economic Disputes between Japan and the United States, *16 Ariz. J. Int'l & Comp. L.* 48 (1990).

systematic anti-competitive activities that have the effect of restricting access to the foreign market may be regarded as 'unreasonable' acts.²⁸ The concept of reasonable or fair trade practice, which exceeds the scope of the tariff or non-tariff barriers at the frontiers, has become the widely and strictly accepted basis of securing fair competition in foreign market.²⁹

Regulation of Trade in Services

Introduction

As the share of services in international trade has steadily increased, international efforts to deal with international trade in services also have increased.³⁰ It culminated³¹ in the adoption of the General Agreement on Trade in

26 The aggressive resent-oriented approach under Section 301 of the *Trade Act* of 1974 was evaluated to be in sharp contrast to the cautious approach of cooperation, consensus building and the development of procedural mechanisms to address cross border competition issues advocated by the official U.S. policy. William H. Barringer, *supra* note 6, at 460. At any rate, it has been speculated by one commentator that the U.S. actions through Section 301 and the international reaction to them became an important factor in the creation of the WTO. Wolfgang W. Leirer, *Retaliatory Action in the United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1972 and Council Regulation 2641/84*, 20N.C.J. INT'L L. & COMM. REG. 41 (1995), cited by Jeffrey Simser, *GATS and Financial Services: Redefining Borders*, 3 *Buff. Jour. Int'l L.* 46(1996)

27 Regarding the negative effect of the WTO mechanism on the United States, which gives one reason for the United States to rely on unilateral measures under Section 301, it was commented: "The United States, as a defendant, suffers perhaps the sole disadvantage from having a remarkably transparent law-based system of trade regulation. ... When the United States crosses the line ... the foreign country plaintiff can go to the WTO, get a judgment against the practice, ... when the United States is a complaint, ... how, then, will it prove that the Korean or Japanese economies are rigged in a variety of hidden ways? ... the panel itself is likely to consist of busy diplomats with other, more pressing, responsibilities. ..." Alan Wm. Wolff, *Operations of the WTO Agreement in the Context of Global Commerce and Competition, Investment and Labour Markets: Panel IIIC: Operation of the WTO in Context of Overall U.S. Trade Policy Objectives: America's Ability to Achieve Its Commercial Objectives and the Operation of the WTO*, 31 *Law & Pol'y Int'l Bus.* 1027 (2000)

28 Ralph H. Folsom, Michael W. Gordon, *International Business Transactions*, 536(1996)

29 Possible options for solving cases involving such anti-competitive practices, for example, in the United States are: "i) proceed under Section 301; ii) bring an anti-trust action in a United States court ...; iii) seek dispute resolution procedures under WTO; or iv) urge "positive comity" on the foreign enforcement agencies... to fully enforce their competition cases ..." Peter E. Ehrenhaft, Asil Holdo Corporate Counsel Committee Briefing on International Antitrust and U.S.- Japan Relations, *The American Society of International Law Newsletter* (Sept. 1995) (file-Lexis)

30 The GATs as the result of the first step to regulate internationally the trade in services, would raise the interpretation public agreements like the GATS, except the attempts by the Vienna Convention of the Law of International Treaties, Jan. 27,

Services (GATS).³² Even though GATS originated from GATT with the same spirit,³³ the particular characteristics of trade in services produce deviations under GATS regulations, in certain key respects, from the concepts and rules incorporated in the GATT.³⁴ Considering that many service industries are required to remain carefully regulated to protect the public interest, the GATS regulates trade barriers that distort competition or restrict access to markets on the one hand, and distinctively, requires legitimate policy objectives to be pursued and ensures the orderly functioning of markets on the other hand.³⁵

1980, 1155, U.N.T.S. 331(Article 3(2) of the Dispute Settlement Understandings brings the Vienna Convention into the interpretative sphere of the WTO, because the Convention is clearly recognized as incorporating customary rules of interpreting public international law). Regarding the interpretation of GATS, it was analyzed: "The GATS,... and Lists of Article II Exemptions are, ... unique instrument. The WTO ... is comprised of nations with various legal systems and economic policies, diverse historical and cultural backgrounds, and vastly different economic strengths and populations. These considerations, ... must be appreciated when interpreting the GATS..." J.Steven Jarreau, *Interpreting the GATS and the WTO Instruments Relevant to the International Trade of Financial Services: The Lawyer's Perspective*, 25 *N.C.J.Int'l L. & Dom. Reg.* 70(1999). It is reasonable to read the drafters' intention interpreting the agreements. Remembering the WTO does not have legislative histories, in the domestic sense, reference to the achievement of respected trade periodicals may be a beneficial, secondary source of authority. *Id.*, at 71. The Preamble offers interpretative insight into the GATS. *Id.* The Dispute Settlement Panel in *Brazil-Measures Affecting Desiccated Coconuts* held that "central objects and purposes" of the WTO Agreements are reflected in the preambles to the Agreements. *Brazil-Measures Affecting Desiccated Coconuts* held that "central objects and purposes" of the WTO Agreements are reflected in the preambles to the Agreements. *Brazil-Measures Affecting Desiccated Coconuts*, available in 1996 WL 738807, *70(Oct. 17, 1996), cited by *Id.*, at 71.

31 Aly K. Abu-Akeel, *Definition of Trade in Services under the GATS: Legal Implications*, 32 *GW. J. Int'l L. & Econ.* 189(1999).

32 General Agreement on Trade in Service, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts 325, 33 *I.L.M.* 1667 (1994) [hereinafter GATS]. For a full text of agreements resulting from the Uruguay round, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments – Results of the Uruguay Round 1 (1994), 33 *I.L.M.* 1125 (1994)

33 They are improving trade and investment conditions through multilaterally agreed disciplines; stabilizing trade relations through policy bindings on an MFN basis; and achieving progressive liberalization through subsequent rounds of negotiations.

34 Aly K. Abu-Akeel, *supra* note 31, at 189

35 The most intractable barriers in services are indicated to arise from government regulation, instead of tariff and non-tariff barriers as like in the case of goods, which, sometimes, have explicit protectionist rationales, even if they are justified by "infant industry" arguments, and may constitute barriers even when they are non-discriminatory in application. Considering these, the real question is not the actual existence of the barrier but the willingness to dismantle it. Joel P. Trachtman, *Trade*

Thus, restrictions on service suppliers in specified fields or discrimination against foreign suppliers are considered as barriers to service trade. However, regulations requiring compliance with technical standards or qualification requirements to ensure the quality of service and the protection of public interest are considered as necessary. Multilateral negotiations have progressively liberalized GATS regulations by removing trade barriers in service markets, while not restricting the individual governments' authority to maintain and develop necessary regulations to pursue their national policy objectives.

International trade has traditionally been understood as involving only the movement of goods and services across national borders.³⁶ Trade in services under the GATS, however, should be much more comprehensive covering transactions which involve moving the factors of production as well as the services themselves across borders. Such a trade in services could be realized through various modes such as cross-border supply (this would include services provided over the internet or telephone, where the service provider does not have to leave his/her territory), consumption abroad (tourism, for example), supply through commercial presence (this might include a Korean company establishing a subsidiary in Japan, for example.) and supply through the presence of a natural person (for example, a medical doctor or other professional temporarily travelling to another country to provide a service).^{37 38 39}

in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis, 34 *Column. J. Transnat'l L.* fn. 27(1995)

36 In general, the differences between trade in goods and trade in services are indicated to exist at four levels. "First, services are intangible and perishable. Second, there are numerous modes for trade in services. In contrast to the exclusively cross-border mode for trade in goods, services can be provided at the location of the service supplier, at the location of the service consumer, or at neither of these two locations. Third, international trade in services usually requires movement of one or more factors of production, such as the movement of capital or the movement of labor. Fourth, the national regulation level of trade in services is more extensive and diverse than trade in goods." Aly K. Abu-Akeel, *supra* note 31, at 189.

37 Influenced by the economic literature and analysis preceding the GATS negotiations, the drafters of the GATS appear to have reached two conclusions in their attempt to define the scope of service activities subject to the GATS: that no practical purpose can be served by an attempt to define "services", and that the definition of trade in services should be as precise as necessary to capture all modes for the service trade. Aly K. Abu-Akeel, *Id*

38 By adopting the definition in specifying the service activities subject to its discipline, the GATS has failed to provide a definition of what services should mean for purposes of the agreement. Failure to address definitional matters might raise issues concerning the scope of applicability of GATS: "i) the applicability of the GATS to situations where service are traded in association with trade in goods; ii) the applicability of the GATS to outsourcings (externalization) of internationally traded services; and iii) the implications of the definition of trade in services on the determination of the rules of origin that are applied to international transactions involving services." Aly K. Abu-Akeel, *Id*, at 189-190.

With such an expanded definition of service trade,⁴⁰ GATS would be relevant to a wider range of domestic policies, regulations⁴¹ and measures⁴² than GATT, since they would have an effect⁴³ on the supply of services which traditionally have not been touched upon by multilateral trade rules.^{44 45} Enforcing domestic policy for

-
- 39 In contrast with the GATT, the definition of trade in services in the GATS does not use the words “originated in” to ascribe the services to a particular country. GATS, art I, 33 I.L.M. at 1168-68, cited by Aly K. Abu-Akeel, *Id*, at 203. The definition refers to the supply of services “from the territory” of one member and to the supply of services “in the territory” of one member. GATS. *supra* note 32, art I, cited by Aly K. Abu-Akeel, *Id* Nonetheless, the rules of origin are as relevant to the GATS as they are to the GATT, and the use of the words “from” or “in” the territory of a member is equal to the use of the words “originating in” the territory of a member, Aly K. Abu-Akeel, *id*. It is inconceivable that the GATS intended to consider the nationality of services as that of the country of the service supplier, *Id*, which will amount to having no rule of origin at all to govern international trade in services. *Id*, at 208.
- 40 The definition of services was heavily negotiated, with many developing countries seeking a definition limited to cross border trade; in the end an all encompassing definition for modes of supply was arrived at. Pierre Sauve, Assessing the General Agreement in Trade in Services: Half-Full or Half-Empty, 29 *J. World Trade* 125, 128 (1995), cited by Jeffrey Simser, *supra* note 26, at 49.
- 41 One unique to GATS, unlike GATT, is its Article VI recognition that a lack of transparency in domestic regulatory processes may operate to inhibit access to markets – a result contrary to a Member’s general obligations. Ruth Ku, A GATT-ANALOGUE Approach to analyzing the Consistency of the FCC’s Foreign Participation Order with U.S. GATS MFN Comments, 32*GW. J. Int’l & Econ.* 117 (1999).
- 42 The term “measure” covers any action taken by any level of government as well as by non-governmental bodies to which regulatory powers have been delegated. A “measure” could take any form; a law, regulation, administrative decision or guideline or even an unwritten practice. GATS, *supra* note 32, art XXVIII.
- 43 The use of the term “affecting”, rather than other terms such as “governing”, seems to mean that the scope of the Agreement extends to the measures to incidentally affect the supply of a service. The WTO Dispute Settlement Panel interpreted the meaning of the term “affecting” in European Communities – Regime for the Importation, Sale and Distribution of Bananas CEC-Bananas (available in 1997 WL 533133, May 22, 1997). Relying on Article 31 of the Vienna Convention, the Panel noted that the GATS, like the GATT, is an “umbrella agreement” applicable to all section of trade in service and all types of resolutions. EC-Bananas, *id*, at 370. In its efforts to determine the ordinary meaning of the term “affecting”, the Panel stated that Article I(1) of the GATS does “not convey any notion of limiting the scope of the GATS to certain types of measures or to a certain regulatory domain” *Id* The Panel concluded that the term “affecting” should be “interpreted broadly” *Id*, at 380, cited by J. Steven Jarreau, *supra* note 30, at 51-52.
- 44 Prior to the Uruguay Round, the Organization for Economic Cooperation and Development (OECD) established international frameworks (referred to as “Codes”) for liberalizing trade in services. The codes were created to “...abolish...restrictions on the movement of capital” and “eliminate... restriction on current invisible transactions...” “Invisible transactions” are service transactions. However, the codes were limited in many ways: they only applied to OECD members, they lacked a

treating foreigners in their service activities, for example, could be directly relevant to a country's obligations under GATS. Thus, the obligations covered by GATS concerns not only the treatment of the service but also that of the service business or service supplier,⁴⁶ which consequently makes GATS the first multilateral treaty regulating the treatment of foreign investors.⁴⁷

GATS covers any tradable service in any sector except the air transport sector, and excludes the services supplied only "in the exercise of governmental authority". For a service to be so considered, it has to be supplied neither on a commercial basis, nor in competition with other service suppliers. GATS comprises three major sets of obligations: the general framework consisting of rules and obligations binding all WTO members; the annexes addressing issues arising in particular service sectors; specific commitments regarding service sectors and sub-sectors negotiated by individual members listed in their schedules of specific commitments.⁴⁸

General Regulation

The GATS contains five types of provisions of general applications: unconditional obligations applied to all service sectors;⁴⁹ conditional obligations to bind a member only in specific commitment-made sectors;⁵⁰ permissive provisions to allow Members to deviate from the most-favored-nation principle, which are allowed because of concern by some nations that there would be a number of 'free

dispute settlement provisions with binding arbitral powers ; and finally they made it easy to reserve obligations on different grounds. Thus, the OECD Codes did not provide a comprehensive multilateral agreement to liberalize trade in services. Jeffrey Simser, *supra* note 26, at 36-37.

- 45 The domestic regulation of professional activities is the most pertinent example, GATS, *supra* note 32, art VI, 6.
- 46 GATT provides little protection against discriminatory enforcement for imported goods and, incidentally, provides no protection for foreign investors who manufacture goods abroad. The GATS provides greater protection, and even protects the foreign investor's "commercial presence", but only for trade in services, and only for services in which specific commitments have been undertaken. Jason E. Kearns, *supra* note 1, at 297.
- 47 GATS, *supra* note 32, part I, Scope and Definition: Regulatory Implications.
- 48 The GATS framework agreement is divided into six parts: i) Scope and Definition; ii) General Obligations and Disciplines; iii) Specific Commitments; iv) Progressive Liberalization ; v) Institutional Provisions ; and vi) Final Provisions. The six parts are further divided into thirty-two articles, reflecting the influence of WTO Members with civil law traditions. The articles, which reflect the influence of common law statutory drafting techniques, are more encompassing than customary civil law legislation. J. Steven Jarreau, *supra* note 30, at 32.
- 49 They are most-favoured-nation treatment (art II), transparency (art III), rules on domestic regulation, monopolies (art VIII), business practices (art XI) and increasing participation of developing countries (art IV).
- 50 They are transparency (art III), domestic regulation (art VI), monopolies (art VIII) and payments and transfers (art IX).

riders' to the agreement;⁵¹ exception provisions to allow a member to impose a regulatory measure that is inconsistent with its GATS obligations to the objectives⁵² of the policy; and provisions for further rule-making in areas⁵³ asking for further disciplines or elaboration.⁵⁴ While all of these provisions are important with regard to ensuring cooperation in opening service markets, certain provisions are far more important for the success of the agreement, which sets the GATS apart from other agreements.⁵⁵ The most-favored-nation principle⁵⁶ under the GATS, like GATT, does not, by itself, require any particular degree of market openness, but ensures fair competition among trading partners.⁵⁷ Domestic

-
- 51 Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services*, 16 *Mich.J. Int'l L.* 941-965(1995), cited by Mara M. Burr, *Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market?*, 20 *Ham line L. Rev.* 674 (1997)
- 52 They are, for example, the protection of life, health or public order. GATS, *supra* note 32, art XIV, XIV *bis*.
- 53 They are, for example, domestic regulation, emergency safeguards, government procurement and subsidies.
- 54 In Contract to this five-type analysis, some authors including Laurel S. Terry separate the GATS into three parts of obligation. According to Laurel S. Terry, thus, for determining the effect of the GATS on cross-border specified services, it is required to examine at least three different aspects of the GATS: "one must i) consider the provisions that automatically apply to every country...; ii) determine if a country exempted itself from the most-favoured nation provision in the GATS ...; iii) one must consult the Schedules of Specific Commitments...." Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers*, 34 *Vand. J. Transnat'l L.* 999-1000(2001)
- 55 Mara M. Burr, *supra* note 51, at 673.
- 56 Article X VII of the GATS, the GATS Most Favored Nation principle, is complemented by Article X VII, the GATS National Treatment obligation. The EC-Bananas Panel (*supra* note 43) demonstrated the complementary nature of Article II and X VII. The panel concluded that the MFN obligation of Article II(1), like the National Treatment obligation of Article X VII, "should be interpreted to require no less favourable conditions of competition." GATS, *supra* note 32, art XVII, cited by J. Steven Jarreau, *supra* note 30, at 63. Thus the GATS MFN obligation, like its National Treatment requirement, contemplates a level competitive playing field for the services and service suppliers of WTO Members: *id*
- 57 In relation to MFN principle in GATS, the characteristics of the GATS as the product of political considerations was thus indicated: "In GATS, unlike GATT's Article □, Members are permitted to schedule exemptions from MFN application. The exemptions for MFN, as well as the exemptions on specific comments, have been described as structural weakness. Many of the obligations are triggered by a shopping list approach and GATS can only be understood by reading the schedules both of commitments and exemptions.... The compromises necessary to create the agreement were driven by political considerations, not purely by technical trade issues. If the goal of GATS was to create an all-encompassing principle-based agreement, the GATS might be adjudged a failure. However, if GATS is viewed as a first step towards liberalization along the lines of the 1947 GATT, then the jury is still out. ...the key

regulations have different requirements:⁵⁸ some are to be fulfilled in all sectors, and others are applied only to scheduled specific commitments.

Each member is required to sustain judicial or administrative procedures to allow appeals of administrative decisions, and to provide for the prompt review of such decisions and appropriate remedies. If the procedures are administrative, and are not independent from the agency in charge of the decision concerned, the review should be objectively and impartially completed.

In sectors of scheduled specific commitments, it requires that all measures of a general application affecting trade in services are to be administered in a reasonable, objective and impartial manner.⁵⁹ This obligation focuses on the manner in which measures are administered and not on their substance,⁶⁰ which is to ensure that foreign service suppliers are not discriminated against or impeded in their work by the arbitrary or biased administration of the regulations;⁶¹ measures relating to qualification requirements and procedures, technical standards and licensing requirements, and procedures can not be formulated or applied so that they constitute an unnecessary barrier to trade in the service. Thus, they should be based on objective and transparent⁶² criteria such as competence and the ability to supply the service and they should not be more burdensome than necessary to ensure the quality of the service.⁶³ In

policy feature of GATS is progressive liberalization, rather than a single reform, an idea enshrined in the preamble to GATS.” Jeffrey Simser, *supra* note 26, at 50-51.

58 GATS, *supra* note 32, art VI

59 *Id.*, art XL.

60 The obligation on Members pursuant to Article VI does not require that they enact or maintain reasonable, objective and impartial domestic regulations. J. Steven Jarreau, *supra* note 30, at 66. The obligation on Member to introduce and maintain only those domestic regulations that are consistent with the GATS derives primarily from Article II, Most-Favoured Nation Treatment, Article XVI, Market Access, Article XVII, National Treatment, and Article XX, Schedules of Specific Commitments. J. Steven Jarreau, *Id.*

61 Article VI is intended to prevent Members from denying, nullifying, or impairing GATS benefits to other WTO Members through the use of onerous domestic administrative measures. J. Steven Jarreau, *Id.*

62 With relation to transparency obligation of Article III, Article III does not state where the publication is to occur or the duration of the publication, nor require to notify the WTO Secretariat or the Council on Trade in Services of these measures. And in the case of Notification of measures significantly affecting a Member’s scheduled commitments [art III(3)], the GATS does not define when a measure significantly affects a Member’s scheduled commitment. J. Steven Jarreau, *supra* note 30, at 64. The GATS also does not define “relevant measures of general application” nor is there any explanation of when a measure should be considered as “pertaining to or affecting” the operation of the Agreement, in Article III(1). GATS, *supra* note 32, art III(i). Reference to the definition of “measure” would be recommended. GATS, *supra* note 32, art XXVIII(a), cited by J. Steven Jarreau, *id.*

63 In the sector-specific context of GATS, this proportionability provision in GATS is roughly analogous to the provisions of the WTO TBT Agreement (arts. 2.1-2.5), but adds a requirement for further work through the Council for Trade in Services to

determining whether such a measure constitutes an unnecessary barrier to trade in services, members are required to take into account the international standards of relevant organizations.⁶⁴

In professional service sectors where specific commitments are scheduled, adequate procedures to verify the competence of professionals from other member countries are required to be established. The members are allowed to recognize⁶⁵ the education or experience obtained, requirements met, or certification granted in other Member countries,⁶⁶ under the condition that discrimination should not be made in the application of their substantive requirements.⁶⁷ Thus, the different procedural tracks allowed by the service suppliers' country of origin are distinct from the application of different substantive requirements to them.

Sometimes governments may grant monopoly or exclusive rights to certain suppliers for legitimate reasons as allowed under the specified requirements.

articulate and expand the disciplines contemplated here. Joel P. Trachtman, *supra* note 35, at 88-89. Regarding this provision, three difficult issues are indicated: i) determining who will judge whether national requirements are more burdensome than necessary and how the components of this equation will be measured; ii) determining what goals of regulation are legitimate; iii) these determinations do not reach the ultimate problem: how to deal with regulation necessary to achieve a legitimate goal that imposes greater costs on trade than the savings it achieves through achievement of its regulatory goal. *Id.*, at 89

64 They would be GATS, *supra* note 32, art VI 5 (b): "International bodies whose membership is open to the relevant bodies of all members of the WTO."

65 Recognition may be granted through harmonization, may be based upon an agreement with other countries, or may be accorded autonomously, thus allowing Members to treat service suppliers of other Members differently depending on the level of qualifications granted in their country of origin. GATS, *supra* note 32, art VII 1

66 GATS, *supra* note 32, art VII. This *supra* note 32, provision is weak, for it allows a Member to recognize or fail to recognize the education or professional license granted in another country based on its own subjective criteria. Kenneth S. Kilimnki, *Lawyers Abroad: New Rules for Practice in a Global Economy*, 12 *Dick J. Int'l L.* 284 (1994), cited by Mara M. Burr, *supra* note 51, at 675. Just one positive section of the Article on recognition provides: "where appropriate recognition should be based on multilaterally agreed criteria. ... Members should work in cooperation with ... organizations ..." GATS, *supra* note 32, art VII, cited by *Id.*, at 676.

67 Thus, Article VII of GATS simply provides that a member may recognize the regulation of another country in satisfaction of its own regulatory requirements, which is somewhat softer than the more mandatory language of the Article 2.7 of the TBT Agreement requiring to accept "as equivalent technical regulations of other Members even if these regulations differ from their own ..." Joel P. Trachtman, *supra* note 35, at 96. This framework for recognition is facilitative, not mandatory, leaving to Members the decision of whether or not to recognize the regulation of another country. In this regard, this framework contains no discipline of proportionality, but simply a possibility of proportionality expressed through recognition: *id.*, at 97. However, Article VII of GATS also contemplates that members may enter into mutual recognition agreement regarding the regulation of other parties to the agreement, which, depending on their scope and sectoral coverage, may be analogous to, or may be contained within, regional or other plurilateral integration agreement: *id.*, at 96.

These requirements, which define member's general obligations and specific commitments, apply not only to the sector granting monopoly rights, but also to the other sectors scheduled to specific commitments. In other words, where a monopoly supplier competes in the scheduled sector outside the scope of its monopoly rights, the supplier is required not to abuse its monopoly position by Acting inconsistently with such commitments. When certain business practices restrain competition and thereby restrict trade in services, members are required, upon request, to enter into consultations to eliminate such practices, and to afford full and sympathetic consideration to other members' submissions.⁶⁸ Further disciplines are scheduled to be negotiated on emergency safeguard measures, government procurement and subsidies, respectively.

Members are required to allow international transfers and payments needed to carry out service activities covered by their specific commitments so as not to frustrate the purpose of the commitments.⁶⁹ As an exceptional measure, members are allowed to introduce restrictions in trade in services, in order to safeguard their balance of payments position, in the event of serious balance of payments problems and external financial difficulties, or threat thereof, which should be imposed properly.⁷⁰ Members are also allowed to introduce measures which would be, otherwise, inconsistent with their obligations under the Agreement, in exceptional circumstances and in order to pursue any of the policy objectives set out in the relevant provisions.⁷¹

Specific Commitments

Each member is required to have a schedule in which it registers its commitments⁷² about market access⁷³ and national treatment⁷⁴ in service trade.

68 GATS, *supra* note 32, art IX

69 *Id.*, art XI

70 *Id.*, art XII.

71 *Id.*, art XIV, IX, X, XII.

72 Though a member is not forced to make specific commitments in a certain sector or sub-sector, once it chooses to do so, general obligations like MFN obligations attach to those commitments: *id.*, art X VI, X VII.

73 The purpose of Article X VI Market Access is to eliminate measures that limit: i) the number of service suppliers; ii) the total value of service transactions; iii) the total number of service operations or of people employed; iv) the type of legal entity allowed to provide the service; and v) the percentages of foreign capital shareholding or investment. John Kraus, international Chamber of Commerce, *The GATT Negotiations: A Business Guide to the Results of the Uruguay Round*, 43 (1994) cited by Ruth Ku, *supra* note 41, at 118.

74 It is notable that the national treatment obligation of GATS applies to those sectors scheduled, and subject to exceptions set forth in the schedule, which makes it subject to further negotiations, based on the sectors included in a country's schedule, and further based on conditions or qualifications set out therein. Joel P. Trachtman, *supra* note 35, at 68-69. GATS specifically provides that this obligation may be met by virtue of treatment that is different from the treatment applicable to domestic services and

Making a commitment is similar to a binding tariff under the GATT: a member binds the level of market access and national treatment specified in the schedule and undertakes not to impose any new restrictive measures or discriminatory practices on services or service suppliers due to their national origin⁷⁵. Commitments can only be withdrawn or modified after negotiating and agreeing with other Members upon.⁷⁶ In nearly all schedules, commitments are grouped into two sections: 'horizontal' and 'sector-specific' commitments.⁷⁷ The horizontal section, often referring to particular modes of supply, notably commercial presence and movement of natural persons, does not contain actual commitments, but limitations, explanatory notes or scheduled commitments which apply to all sectors included in the schedule.⁷⁸ ⁷⁹ Thus any evaluation of sector-specific commitments should take account of the horizontal entries.

suppliers, which recognizes that national treatment is not necessarily identical treatment but, makes the applicable standard one of *de facto* rather than *de jure* national treatment. *id.*, at 69.

- 75 Regarding the developing process of the Schedules of Specific Commitments, it is explained: "Because the GATS negotiation process was based on a request-offer system, countries exchanged information about their proposed Schedules of Specific Commitments.... This permitted a country to know before it finalized its own Schedule..., what it could expect from other countries. These Schedules were subject to fierce negotiations.... At a certain specified deadline, each country had to submit its final proposal including its Schedule of Specific Commitments" Laurel S. Terry, *supra* note 54, at 1004.
- 76 Most countries listed their current regulations in the Schedules, the consequence of which is that the current law need not comply with those aspects of the GATS that applied to "scheduled" services. See Accord Sydney M. Cone, III, *International Trade in Legal Services: Regulations of Lawyers and Firms in Global Practice* 2: 20-24, cited by Laurel S. Terry, *supra* note 54, at 1004. Thus, this structure has the effect of requiring a country's future regulation of legal services to comply with the GATS, and be no more restrictive than its current regulations, but "grandfathers" in the exiting set of regulations, Accord Sydney M. Cone, III, *Id.*, at 2:32, cited by Laurel S. Terry, *id.*, which makes commentators often describe the GATS as creating standstill provisions. Accord Sydney M. Cone, III, *Id.*, at 2:31-32, cited by Laurel S. Terry, *Id.*
- 77 All clauses in GATS are grouped into two clauses: for example, which the Most-Favored-Nation clause is a horizontal clause, the National Treatment clause is vertical, meaning that it is a conditional rule, the application of which depends on commitments made by each country, sector by sector. Francisco Henriques Da silve, *Les Six Points de Mons et Lear Suite*, in *L'Europe et les Enjeux du GATT dans le Domaine de L'Audiovisuel* 137 (1994), cited by Sandrine Cahn, Daniel Schimmel, *The Cultural Exception: Does It Exist In GATT and GATS Frameworks? How Does it Affect or Is It Affected by the Agreement on TRIPS?*, 15 *Cardozo Arts & Ent. L. J.* 299 (1997)
- 78 J. Steven Jarreau, *supra* note 30, at 48.
- 79 It is essential to review the notations in the horizontal commitments to determine a Member's intention and to fully understand the Member's scheduled commitments. Thus, Members have considerable autonomy regarding the manner in which their commitments are scheduled, particularly at this early stage in the international regulation of trade in services. Future schedules to come should become more uniform,

The GATS mandates successive negotiations in order progressively to liberalize service trade,⁸⁰ which implies that the establishment of GATS is only the first stage in a progressive process of liberalization,⁸¹ during which national policy objectives and the level of development of individual Members are to be taken into account.⁸²

There being two kinds of annexes to GATS, some have permanent validity like the Annexes on air transport services, on movement of natural persons, on MFN exemptions, on telecommunications and on financial services,⁸³ while others will cease to be effective once future negotiations are concluded.⁸⁴

to the advantage of all WTO Members and their service consumers and suppliers. J. Steven Jarreau, *supra* note 30, at 48.

- 80 Progressive liberalization, containing Article X IX through X XI, was drafted with future negotiations in mind. The purposes of these articles are two-fold: the first purpose, diplomatic in nature, is to provide for built-in rounds of successive negotiations with the aim of further liberalizing trade in services; the second purpose, essentially a shake-out provision, is to review how the GATS works in practice, with the aim of entering into future negotiations to reconcile practice with expectations. J. Steven Jarreau, *Id*, at 33-34.
- 81 For the achievement of GATS, as with GATT in 1947, creating and encouraging the process of liberalization, there are not only facilitative provisions but also provisions to prevent “backsliding”. To the extent that GATS preserves the status quo, there will be a stable and predictable market for entrepreneurs and investors. Jeffrey Simser, *supra* note 40, at 54.
- 82 The GATS does not definitively regulate trade in services, but delegates to another WTO institution the obligation to develop a more detailed understanding of how the provisions of the GATS should apply to service trade, which makes the GATS be described as an example of a legislative delegation model of regulating service trade. Laurel S. Terry, *supra* note 54, at 1015: “... the GATS itself delegate to Council for Trade in Services the obligations to establish the necessary body... The Ministerial Conference, however, issued a Decision that directed the Council for Trade in Services to exercise this delegation by creating a Working Party on Professional Services, or WPPS,the Council on Trade in Services implemented this Ministerial Decision by creating the WPPS, ... Thus, in order to understand the impact of the GATS. ..., one must understand the structure of the GATS. In addition, ... because GATS used a legislative-delegation model, one cannot fully understand the obligations imposed by the GATS until one examines the post-GATS developments...”: *id*, at 1019
- 83 The Annex of GATS defined financial services broadly to include: i) insurance and related services, including reinsurance, retrocession, and intermediation such as brokerage and agency work; ii) banking and other financial services, including deposit taking, lending, guarantees, leasing, certain trading activities and other forms of intermediation. Annex on Financial Services, s. 5.1.
- 84 The provisions in the Annex of GATS are best understood as a road map of intentions rather than as a statement of commitments. In case of financial service provisions of GATS, for example, while face-saving specific commitments provide some level of firm multilateral commitment, the main focus of the financial services provisions are the identification of areas where further liberalization is desirable. Jeffrey Simser, *supra* note 40, at 57-58.

The Annex on movement of natural persons supplying services under the Agreement deals with the temporary movement of service suppliers (as natural persons not as juridical persons), and does not apply to measures regarding citizenship, residence or employment on a permanent basis, or to people to travel abroad looking for a job. The Annex on MFN exemptions specifies the conditions under which a member can be excluded from the MFN principle.⁸⁵ Exceptions to derogations⁸⁶ to the MFN principle may only be granted in the form of waivers under the WTO Agreement.

The Annex on telecommunications requires each Member to provide foreign service suppliers reasonable and non-discriminatory access to the related networks and services for the listed service supply. The Annex on financial services provides detailed definitions in financial services and exclusion of prudential measures taken by Members from the application of the Agreement. Members are allowed exemptions in order to maintain measures that may deviate from the provisions of GATS to protect investors, depositors and policyholders, and to ensure the integrity and stability of their financial systems, which are not to be treated as limitations on market access and national treatment.

Regulation of Treatment of Foreign Investment.

The primary catalyst for the proliferation of trade-related investment measures (TRIMs)⁸⁷ has been the massive increase in the flow of foreign

85 The list of Article II Exemptions are organized using five columns: i) sector or subsector to which the exemption is applicable; ii) description of the MFN inconsistent measure; iii) names of the countries to which it applies; iv) intended duration of the exemption; and v) conditions for the exemption. GATS, Annex on Article II Exemptions, Switzerland.

86 Exemptions currently included in many Members' List have durations intended to be "indefinite". See e.g. GATS, Dec. 3, 1997, Fifth Protocol <http://www.wto.org/wto/services/s145.htm> (visited May 15, 2003) cited by J. Steven Jarreau, *supra* note 30, at 49. Paragraph 6 of the annex does contain significant diplomatic overtones, as opposed to legal dictates, that may allow for ambiguously worded exemptions and exemptions of indefinite duration, which states that "in principle", exemptions should not exceed ten years, and establishes that they "shall be subject to negotiation in subsequent trade liberalizing rounds". The use of the term "in principle" implies that ambiguous exemptions and exemptions of extended duration may be technically permissible, though not encouraged. J. Steven Jarreau, *supra* note 30, at 49-50. These ambiguous exemptions with indefinite durations do not comport with the spirit of the GATS. J. Steven Jarreau: *id.*, at 49.

87 TRIMs are government measures that require or encourage specific behavior by private investors. Robert H. Edwards Jr., Simon N. Lester, *Towards a More Comprehensive World Trade Organization Agreement on Trade 109* (1997). Despite the growing multilateral concern about the increased use of TRIMs, there is no exact formula for identifying them, in part because the term itself reflects a political judgement that a certain measure reduces economic welfare and should therefore be prohibited. Robert H. Edwards Jr., Simon N. Lester, *Id.*, at 172. The United Nations has devised four categories of TRIMs: performance requirements, investment

investment. From 1985 to 1995, the annual global flow of foreign direct investment (FDI) increased from \$60 billion to \$315 billion. By the end of 1993, the FDI of active corporations totalled \$2.1 trillion worldwide. As FDI has grown, so has the use of TRIMs, because host countries have increasingly employed TRIMs⁸⁸ to extract greater economic benefit from foreign investment.⁸⁹

Since the Charter for an International Trade Organization (1948) containing provisions on the treatment of foreign investment failed to be ratified and only its provisions on commercial policy were incorporated into GATT (1947),⁹⁰ the linkage between trade and investment attracted little attention in the framework of GATT⁹¹ until the Uruguay Round negotiations,^{92 93} which did not seem compatible to the globalization of modern economy.⁹⁴

incentives, corporate measures (restrictive business practices), and home-country measures. See the United Nations, *The Impacts of Trade-related Investment Measures on Trade and Development at 12, U.N. Doc. ST/LTL/120, U.N. Sales No. E. 91. II. A. 19 (1991)*, cited by Robert H. Edwards Jr., Simon N. Lester: *id.*, at 172.

88 According to the United States "Super 301" report on October 1, 1996, the United States USTR announced that China's automotive industry policies would be closely monitored for possible TRIMs Agreement violations. According to it, China then imposed local content requirements, import restrictions, and export performance requirements in the auto sector, all of which the United States planned to address both bilaterally and in the context of negotiations regarding China's accession to the WTO. See U.S. Trade Representative, *Identification of Trade Expansion Priorities pursuant to Executive Order 12901*, at 4 (Oct. 1, 1996), cited by Robert H. Edwards Jr., Simon N. Lester: *id.*, at 199.

89 See Robert H. Edwards Jr., Simon N. Lester: *id.*, at 170

90 While the idea of negotiating a Multilateral Investment Treaty has been appeared, see Jeswald W. Salacuse, *Towards a New Treaty Framework For Direct Investment*, 50 *J. Air L. & Com.* 1005-09 (Arguing for a general agreement on direct investment), cited by Todd S. Schenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 *U. Pitt. L. Rev.* 593(1994), the international consensus that now exists in at least four key investment areas is new: "i) the WTO TRIMs proves that both developed and developing nations are willing to grant national treatment or specific treatment with respect to some investment establishment performance requirements; ii) with respect to investment maintenance or conduct in host countries, most investment treaties guarantee national treatment and every treaty guarantees at least MFN treatment; iii) every investment treaty, except for the Organization of the Islamic Conference, guarantees at least full compensation with reference to international law in the event of the nationalization; iv) every investment treaty, except for the Organization of the Islamic Conference, permits foreign investors to challenge directly sovereign conduct that injures them, usually through International Centre for Settlement of Investment Disputes." Todd S. Shekin: *id.*, at 593-594.

91 During the period through 1960 to 1981, FDI was seen as only one component of the balance of payments problem traced by many nations, and was not considered a crucial component of industrialization, as a result of which no specific guidelines were created to regulate it under the GATT. Terence P. Stewart, *supra* note 4, at 2056-57, cited by Robert H. Edwards Jr., Simon N. Lester, *supra* note 87, at 188.

Perhaps the most significant development with respect to investment during the period before the Uruguay Round was a ruling by GATT in the dispute panel between the United States and Canada. In Canada- Administration of the Foreign Investment Review Act⁹⁵ (FIRA), which was an example of a statutory

-
- 92 In 1955, the GATT CONTRACTING PARTIES adopted a resolution on International Investment for Economic Development in which they, inter alia, urged countries to conclude bilateral agreements to provide protection and security for foreign investment. TRIMs first came up as a distinct issue in 1981, in the context of GATT discussions on structural adjustment and trade policy, Terence D. Stewart *The GATT Uruguay Round: A Negotiating History (1986-1992)*, 2056-2057, cited Robert H. Edwards Jr., Simon N. Lester, *supra* note 87, at fn. 117. The Consultative Group of 18 concluded that TRIMs produced trade-distorting economic effects, but reached no conclusions, but elected to keep the matter on the agenda for further discussion. Terrence P. Stewart, *id* at 2062 n. 242, cited by Robert H. Edwards Jr., Simon N. Lester: *id*, at 120.
- 93 Since the investment and competition policies were clearly indicated as potential subjects for further negotiations,
http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto01/wto1_32.htm
 (visited April 9, 2004) at the Ministerial Conference held at Singapore in 1996, Ministers decided to, inter alia, establish a working group to examine the relationship between trade and investment,
http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto01/wto1_26.htm (visited April 9, 2004) and at the Ministerial Conference held at Geneva in 1998, it was mandated for the General Council to treat with this matter continuously.
http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto01/wto1_27.htm (visited April 9, 2004)
- 94 The modern economy may be global, but the international commercial system is not synchronized, for which private party rights should be expanded within the WTO and a multilateral investment treaty must be negotiated. Todd S. Shekin, *supra* note 90, at 579.
- 95 Canada's FIRA provided that the acquisition or establishment of individual business by foreigners would be allowed in Canada only if the Canada government determined that such operations would be a "significant benefit to Canada". Act of Dec. 12, 1973 (Foreign Investment Review Act), ch. 46, 1973-74 Can. Stat. 619, amended by ch. 52, 1976-77 Can Stat. 1193 (FIRA), 2(1), cited by Todd S. Shenkin, *supra* note 90, at 561. In section 2(2), the FIRA provided five sectors to be considered when determining whether a particular foreign investment would provide a significant benefit to Canada – "a) effect of the acquisition or establishment on the level and nature of economic activity...; b) degree and significant of participation by Canadians in the business enterprises...; c) effect of the acquisition or establishment on productivity...; d) effect of the acquisition or establishment on competition...; e) compatibility of the acquisition or establishment with national industrial and economic policies...". FIRA, *Id*, 2(2) cited by Todd S. Shenkin, *id* The FIRA also provided that foreign investors could submit their own "written understandings" to be considered in eight of the five factors. Canada-Administration of the Foreign Investment Review Act(Panel Report) (LI5504), 30th supp. GATT, BISD140 (1984) (FIRA Panel Report), 143-146, cited by Todd S. Shekin, *Id* They took the form of local content and export performance requirements, FIRA Panel Report, *Id*, at 143-144, cited by Todd S. Shenkin, *Id*, at 561-562. In theory, the performance requirements were optional under the FIRA, but in practice, they

scheme that provided for the negotiation of particularized requirements on a case-by-case basis,⁹⁶ a GATT dispute settlement panel decided that the local content requirements were inconsistent with the national treatment obligation of GATT, but that the export performance requirements,⁹⁷ one of the most trade-distorting TRIMs,⁹⁸ were not inconsistent with GATT obligations.⁹⁹

The panel decision in the FIRA case was evaluated to ensure that existing obligations under GATT were applicable to performance requirements imposed in

became mandatory in order for a foreign investor to obtain the Canadian Government's approval. They can therefore be classified as performance requirements that were both an investment establishment condition and a legally binding investment maintenance condition. Todd S. Shenkin: *id.*, at 562.

96 Robert H. Edwards Jr., Simon N. Lester, *supra* note 87, at 186.

97 These requirements specify that products sold within their borders to contain a certain percentage of domestic content (value produced within the country, or materials coming from within the country). One such rule, considered in the United States in 1982, would have required auto-makers selling cars in the United States to meet increasingly higher domestic content minimums as their U.S. sales increased (e.g., U.S. sales of 100,000: 25 domestic content required; sales of 150,000: 50%; sales of 200,000:75%; sales of 500,000:90%) or suffer penalties. The penalties would require that the offender's next year's sales be reduced 25 percent. While there had been the disputes over the question whether the proposed legislation consistent with the GATT provisions and the United States-Japan FCN Treaty, the House of Representatives passed the bill described in 1982, followed by the failure in the Senate to act upon it. John H. Jackson, et al. *supra* note 13, at 521.

98 Besides, export performance is one of the concerns high on the priority list of the industrialized countries, as these TRIMs may promote dumping in their home markets and disrupt trade flows to third country markets. Robert H. Edwards Jr., Simon N. Lester, *supra* note 87, at 191-192.

99 There are various forms of TRIMs such as: local content requirement; local equity requirements affecting ownership; foreign exchange restrictions; export or trade-balancing requirements; foreign exchange balancing requirements; manufacturing limitations; technology transfer requirements, remittance restrictions, licensing requirements and product mandating requirements. See Catherine Curtiss & Kathryn Cameron Atkinson, *The United States - Latin American Trade Laws*, 21 *N.C.J. Int'l L. & Com. Reg.* 111, 127 (1995) and; Patrick Low & Arvind Subramania, TRIMs in the Uruguay Round: An Unfinished Business?, represented at the Uruguay Round and the Developing Economics, A World Bank Conference, Jan. 26-27, 5 (1995), cited by Paul Civello, *The TRIMs Agreement: A Failed Attempt at Investment Liberalization*, 8 *Minn. J. Global Trade* 99 (1999). Out of such measures, beside the local content requirements, the issue of trade-balancing did not arise in the FIRA controversy, and the FIRA Panel declined to hold that Canada's purchase undertakings violated GATT Article XI, FIRA Panel Report, at 162-163, cited by Paul Civello, *Id.*, but its refusal to do so may not mean that Article XI does not protect against trade-balancing regulations. Indeed the reason for such Panel's decision should be ascribed to the drafters of the United States' complaint rather than to the FIRA Panel: The United States only alleged that the purchase and manufacturing undertakings violated Article XI (general prohibition against quantitative restrictions); the export undertakings were only alleged to violate GATT Article X VII: 1(c). See FIRA Panel Report, at 154-155, cited by Paul Civello: *id.*, at 114.

the context of investment so far as such requirements involve trade-distorting measures.¹⁰⁰ The decision was also evaluated to provide an impetus for the countries concerned to get the TRIMs issue included in a new Multilateral Trade Negotiations Round in order to settle how TRIMs would be treated by all GATT members.¹⁰¹ At the same time, the panel's conclusion that export performance requirements were not covered by the GATT also underscored the limited scope of existing GATT disciplines with respect to such trade-related performance requirements.¹⁰²

During the Uruguay Round negotiations in trade-related investment measures¹⁰³ strong disagreement among participants was revealed over the coverage and nature of possible new disciplines.¹⁰⁴ While some developed countries proposed prohibiting a wide range of TRIMs in addition to the local

100 Todd S. Sherkin, *supra* note 90, at 564.

101 *Id*

102 Robert H. Edwards, Jr., Simon N. Lester, *supra* note 87, at 191-192

103 Authors categorized TRIMs for the new agreement by fitting TRIMs into the traffic light categories, considering the fact that TRIMs have similar purposes with subsidies, that is, to promote economic growth and to further other social and economic objectives: "a. Prohibited (red light) TRIMs... Because these TRIMs are inherently trade distorting, ... they should therefore be eliminated... export performance requirements, product-mandating requirements, trade-balancing requirements, local content requirements, and manufacturing requirements and limitations, b. Actionable (yellow light) TRIMs... If actionable TRIMs impose adverse effects on investors, the measure will be prohibited... equity requirements, licensing requirements, and technology transfer requirements. c. Permitted (green light) TRIMs... they must be used to enhance economic development in specific region. ... as is true in the Subsidies Agreement, TRIMs that fall into the red light category ... is prohibited regardless of their purpose" Robert H. Edwards Jr., Simon N. Lester, *supra* note 87, at 210-211
This categorization is similar to Swiss government's proposal, made during the Uruguay Round negotiations, which divided TRIMs into the same three categories: prohibited, permitted, and actionable: *id*, at 211

104 Two issues were central to the TRIMs negotiations: "First, ... under the Uruguay Round, TRIMs were to some extent acknowledged to be covered by existing GATT articles. ... The industrialized countries took the position that a separate agreement or TRIMs was within the scope of the Negotiating Groups Mandate. In contrast, ... mostly developing countries, felt the inquiry should be limited to an examination of how existing articles applied to TRIMs." Terence P. Stewart, *supra* note 87, at 2081, cited by Robert H. Edwards Jr., Simon N. Lester, *supra* note 87, at 194. "The second issue was whether the targeted TRIMs should be prohibited outright, or to be actionable ..., taking into account the actual economic effects of the measure The developing countries felt strongly ... to look only at the direct effect of the measures, not at the measures themselves." See Terence P. Stewart, *supra* note 4, at 2081-82, cited by *Id*, at 194. As a Result, the Agreement specifies that certain TRIMs are prohibited only in the context of existing GATT articles. Thus, other trade-distorting TRIMs are still permitted. Robert H. Edwards Jr., Simon N. Lester, *Id*, at 196.

content requirements,¹⁰⁵ many developing countries opposed this.¹⁰⁶ The resulting WTO Agreement on Trade-Related Investment Measures is a compromise.¹⁰⁷ The agreement is essentially limited to the application of the trade-related investment measures of GATT provisions to national treatment of imported goods¹⁰⁸ and to quantitative restrictions of imports or exports,¹⁰⁹ ¹¹⁰ and does not cover other measures, such as export performance and the transfer of technology requirements.¹¹¹

105 The data from GATT showed that nineteen developing countries maintained local content requirements in various industries between 1991 and 1994. Robert H. Edwards Jr., Simon N. Lester, *supra* note 87, at 178

106 Three major TRIMs negotiation positions were represented in the Uruguay MTN Round, that is, positions espoused by both the United States and Japan, the EEC and developing countries. Todd S. Skenkin, *supra* note 90, at 564. The United States and Japan, however, both wanted the TRIMs negotiations to result in an agreement that specifically detailed the treatment of TRIMs in the GATT. Edmund H. A. Know, Trade Related Investment Measures in the Uruguay Round: Towards a GATT for Investment ?, 16 *N.C.J. Int'l L. & Com. Reg.* 327 (1991), cited by Todd S. Shenkin, *Id* The EEC took a moderate view toward TRIMs in the GATT. Todd S. Shenkin, *Id* The EEC, proposed to limit the GATT's scope only to investment measures directly related to trade in goods, such as local content, manufacturing, and export requirement. *Id* Similar to the EEC, developing countries argued for the exclusion of non-trade related investment measures, such as local equity requirements and investment incentives. Edmund M. A. Know, *id* at 84-85, cited by Todd S. Shenkin, *Id*

107 Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1A, reprinted in the Results of the Uruguay Round of Multilateral Trade Negotiations-The Legal Texts, 163(1994)(hereinafter TRIMs Agreement)

108 TRIMs Agreement, *id*, art III

109 *Id*, art XL The TRIMs Agreement's failure has thus been described: "it does nothing new. ... the Agreement merely reiterates what was already in GATT, providing no new protections or remedies for foreign investors. ... the Agreement contains no plan or procedural framework for moving forward investment liberalization and shies away from innovation or experimentation ... the TRIMs Agreement is at best a transitional arrangement that may serve, at least, as a sign that future trade negotiations have to address FDI. ..." Paul Civello, *supra* note 99, at 97.

110 The multilateral Agreement on Investment proposed by Organization for Economic Co-operation and Development, as an alternative to inefficient TRIMs, focuses directly on Foreign Direct Investment, and includes the two provisions that the TRIMs Agreement sorely lacks: a MFN obligation and a national treatment obligation for investment, as well as, the explicit prohibitions on performance requirements and regulations on investment incentives, which, if approved, would provide a blueprint for future arrangements that may eventually include the developing countries. See the MAI Negotiating Text <http://www.oecd.org/dat.cmis/mai/negtext.htm>, (visited February 28, 2004) cited by Paul Civello, *supra* note 99, at 123.

111 Regarding the automobile trade and investment policies of Brazil and Indonesia, against which the United States launched a Section 301 to WTO Dispute Settlement Body, 1997, John Parry & Ed Taylor, TRIMs: United States Accuses Indonesia, Brazil of Violating TRIMs obligations, *Int'l Trade Daily* (BNA), (Mar. 18, 1997), available in Westlaw, BNA-BTD Database cited by Paul Civello, *supra* note 99, at 111, the

The objectives of the Agreement are to promote the liberalization of international trade and to facilitate international investment so as to increase worldwide economic growth while ensuring free competition.¹¹² Since it is based on existing GATT disciplines on trade in goods, the TRIMS agreement is not concerned with the regulation of service or foreign investment itself.¹¹³ Thus, the imposition of regulations concerning discrimination between domestic and foreign investors in TRIMs is irrelevant under the TRIMs Agreement.¹¹⁴

numerous complaints those policies elicited, and their resolutions expose the ineffectiveness of the TRIMs Agreement and the need for new directions in international investment policy: Paul Civello, *Id*, at 111. Brazil has taken a series of measures in recent years that have provoked sharp criticism from developed nations containing two TRIMs: a local content requirement and a trade-balancing regulation. See George Kleinfeld & Deborah Wengel, Foreign Investment, 31 *Int'l Law*, 406 (1991), cited by Paul Civello, *Id*, at 111. Against Brazil complaints have been made to WTO by Japan, the United States and European Union respectively. However, they preferred to try to resolve the conflict through negotiations instead of requesting. Paul Civello, *Id*, at 112-113. "The Brazilian controversy reveals several reasons for the TRIMs Agreement's ineffectiveness in preventing and remedying TRIMs. All stem from the Agreement's glaring unoriginality, its refusal to confront issues regarding investment measures which have not previously been faced." Paul Civello, *id*, at 113. "Redundancy is not the TRIMs Agreement's only flaw. The Agreement does nothing beyond recapitulating Articles III XI and the dispute settlement process of GATT. ... Yet the Brazilian controversy cries out for new, innovative approaches to the problem of TRIMs and FDI, and the Agreement offers no response. ..."; Paul Civello, *id*, at 115. The Indonesian "Pioneer Auto Program" contained two features that violated the Agreement: a local content requirement and an import preference. European Union submitted the complaint to the WTO in 1996. Paul Civello, *id*, at 118. Due to the Asian economic crisis, until now, Indonesia's "Pioneer Auto Program" is moribund, if not dead. Like the Brazilian controversy, the Indonesian debacle demonstrates the inefficacy of the TRIMs Agreement, *Id*, at 120-121. The Agreement's effectiveness against Brazil's local content requirement holds true in the Indonesian case, Paul Civello, *Id*, at 121, but the Indonesian controversy adds two new features about which the TRIMs Agreement is silent: an import preference and equity requirement. The import preference like the local content requirement, being sufficiently covered by GATT, equity requirements, however, are not prohibited by the GATT or the Uruguay Round Agreements, and the TRIMs Agreement's failure to do so is perhaps its biggest shortcoming. Paul Civello, *id*, at 121-122.

112 TRIMs Agreement, *supra* note 107, Preamble.

113 For example, a local content requirement imposed in a nondiscriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMs Agreement because it involves discriminatory treatment of imported products in favor of domestic products. FIRA Panel Report, *supra* note 95, at 160, cited by Todd S. Shenkin, *supra* note 90, at 565.

114 Even though the TRIMs Decision would incidentally and indirectly affect foreign investors, it would not provide foreign investors with a right or a remedy within the GATT. After claim espousal from injured goods producers or exporters, dispute resolution would be handled exclusively by sovereigns under GATT's dispute resolution provisions, Article X XII and XX III, which is improved and substituted by the WTO Dispute Settlement Understandings. Todd S. Shenkin, *supra* note 90, at 566.

Anti-competitive Practices in Korean Market

General

During the dynamic period of economic growth and development from the 1960s to the 1990s, the Korean government promoted economic development much more directly and positively than any other Asian country, resulting in a greater unevenness in income growth, prices, trade and in the pattern of structural change. Meanwhile, the government has made major decisions regarding the management of the Korean economy, and the condensed growth initiated by the government has been achieved at the cost of retarding development of a national competition policy, which raises the costs of foreign service suppliers or investors to access and do business in the Korean service market.

In the service market, domestic regulations are more important and serious as trade business than they are in the commodities market. Korean laws and regulations related to trade in services as well as to trade in goods have generally been criticized for lacking specificity,¹¹⁵ and the Korean government has been criticized for lacking transparency in the rulemaking procedures and in maintaining regulatory systems.¹¹⁶ This system gives governmental officials room to exercise wide discretion in applying those laws and regulations, resulting in inconsistency in their application and uncertainty in doing business in Korea.¹¹⁷ Internal office guidance developed by relevant government agencies, which is rarely published, gives direction in the implementation of regulations, and adequate information about planned or actual changes to laws and regulations is not available.¹¹⁸

Korea maintains restrictions in some service sectors through a “negative list”, in which foreign investment is prohibited or severely circumscribed through equity or other restrictions, which is in line with the GATS spirit and disciplines to allow the member countries to make scheduled specific commitments.¹¹⁹

The impact of this on foreign investors is that although their interests are directly affected by TRIMs imposed by host countries on their investments, they have no legal recourse under the TRIMs Agreement; only goods producers do: *id.*

115 See Eun Sup Lee, Safeguard Mechanism in Korea Under the WTO World, *14 The Transnational Lawyer* 2, 355 (2001).

116 For the detailed criticism raised by the United States, See USTR, NTE (Korea), *supra* note 3, at 257 (2003).

117 See *id.*, at 265-266 (2002).

118 Eun Sup Lee, Anti-competitive Practices as Trade Barriers used by Korea and Japan, presented at Ritsumeikan Asia Pacific Conference held by Ritsumeikan Asia Pacific University, Japan on Nov. 28-29, 2003, 12 (2003).

119 GATS *supra* note 32, Part III (Specific Commitments).

Non-financial Service Markets

The advertising market in Korea is among the world's twelve largest advertising markets.¹²⁰ However, it is a highly restricted market. Despite legislation in 1999 ending the state-sponsored Korea Broadcast Advertising Corporation's (hereinafter, KOBACO) monopoly of sales of advertising time, anti-competitive practices still remain.¹²¹ KOBACO has implemented some market-oriented measures in recent years, like the 'Global Standard' system offering advertising airtime in various time-lengths and providing more purchasing flexibility. However, some restrictions have hindered the flexibility of advertisers to respond to their immediate market needs.¹²²

Since 2000, the Korea Advertising Review Board (KARB) has had control of advertising censorship procedures replacing the Korea Broadcasting Committee (KBC). However, considerable problems in the process of censorship have been reported.¹²³ For example, advertising materials must be submitted in fully produced film format rather than as 'storyboard', thereby significantly increasing the risks and costs of developing new advertising campaigns and introducing new brands, which is relevant to the provisions prohibiting the unnecessary restriction to trade in services¹²⁴ as well as the provisions affording protection to materials submitted under GATS¹²⁵ and TRIPs.¹²⁶ Also, products that have been tested and approved in other countries must be re-tested in Korea, which may be inconsistent with the provisions of both the other WTO Agreements¹²⁷ and GATS.¹²⁸

In some product categories, e.g., cosmetics, the approval of advertising copy in advance of airing or publication from the trade associations is required, the guidelines for the application, however, are vague, and during the approval process, information on the future marketing activity, including the introduction of new products are revealed to their competitors.¹²⁹ It is also prohibited to show the 'before and after' demonstrations of product effectiveness in the case of

120 USTR, NTE (Korea), *supra* note 3, at 251 (2003).

121 *Id.*

122 *Id.*

123 *Id.*

124 GATS, *supra* note 32, art VI 4 (Domestic Regulation).

125 *Id.*, art III *bis* (Disclosure of Confidential Information).

126 Agreement on Trade-Related Aspects of Intellectual Property Rights (herein after, TRIPs), Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round vol. 31,33 I.L.M.112 (1994) art 39 (Protection of Undisclosed Information).

127 For example, see WTO Agreement on Technical Barriers to Trade, art 6.3.

128 GATS, *supra* note 32, art VI.

129 These practices are relevant to the applications and interpretations of the provisions of GATS, *Id.*, art III (Transparency) and also of the TRIPs, *supra* note 126, art 39 (Protection of Undisclosed Information).

cosmetics and pharmaceuticals, and to claim direct efficacy for pharmaceuticals and over-the-counter medicines.¹³⁰

In the field of direct selling, the Korean government has tried to improve the *Door-to-Door Sales Act* (herein after, DDSA),¹³¹ which governs direct selling, including changes to the provision that have made direct selling companies jointly and severely liable for actions taken by their independent contractors including actions that are outside the contractor's scope of duties and responsibilities and beyond the control of the direct selling company.¹³² This improvement is required for the development and competitiveness of the newly emerging domestic direct selling industry as well as the foreign suppliers that have traditionally been competitive. A variety of barriers in Korea including penalties for violating the DDSA, a minimum requirement for capital paid, restrictions in price, and limitations on payouts for multilevel compensation companies,¹³³ which is a regulatory provision unique to Korea,¹³⁴ could create disputes concerning transparency,¹³⁵ national treatment¹³⁶ or policy objectives.¹³⁷

The Korean film industry's strict screen quota system is considered to discourage trade, cinema construction, the expansion of film distribution in Korea, and the competitiveness of the Korean film industry.¹³⁸ Korea's insistence on keeping its strict screen quotas has been a topic of dispute in bilateral and multilateral trade negotiations, which, however, is in line with the provisions of current GATT¹³⁹ and GATS,¹⁴⁰ and thus, has been controversial in terms of progressive liberalization.¹⁴¹

Korea restricts foreign activities in the free TV sector by limiting monthly broadcasting time, and the annual quotas for broadcast motion pictures, animation and popular music, as well as the prohibition of foreign investment for territorial television operations,¹⁴² which could become a controversy between the

130 This requirements and prohibitions are relevant to the provisions on domestic policy objectives provided in GATS, *Id*, art VI and to the provisions on General Exceptions (to protect human life or health) in GATS, *id*, art X IV

131 Law No. 5982 (1999).

132 Korea's Fair Trade Committee, Press Release Materials, 1 (July 16, 2002).

133 DDSA, *supra* note 131, at art 10.

134 See USTR, NTE (Korea), *supra* note 3, at 252 (2003).

135 GATS, *supra* note 32, art III.

136 *Id*, art X VII.

137 *Id*, Preamble, "Desiring ... in order to meet national policy objectives...", art VI.

138 USTR, NTE (Korea), *supra* note 3, at 252 (2003).

139 GATT General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 stat. A-II T.I.A.S. 1700, 55 U.N.T.S. 194 (hereinafter GATT) GATT1947 was incorporated into the 1994 World Trade Organization Agreement. Art 3, 10, 4.

140 GATS, *supra* note 32, art XIV, (a).

141 *Id*, art VI.

142 USTR, NTE (Korea), *supra* note 3, at 252 (2003).

domestic policy objectives¹⁴³ argued by the Korean government and the national treatment¹⁴⁴ claimed by the partner countries.

Korea restricts foreign participation in the cable TV sector by limiting airtime through annual quotas for broadcast motion pictures and animation.¹⁴⁵ These restrictions limit market access and the development of Korea's film and animation industries. The Korean Government also restricts foreign ownership of cable television-related systems, program providers, and foreign participation in satellite broadcasts. These restrictions could basically be in accordance with the frameworks and requirements of GATS.¹⁴⁶ However, have become controversial with trade partner countries.¹⁴⁷

The Korean professional service market has been the important target of trade disputes with trade partner countries particularly since the financial crisis of 1997.¹⁴⁸ With regard to the accounting field, Korea restricts the establishment of foreign accounting firms by requiring that a minimum number of Korean-certified accountants/partners be employed.¹⁴⁹ Foreign Certified Public Accountants (hereinafter, CPAs) are required to satisfy the same requirements as Korean CPAs, including: i) obtaining Korean certification; ii) completing a two-year internship; and iii) registering with the Korean Public Accountants Association.¹⁵⁰ Accounting firms in Korea are prohibited from making an investment in or providing a debt guarantee to any other firm in excess of 10 percent of the accounting firm's paid-in-capital.¹⁵¹ These restrictive requirements, justified currently under the GATS provisions,¹⁵² are required to be reviewed from the viewpoints of the productivity and efficiency of Korean accounting industry, and policy objectives.¹⁵³ Regarding the engineering industry, although there are no legal restrictions on foreign engineering services, procuring agencies (national, local and private) can specify particular conditions and/or requirements for engineers and engineering services depending on the nature of the project,¹⁵⁴ which may favour domestic engineering service firms and raise the national treatment¹⁵⁵ and transparency¹⁵⁶ issues.

Regarding the construction market, foreign companies may bid on public projects, including the massive capital projects designed to improve basic infrastructure. Foreign firms, however, still meet the attempts to renegotiate

143 GATS, *supra* note 32, Preamble, art VI.

144 See *Id.*, art XVII.

145 USTR, NTE (Korea), *supra* note 3, at 252 (2003).

146 See GATS, *supra* note 32, XIV, XVI.

147 See USTR, NTE (Korea), *supra* note 3, at 252 (2003).

148 See *Id.*, at 253.

149 *Id.*

150 *Id.*

151 *Id.*

152 GATS, *supra* note 32, art XVI.

153 See *Id.*, art VI.

154 USTR, NTE (Korea), *supra* note 3, at 253 (2003).

155 See, GATS, *supra* note 32, art X VII.

156 See *Id.*, art III.

accepted bid prices, as well as with registration and bonding procedures, which are excessively burdensome.¹⁵⁷

Regarding legal services, the Korean Government amended not only the *Lawyer Act*¹⁵⁸ to permit foreigners to be licensed to practice law in Korea in 1996, but also the *Regulation in Foreign Investment* in 1977 to allow for foreign investment in the legal sector.¹⁵⁹ However, Korean law has been criticized for not providing foreign legal consultants, foreign lawyers,^{160 161} thus creating serious difficulties for foreign lawyers employed by local firms.¹⁶²

157 USTR, NTE (Korea), *supra* note 3, at 251 (2003).

158 Law No.5177 (1996).

159 There is the empirical study of the effects of the deregulation of legal services in housing conveyances in Great Britain providing some insights into the potential benefits of terminating a cartel in a legal services market: it demonstrated that price discrimination became more difficult and costs to consumers decreased by about one-third as competition increased, and that the quality of service increased at all price levels due to deregulation. Simon Domberger & Avrom Sherr, *The Impact of Competition on Pricing and Quality of Legal Services*, 9 *Int'l Rev. L. & Econ* 41, 59 (1989), cited by Michael J. Champman, Paul J. Tauber, *supra* note 51, at 955.

160 Regarding the reason of the scope of practice restriction to foreign lawyers for protecting the public, it was indicated: "Perhaps the strongest reason for eliminating broad scope of practice limitations is the high level of sophistication of foreign lawyers' typical clients. For most foreign lawyers, typical clients are governments, multinational cooperation and financial institutions." 5 *Minn. J. Global Trade* 165 (1996). "It is disingenuous to argue that strict qualifications are needed to protect the likes of ...IBM, as the consumers of legal services, from incompetent lawyers". John Haley, *The New Regulatory Regime for Foreign Lawyers in Japan: An Escape From Freedom*, 5 *UCLA Pac. Basin L. J.* 1, 14 (1986), cited by Orlando Flores, *Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA*, Richard Abel, *Transnational Law Practice*, 44 *Case W. Res. L. Rev.* 151 (1994)

161 The shapes of the regulation of foreign lawyers in Korea are within the internationally the most prevalent restrictions on foreign lawyers' practice: i) scope of practice restrictions-jurisdictions allowing foreign lawyers' practice without re-qualifying as local lawyers limit the scope of their practice, Orlando Flores, *Id.*, at 164; ii) examination requirement – some jurisdictions impose examination requirements before allowing foreign lawyers to practice any kind of law, Joanne Naiman, *Bill to Curb U.S. Lawyers Passes 1st Test in France*, *N. Y. L. J.*, Nov. 21, 1990. at 1, cited by Orlando Flores, *Id.*, at 167; iii) restrictions on the right of association-restrictions on foreign lawyers' ability to employ or associate in partnership with local lawyers are common, Richard Abel, *Id.*, at 759, cited by Orlando Flores, *Id.*, at 168; iv) experience requirements-most jurisdictions impose experience requirements before allowing foreign lawyers to practise law, American Bar Association, Section of International Law and Practice, *Report to the House of Delegates: Model Rule for the Licensing of Legal Consultants* 215, 221 (1994), cited by Orlando Flores: *id.*; v) regulations and practices with unintended effect of interfering with foreign lawyers' ability to efficiently serve their clients. American Bar Association, *Id.*, at 215, cited by Orlands Flores: *id.*, at 170.

162 The rationales upon which Korean authority relies to restrict access to foreign attorneys could be within five common rationales relied upon by other foreign

Financial Service Markets

As a condition of its IMF economic stabilization package, Korea agreed to bind its OECD commitments on financial services market access in the WTO and Korea's revised schedule of WTO financial services commitments came into force in 1999.¹⁶³ However, foreign-based, non-financial organizations in Korea are required to follow burdensome and costly procedural requirements for financial transactions that are incompatible to Korea's level of development and financial sophistication. For instance, virtually all inter-company transfers are subject to certification, which is a cumbersome, costly, and unnecessary requirement, particularly for transactions between subsidiaries,¹⁶⁴ which seems to reflect the positive policy objectives of the Korean government to regulate the improper internal transactions particularly of the conglomerates.¹⁶⁵ Even after most foreign exchange transactions were liberalized in 2001,¹⁶⁶ foreign exchange transactions of the foreign bank and financial subsidiaries have been regulated.

Almost of all restrictions imposed by the Korean government on financial market and foreign exchange transactions seem to reflect Korea's unique domestic situation. However, it is particularly difficult to justify those restrictions in the face of the policy objectives¹⁶⁷ or procedural requirements¹⁶⁸ provided by GATS. For example, policy decisions on the complete liberalization of Korea would be required to consider the political or social situation unique to a peninsula divided into two politically controversial regimes, besides the economic or legal considerations which are sufficient for other countries to take in the same decision-making.¹⁶⁹

authorities: i) national authorities may name legitimate concerns about the involvement of legal professions who do not share the values of the local community; ii) national authorities may have general concerns about the foreign attorney's to practice domestic law; iii) foreign attorneys may not be accustomed to local ethics rules; iv) local authorities sometimes express concern that foreign lawyers and firms will overwhelm the local firms stifling the development of the local bar, an "infant industry" argument applied to legal services industry; vi) concerns about reciprocal access to legal markets represent significant barriers to transnational practice. See Michael J. Champman, Paul J. Tauber, *supra* note 51, at 952-953.

163 USTR, NTE (Korea), *supra* note 3, at 253 (2003).

164 *Id.*

165 See, Eun Sup Lee, *supra* note 118, at 10-12.

166 USTR, NTE (Korea), *supra* note 3, at 253 (2003).

167 GATS, *supra* note 32, Preamble, "Recognizing ... in order to meet national policy objectives ...".

168 *Id.*, art VI.

169 These policies could be justified under the GATS provisions (GATS: *id.*, Preamble, art VI) on policy objectives with sufficient rationales and evidences. However, it would be difficult to establish the sufficient rationales and evidences for those restrictions, particularly, without clear construction rules of the WTO provisions to take into account such unique situations of the member countries.

In the field of insurance industry, which has been the central target of trade disputes with the United States from the 1980s,¹⁷⁰ the regulatory environment for foreign insurance companies has improved considerably since Korea implemented a series of regulatory changes following its 1996 OECD accession, some of which, including expanded market access and national treatment commitments, have been incorporated into the 1997 WTO Financial Services Agreement.¹⁷¹

The ambitious restructuring of the Korean insurance industry has been promoted since the 1997-98 financial crisis through the newly established Financial Supervisory Commission (herein after, FSC), the Korean Government's financial watchdog and centre for financial reform,¹⁷² by way of insolvency or implementing workout programs supervised by the FSC. A workout program is a voluntary, out of court debt- restructuring framework, which may or may not involve government supervision. The Korean Government is gradually liberalizing foreign entry into the life and non-life insurance markets; has lifted some restrictions on partnering with Korean insurance companies and hiring Korean insurance professionals; and has liberalized insurance appraisals and activities ancillary to the management of insurance and pension funds, since the financial crisis.¹⁷³

In the field of banking industry, despite the Korean government's positive efforts¹⁷⁴ at restructuring since the financial crisis, the IMF and the U.S.

170 See, Eun Sup Lee, Regulation of Foreign Trade in Korea, 26 *Georgia Journal of International and Comparative Law* 1, 156-158 (1996).

171 USTR, NTE (Korea), *supra* note 3, 254 (2003).

172 Eun Sup Lee, Regulation of Insurance Contracts in Korea, 13 *The Transnational Lawyer*, 5 (2000).

173 For the IMF funding of USD 21 billions to meet the financial problems in 1997, Korean government promised to take the package of measures to IMF: tight monetary policy with high interest rate to stabilize markets; tight fiscal policy; strengthening the financial system through a firm exit policy, market and supervisory discipline and increased competition; further trade liberalization; easing restriction on foreign ownership; making it easier to dismiss workers. Economics, Commerce and Industrial Relations Group, 29 June 1998, David Richardson, Asian Financial Crisis, available at <http://www.aph.gov.au> (visited April 9, 2004).

174 In the aftermath of the economic crisis, the Korean Government injected public funds into the commercial banking system, effectively nationalizing it or retaining majority ownership in it. In 2000, the Korean Government permitted the formation of financial holding companies and recapitalized ailing financial institutions with public funds. In 2002 the Korean Government announced a comprehensive plan to sell off its stake in the state-owned banks and liquidate the government's minority stakes in other banks within 3 to 4 years. In 1988 and 1999, the Korean Government opened the capital markets to foreigners, permitting foreign financial institutions to engage in non-hostile mergers and acquisitions of domestic financial institutions. Besides, since the Foreign Exchange law had introduced the first phase of foreign exchange and import-export transaction liberalization in 1999, the Korean Government further deregulated foreign exchanged transactions by easing the Capital Transaction Permission Systems. USTR, NTE (Korea), *supra* note 3, at 254-255 (2003).

Government have strongly urged Korea to privatize state-owned banks, which would allow market forces to allocate financial resources more efficiently, and to increase investor confidence in the Korean economy.

Korea has been criticized for continuing to restrict the operations of foreign bank branches based on branch capital requirements. These restrictions limit: loans to individual customers; foreign exchange trade; and foreign-bank capital adequacy and liquidity requirements. Foreign banks are subject to the same lending ratios as Korean banks, which require them to allocate a certain share of their loan portfolios to Korean companies other than to the top four *chaebol* conglomerates and to small and medium enterprises. Although foreign investors may legally become majority owners of Korean banks, this has proven to be difficult in practice. Thus all banks in Korea suffer from a non-transparent regulatory system and are required particularly, to seek approval before introducing new products and services - an area where foreign banks are most competitive.¹⁷⁵

In the field of the securities industry, despite the Korean government's liberalization,¹⁷⁶ foreign securities firms in Korea have claimed to face some non-prudential,^{177 178} barriers to their operations. In the financial sector, the Korean government's basic policy has been to give a higher priority to stabilizing the markets, and to protect the public interest, as compared to promoting market mechanisms or efficient allocation of resources.¹⁷⁹ The recognition of such differences in policy objectives among the member countries may be one rationale for GATS strengthening the importance of domestic regulations in the service sector, which differs substantially from GATT.

Some disputes about the Korean government's measures that some trade partner countries consider to be anti-competitive, seem to be relevant to the

175 These regulations may be in breach of the GATS provisions on transparency (art III) and national treatment (art XVII).

176 Since the Korean Government removed limits on local currency issues of stocks and bonds by foreign firms in 2000, the Korean Government places no limits on foreign ownership of listed bonds or commercial paper, no longer restricts foreign ownership of securities traded in local markets and has removed almost entirely foreign investment ceilings on Korean stocks. USTR, NTE (Korea), *supra* note 3, at 255 (2003).

177 Section 2 of the Annex on Financial Services is referred to as the "prudential carve-out". Wendy Dobson & Pierre Jacquet, *Financial Services Liberalization in the WTO* 76 (1998), cited by J. Steven Jarreau, *supra* note 30, at 67. Measures that may be deemed prudential are not defined, but may include measures taken for "the protection of investors, deponents, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier or to ensure the integrity and stability of the financial system." GATS, *supra* note 32, art XXIII, cited by *Id.*

178 Measures created for prudential reasons are permitted so long as such measures are not designed to defeat the commitments under GATS. The prudential carve-out may have important implications, as in the case of NAFTA: it will be the basis to defend virtually all actions in the financial services sector that are controversial. Jeffrey Simser, *supra* note 26, at 57.

179 *Id.*

differences between the policy priorities in the financial service sectors. For example, the Korean government imposes priority in the area of consumer protection in its regulation of the financial sector as compared to market efficiency, which is different from other advanced western countries where market functions are strongly pursued by the governments.¹⁸⁰ And the Korean government's positive restrictions to foreign exchange transactions seem to reflect the politically and socially unique situation on the Korean Peninsula¹⁸¹.

Investment Markets

The Korean Government has made a strong commitment to create a more favorable investment climate and to facilitate foreign investment since the financial crisis in 1997, but additional steps are required to achieve this goal fully. The 1998 *Foreign Investment Promotion Act*¹⁸² opened some business sectors to foreign investment (currently, four remain fully closed to foreign direct investment (FDI), including inshore fisheries, coastal fisheries, television and radio stations and 17 remain partially closed). The Act also expanded tax incentives, simplified investment procedures, and established Foreign Investment Zones.¹⁸³

The Korean Government is required automatically to approve a foreign investor's notification unless the activity appears on an explicit 'negative list'¹⁸⁴ or is related to national security, the maintenance of public order or the protection of public health, morality or safety, which are generally excused under the WTO mechanism.¹⁸⁵ Since 1998, foreigners have been permitted to engage in hostile takeovers and may purchase 100 percent of a target company's outstanding stock without consent of its board of directors, which has traditionally been a controversial issue with trade partner countries since the Korean government proclaimed an open policy for inward foreign investment.¹⁸⁶

Capital market reforms have eliminated or raised the ceiling in aggregate foreign equity ownership, on individual foreign ownership and on foreign investment in the government, corporate and special bond markets, and have liberalized foreign purchases of short-term financial institutions. However, the Korean Government still maintains foreign equity restrictions with respect to investments in various state-owned firms and many types of media, including cable and satellite television services and channel operators, as well as schools

180 See Eun Sup Lee, Regulation of Insurance Contracts in Korea. 13 *The Transnational Lawyer*, 34-35 (2000).

181 See Eun Sup Lee, Regulation of Foreign Trade in Korea, 26 *Georgia J. Int'l & Com. L.* 161 (1996).

182 Law No. 5559 (1998) as amended by Law No. 6643 (2002).

183 USTR, NTE (Korea), *supra* note 3, at 255 (2003).

184 This requirement, for example, may be relevant to the spirits of the GATS provisions (Part III, Specific Commitment) applied to scheduled specific sections in which positive regulations are imposed by negative methods.

185 GATT 1944, *supra* note 139, art XX, GATS, *supra* note 32, art XIV.

186 USTR, NTE (Korea), *supra* note 3, at 256 (2003).

and beef wholesalers. These restrictions may be evaluated case by case under the criteria of policy objectives or domestic regulations provisioned in WTO Agreements without pure investment-specified provisions.¹⁸⁷

The Korean Government removed restrictions on the direct purchase of land by foreigners through the 1999 revision of the *Alien Land Registration Acquisition Act*.¹⁸⁸ Foreign investors have complained, however, that non-Koreans still cannot produce certain agricultural products for commercial purposes, nor can agriculturally-zoned land be taken out of agricultural production, which might be regarded as investment barriers to foreigners,¹⁸⁹ but might also have proper policy objectives considering the traditional Korean policy in the agricultural sector.¹⁹⁰

While the more liberalized Korean investment regime has increased foreign investors' interest in Korea, additional changes, including a more transparent and predictable regulatory environment, more sustained intellectual property protection, significant progress on structural reform and the opening of markets, and enhanced labor-market flexibility are required by the trade partner countries to improve Korea's attractiveness as a destination for foreign investment, which is also a stated goal of the Korean Government.¹⁹¹

It is somewhat difficult to assess objectively the Korean government's policy for the liberalization and deregulation of the inward foreign investment market without internationally accepted regulatory mechanisms. As for now, the investment environment in Korea seems anaemic to the foreign investors and is not so attractive as the government's ambitious policy to improve them.¹⁹²

Anti-competitive Practices in Japanese Market

General

For most of the post-war era, the principal goal of Japan's economic policy has been development and stability.¹⁹³ Free competition has sometimes appeared

187 See GATS, *supra* note 32, Preamble, art VI.

188 Law No. 5656 (1999).

189 USTR, NTE (Korea), *supra* note 3, at 256 (2003).

190 See GATS, *supra* note 32, art VI.

191 USTR, NTE (Korea), *supra* note 3, at 256 (2003).

192 There has seemingly been the gap between the government's policy and the practical environments of the foreign direct investment in Korea. For example, in Korean investment markets, there have been the disputes between the government and the domestic industrial associations on the counter-discrimination, which originated from the government's strong incentive policy for the inward foreign direct investment, particularly since the Korean financial crisis in 1997. See Kil Sum Kim, M&A as Violent Gale (Korean), <http://kilsp.jinbo.net/publish/98/981202.htm> (visited April 9, 2004).

193 Economic stability has been regarded as presupposing a relatively high level of government intervention in business planning. Frederick M. Abbott, *supra* note 3, at 187.

not to meet that goal.¹⁹⁴ Competition policies in such situations should have been treated as regulation policies, not as organizing principles for the economy,¹⁹⁵ which has resulted in a regulation-based economy.¹⁹⁶ Although Japan has recently focused on deregulation,¹⁹⁷ responding to internal and external requirements,¹⁹⁸ over-regulation in Japan has been seen as continuing to hamper economic growth, raising the cost of doing business,¹⁹⁹ and impeding imports and foreign investment, particularly in the service markets.²⁰⁰

Regulations would sometimes aim squarely at the entry of foreign services to protect the *status quo* against market entrance stifling entrepreneurship and inhibiting risk-taking and innovation.²⁰¹ The highly regulated, inefficient

194 Consequently, Japan's economy today suffers from over regulation and its concomitant inefficiency, while at the same time Japanese social and labor conditions are relatively stable. This is different, for example, from the case of the United States. The United States suffers from wide disparities in social and labor conditions and concomitant destabilizing effects, while at the same time its economy enjoys a relatively high rate of productivity/ efficiency: *id*, at 187-188.

195 Reflecting the relative priorities of competition policy in Japan, competition policy has been assigned to a separate agency, independent of the government but politically not strong enough to promote its policies effectively. Michael Wise, Review of Competition Law and Policy in Japan, *OECD Journal of Competition Law and Policy* 4 (2000).

196 Japanese competition policy has been criticized as follows: "Although the cartels are prohibited by law, historically the law has provided numerous exceptions for particular industries or circumstances. Also, the Japanese government, at times, has promoted coordination among competitors and encouraged them to avoid excessive competition." James D. Southwick, *supra* note 11, at 949.

197 Japanese government, for example, has been working from 2002 to establish Special Zones for Structural Reform that would plant the seeds of deregulation locally for subsequent growth nationwide. Prime Minister Koizumi has made the zones the centrepieces of his drive to achieve bold regulatory reform in an expeditious manner. USTR, NTE (JAPAN), *supra* note 3, at 194, 204 (2003).

198 According to the U.S.-Japan Regulatory Reform and Competition Policy Initiative (herein after, Regulatory Reform Initiative) operated by the United States and Japan which have been the main vehicle for bilateral efforts to promote comprehensive deregulation and structural reform, Japan, for example, addresses crosscutting issues, including competition policy, transparency, legal system reform, revision of Japan's commercial law, and distribution *Id*, at 194.

199 For example, starting in 2002 the Japanese Government has implemented a "foreign reference pricing" system for medical devices, which links prices in Japan to those prevailing in other developed countries. This approach is arbitrary because it sets a cap on prices without taking into full account the high cost of doing business in Japan. *Id*, at 211 (2002).

200 The central issue with regulatory barriers in Japan is seemingly a bias against new entrants, new products, and lower prices, which may appear in regulations that are simply too rigid or vague. James D. Southwick, *supra* note 11, at 956.

201 The characteristics of the Japanese government regulations or measures were assessed as follows: "The types of Japanese government measures ... almost never are discriminatory on their face. Rather, measures ... discourage competition and limit market entry or expansion for new domestic as well as foreign suppliers. While the

system²⁰² in the Japanese distribution markets has widely been recognized as a significant trade and investment barrier.²⁰³ Distribution issues in Japan have been addressed by the trade partner countries through basic approaches focusing on aspects of competition law, deregulation of measures supporting restrictive distribution structures, and agreements calling upon the Japanese government to use administrative guidance and moral persuasion to loosen the tight relationships between Japanese producers and distributors.²⁰⁴ As one of the leading markets in the world, the Japanese service and investment market has traditionally been the central target of trade disputes with other trade partner countries like including United States,²⁰⁵ even under the WTO mechanism.²⁰⁶

entrenched suppliers protected by such regimes most often are Japanese, those adversely affected normally include identifiable competitors in Japan as well as abroad. In such circumstances it is exceedingly difficult to prove ... that the government measures create conditions of competition adverse to foreign suppliers as compared to like domestic suppliers." *Id.*, at 965.

202 For example, in gaining access to distribution in Japan, foreign companies are often in a difficult situation: "The existence of long-term exclusive or semi-exclusive relationships between Japanese manufacturers, wholesalers and retailers make it difficult for new products to enter into the distribution networks. The problem ... is that, ..., the Japanese producers possess significant power ... and stand in a strong position with respect to the distributors in their sector. In some cases, these producers have had exclusive contracts or incentives for exclusive dealings ... for new entrants, whether or not be they foreign or domestic." *Id.*, at 927-928.

203 Domination of the distribution system by Japanese producers can create a significant market access problem in many industries in Japan because of the cost, risk, and difficulty of establishing an alternative distribution network: *id.*, at 928.

204 *Id.*, at 929.

205 The last decade has been described as the least contentious period in U.S.–Japan trade relations in a generation: "It just tends to be masked by the unremitting gloom about the recovery of the Japanese economy and the preserve of some welcome positive developments in some sectors. ... Japan's willingness to bear the burden of adjustment for its own competitive failings is still very limited ... The issues that once troubled U.S.–Japan relations ... have not been allowed to boil over. ... they have grown ... It is ... because of lack of U.S. private sector interest in pursuing access to the Japanese market as aggressively as previously. It is also because of Japan's surprising success in its policy of *monzenbarai* (not answering the knock at the gate). In the WTO world, ..., Japan has succeeded in resiting all attempts at a civil dialogue, not to mention negotiations with its trading partners, over its very special trade barriers. ... U.S.–Japan trade relations provide one bright sectional note where there was contentiousness in the past. ... The appearance of a Japanese blue-ribbon panel report calling even more strongly for reform in Japan presents another potentially bright note ... Another factor deprives the U.S.–Japan relationship of attention. When it comes to East Asia, China accounts for ninety-five percent of U.S. trade policy interest, absorbing the energy that was for years devoted to Japan..." Alan Wm. Wolff, *supra* note 27, at 1024 (2000).

206 Regarding the fitness of the WTO to treat with Japan's special trade barriers, the comments are not positive: "it declared itself wholly irrelevant to most problems of access to the Japanese market It could be, and was, foreseen in 1994 ... that if a

Non-financial Market

With regard to professional services, the ability of foreign firms and individuals to provide professional services in Japan has been hampered by a complex network of legal, regulatory and commercial practice barriers.²⁰⁷ In the accounting and auditing services market, foreign service providers are reported to face a series of regulatory and market access barriers in Japan which impede their ability to serve this important market. Regulated accounting services may be provided only by individuals qualified as Certified Public Accountants (CPAs) under Japanese law or by an Audit Corporation (composed of five or more partners who are Japanese CPAs). CPAs must also be registered as members of the Japanese Institute of Certified Public Accountants and pay membership fees.

Only Japanese CPAs can establish, own or serve as directors of Audit Corporations. An Audit Corporation may employ foreign CPAs as staff, but foreign CPAs are not allowed to conduct audit activities. Furthermore, an Audit Corporation may engage in a partnership/association relationship with foreign CPAs only if the partnership/association does not provide audit services. Audit Corporations are prohibited from providing tax-related services, although the same individual may perform both functions as long as totally separate offices are maintained. Audit corporations are required to be established firms, but firms supplying accountancy services other than audits have no such requirements. Branches and subsidiaries of foreign firms are not authorized to provide regulated accounting services. Nor can a foreign firm practice under its internationally

case was brought by a country having an open and transparent economy against a country having a complex, rigged protectionist system, WTO dispute settlement would work, perversely, in favor of the closed economy, and it does. WTO dispute settlement is an ineffective tool to open the Japanese market. This failure of WTO dispute settlement has made Section 301 ... usable only at very high cost. ... Thus, while the United States cares much less about remaining problems of Japanese market access, the WTO, which should care, is neither engaged nor held accountable. ... the failure to have any answers to the Japan problem would, ..., be STRIKE ONE for the WTO." *Id.*, at 1025-1026

207 Exclusive (private) business practices, included corporate alliances and exclusive buyer-supplier networks, have been a crosscutting issue in trade relations with other trade partner countries. These networks have traditionally been maintained by the exclusive contracts or incentives: examples of incentives for exclusive dealing include rebate systems, access to manufacturer credit and other financial ties, requirements for the distributor to notify the producer before dealing with another supplier, exchanges of personnel, and systems for inventory control. James D. Southwick, *supra* note 11, at 928. James D. Southwick indicated that private anticompetitive practices could undermine the benefits of regulatory reform as follows: "... one may be cheered by the gradual progress of regulatory reform in Japan, but it would be far premature to assume that the types of concerns raised in the past about regulatory market access barriers in Japan will not continue to arise for some time to come." *Id.*, at 956.

recognized name; its official firm name must be in Japanese and is subject to approval by the Japanese Institute of Certified Public Accountants.

Regarding legal services, foreign lawyers have sought greater access to Japan's legal services market and full freedom of association with Japanese lawyers (*bengoshi*) since the 1970s.²⁰⁸ However, strong opposition from the Japan Federation of Bar Associations (*Nichibenren*) and a reluctant Japanese bureaucracy has largely thwarted this objective.²⁰⁹ In Japan, one of the largest legal markets in the world, foreign and local lawyers face strict regulation.²¹⁰ Since 1987, Japan has allowed foreign lawyers to establish offices and advise on matters concerning the law of their home jurisdictions in Japan as foreign legal consultants, subject to restrictions in the Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers.²¹¹

While Japan has liberalized several restrictions of foreign lawyers, the most critical structural deficiency in Japan's international legal services sector remains the severe limitations on the relationships permitted among Japanese lawyers and registered foreign legal consultants.²¹² Foreign lawyers are allowed to form limited partnerships, called "specified joint enterprises" (*tokutei kyodo kigyō*) instead of allowing *bengoshi* and foreign lawyers (*gaiben*) to form partnerships, but they are highly regulated, which does not provide the framework needed for effective teamwork between *bengoshi* and *gaiben*; nor will further adjustments of that system meet the needs of lawyers in Japan.²¹³

Foreign lawyers are required to follow strict accounting guidelines in order to share offices, and the joint enterprise can give only limited advice on Japanese law.²¹⁴ Japanese lawyers can form partnerships with individual foreign lawyers

208 For example, the United States and the EU have exerted substantial pressure on Japanese officials in bilateral, trilateral and multilateral discussions to reduce restrictions on foreign lawyers: as a result of heavy pressure by the U.S government and the ABA, the Foreign Lawyers Law was enacted in 1987; the United States and the EU have sought relaxation of certain restrictions of the Foreign Lawyers Law in bilateral and trilateral negotiations. Michael J. Chapman, Paul J. Tauber, *supra* note 51, at 961, fn. 116.

209 Apart from the fear of lack of qualifications, which seems to be the international common trend, cultural concerns may prompt countries to limit foreign lawyers' scope of practice. For instance, Japan prohibits foreign lawyers to represent parties in international arbitration proceedings in Japan, which limits an important and very common function that lawyers perform for their international clients. Karen Dillon, *Unfair Trade? Am. Law* 54 (1994), cited by Orlando Flores, *supra* note 160, at 167.

210 Orlando Flores, *Id.*, at 160.

211 Law no.66 as amended, i.e. Foreign Lawyers Law. The Law basically conditions the ability of a foreign lawyer to practice in Japan on reciprocal treatment of Japanese lawyers in the foreign lawyer's home country. *supra* note 51, at 961.

212 Of the industrialized countries, Japan's regulations on foreign lawyers are indicated to be the most stringent and discriminatory. Michael J. Chapman, Paul J. Tauber, *Id.*, at 960.

213 See, Karen Dillon *supra* note 209, at 52, cited by Orlando Flores, *supra* note 160, at 169.

214 Karen Dillon, *id.*, at 55, cited by Orlando Flores: *id.*

but not with a foreign lawyer's law firm.²¹⁵ The restrictions about foreign lawyer's ability to employ or form partnerships with local lawyers can severely handicap a law firm's ability to service its clients, and inhibit the growth of international law firms because they force branch offices to "farm out" work locally.²¹⁶ Besides, the required annual residency of 180 days and the limit to only one office in Japan,²¹⁷ combined with the high cost of maintaining an office in Tokyo, effectively keeps most foreign lawyers out of practice in Japan.²¹⁸

In addition, education, language and cultural differences have worked to keep foreign lawyers from establishing a larger presence in Japan.²¹⁹ With regard to determining a legal professionals' form of association, it is advisable to allow them to best service their clients' needs. Thus, it is recommended that foreign lawyers be allowed to hire Japanese lawyers; to provide advice on so-called "third country" law (that is, the law of a country other than the one that is a foreign lawyer's home jurisdiction) on the same basis as Japanese lawyers; and to establish professional corporations, limited liability partnerships (LLPs) and limited liability corporations. It is further recommended that the *Nichibenren* and the mandatory local bar associations provide *gaiben* (foreign lawyers) with effective opportunities to participate in the development and enforcement of all laws and rules that affect them.

Many of the anti-competitive practices indicated by the trade partner countries in the Japanese accounting and legal services markets seem to be established and operated to maintain the domestic markets, especially when considering the demands from the Japanese and foreign multinational enterprises' activities in Japanese markets, which is similar to the case of Korea. There may, however, be specific instances when maintaining such practices is justified due to the cultural or social circumstances unique to the two countries.²²⁰

Financial Market

With respect to the insurance industry, Japan's private insurance market is the second largest in the world after that of the United States.²²¹ The Japanese insurance market is composed of private insurers, a large public sector provider of postal life insurance products (Kampo), the National Public Health Insurance System, and a web of mutual aid societies (Kyosai).²²² The Japanese insurance

215 Karen Dillon, *id.*, at 52, cited by Orlando Flores: *id.*

216 Bob Rossi, NAFTA Won't Open Doors for Lawyers; Despite Negotiations, Limits on Foreign Law Practices Will Remain, *Legal Times*, Oct. 25. 1993, at 8, cited by Orlando Flores, *Id.*

217 Kenneth S. Kilimnik, *supra* note 66, at 323, cited by Mara M. Burr, *supra* note 51, at 685.

218 Kenneth S. Kilimnik, *Id.*, cited by Mra M. Burr: *id.*

219 Mara M. Burr: *id.*

220 For such detailed circumstances, see Eun Sup Lee, *supra* note 118, at 10-36.

221 USTR, NTE(Japan), *supra* note 3, 218 (2003).

222 *Id.*

sector, aside from the Kampo and Kyosai, is regulated by the Financial Services Agency (herein after, FSA),²²³ which was established in 1998. The FSA is in charge of all aspects of financial regulation in Japan, including inspection, supervision, and surveillance of financial activities related to banking and securities business in addition to insurance, the function of which is just similar to Korea's Financial Supervisory Service²²⁴ established after the financial crisis in 1998.

As the market has changed and the Japanese Government has pursued further deregulation and liberalization in this sector, and despite the noteworthy success in this sector, a number of controversial issues have been raised by trade partner countries. These include further liberalization and expansion of the insurance market, as well as the introduction of new products such as variable annuities and possible expansion of sales of such products by banks.²²⁵ The trade partner countries have required the Japanese government to adopt the policy of increasing competition as one of the basic principles of regulatory reform,²²⁶ and to provide the foreign and domestic insurance industry meaningful opportunities to be informed of²²⁷ comment, and exchange views with Japanese officials²²⁸

223 *Id.*

224 See, Eun Sup Lee, Regulation of Insurance Contracts in Korea, 13 *The Transnational Lawyer*, 6 (2000).

225 USTR, NTE (Japan), *supra* note 3, 219 (2003).

226 Motivations for deregulation in Japan have changed over time. In the 1980s, deregulation meant privatization and administrative reform. Since the 1990s, however, the motivation has come from a concern about industrial structures and international competitiveness. Concern for international competitiveness has been a domestic incentive for introducing deregulation. Hiroko Yamane, Deregulation and Competition Law Enforcement in Japan: Administratively Guided Competition?, 23 *Journal of World Competition* 3, 142 (2000).

227 Japan adopted its first government-wide Public Comment Procedures in 1999, which requires central government entities to give notice and invite public comments on draft regulations. USTR, NTE (Japan), *supra* note 3, at 204(2003). However, it has been evaluated to have only marginal impact on the substance of new regulations. See, *Id.*

228 "Ministries create deliberate councils (shingikai) to investigate some problem, draft legislation ..., or recommend alternative means The goal of this system is to gather expert opinion and provide an open forum. Bureaucrats have frequently, however, been assessed to use shingikai to diminish opportunities for open conflict in policy adjustments." Ken Duck, Now That the Regulation of Industry and Governance, 19 *Fordham Int'l L.J.* 1699-1700(1996). For instance, shingikai are considered to be often mere extensions of the ministry or agency overseeing their deliberations. Often bureaucrats frame the issue for deliberation and approve background documents for use by the council members. The shingikai members are often to rely heavily upon the resources supplied by the bureaucrats. David Boling, Access to Government-Held Information in Japan: Citizens' "Right to Know" Bows to the Bureaucracy, 35 *Stan. J. Int'l L.* 20-21 (1998). Besides difficulty to access the concerned authorities, it is difficult to access government information about business: "The American Freedom of Information Act... has worked so well that Japanese companies often obtain

regarding the development or revision of guidelines or regulations. Such opportunities would be provided through such means as public comment procedures²²⁹ and participation on government advisory groups.

The FSA is also required to shorten standard approval periods and to move to a quicker, less-burdensome “file and use” system for certain insurance products. Partner countries are concerned about the Policyholder Protection Corporations, which are mandatory policyholder protection systems created by Japan in 1998 to provide capital and management support to insolvent insurers. Despite their strong and stable presence in the Japanese insurance market, foreign insurers continue to have serious concerns that they will be asked to make even higher contributions to these funds in the future.

Those concerns and practices raised by trade partner countries as the trade barriers in the Japanese financial markets are similar to those of Korea, which are rooted in consumer-protection or market-stability oriented policy.

Investment Market

Despite being the world’s second largest economy, Japan continues to have the lowest inward FDI as a proportion of total output of any major OECD nation. In 2000, Japan’s total cumulative stock of FDI totalled only 1.1 percent of GDP, compared with 12.5 percent for the United States and 29 percent for the United Kingdom.²³⁰

Although most direct legal restrictions on FDI have been eliminated, bureaucratic obstacles remain, including the occasional discriminatory use²³¹ of

information about their American competitors through the ... requests. However, American companies have no similar access.” Higuchi Norio, Lecture on Japanese Information Disclosure, Mar. 1992, cited by David Boling, *Id.*, at 3. With regard to this, the following comment is notable: “Japanese government ministries and agencies often exclusively possess economically strategic information ..., thus forcing smaller companies ... to hire former bureaucrats in order to gain ... business information” *Id.*, at *fn.* 16. This absence of a Japanese information disclosure law have been criticized as one kind of a non-tariff trade barriers. *Id.*, at 4.

229 Japan adopted its first government-wide Public Comment Procedures in 1999 to solve the problem that even though public policy and regulations are made by and instituted through constant interaction with the private sector, few opportunities exist for interested parties having no special access to the authorities or related councils to have any input into the legislative process. USTR, NTE(Japan), *supra* note 3, at 204 (2003).

230 *Id.*, at 221.

231 The ability to treat with these types of barriers in Japan through WTO procedures is limited: “Although WTO dispute resolution is able to reach regulatory actions by government, in Japan the regulations of concern often make no distinctions between foreign and domestic businesses... Even when the fact pattern shows a fairly clear distinction between the position of foreign and Japanese companies, the Japanese government often can present a coherent policy rationale for the regulations that is unrelated to restricting market access by foreign companies...; WTO dispute

bureaucratic discretion, particularly through the use of administrative guidance.²³² While Japan's foreign exchange laws currently require only *ex post facto* notification of planned investment in most cases, a number of sectors (e.g. agriculture, mining, forestry, fisheries), which have traditionally been the national strategic industries in Japan, still require prior notification to government ministries.²³³ More than government-related obstacles, however, Japan's low level of inward FDI flows reflects the impact of exclusionary business practices²³⁴ and high market entry costs.

Difficulty in acquiring existing Japanese firms—as well as doubts about whether such firms, once acquired, can continue normal business patterns with other Japanese companies — makes investment access through mergers and acquisitions (M&As) more difficult in Japan than in other countries. Even though the pressure of economic restructuring and the surge in M&As have weakened, to a degree, *keiretsu* relationships, for example, U.S. investors cite the lack of financial transparency and disclosure and differing management techniques as

resolution generally is not able to address private anti-competitive or market-restrictive practices or structure.” James D. Southwick, *supra* note 11, at 924-925.

232 Japanese legal environment has been indicated to increase the effectiveness of administrative guidance in industrial policy as follow: “Japan’s informal regulatory process functions within a legal system that consists of a ministry’s statutory authority limited by administrative rules and doctrines of judicial review that are designed as a check against arbitrary policies. In Japan, courts grant ministries’ broad discretion in their regulatory methods because of vaguely worded statutes. Combined with low levels of judicial review, this broad discretionary authority insulates much of Japan’s industrial policy from challenge.” Frank K. Upham, *Law and Social Change in Post War Japan*. 169(1987), cited by Ken Duck, *supra* note 228, at 1703.

233 USTR, NTE(Japan), *supra* note 3, at 221 (2003).

234 Exclusive business practices have been a crosscutting issue in trade partner countries. *Id.*, at 202. A key reason for the persistence of anti-competitive business practices in Japan is indicated to be historically weak anti-trust enforcement record of the Japanese Fair Trade Commission (JFTC). *Id.*, at 974-975. The Commission’s record of reluctance to initiate formal investigations of market access complaints stems from the JFTC’s practice of requiring a near-absolute proof of law violation before it commences to investigate as well as seemingly in part from a natural resistance to foreign pressure. Although the JFTC has declared that it will deal fairly and strictly with problems of market access, it seems difficult to identify law enforcement efforts with that focus. Michael Wise, *Review of Competition Law and Policy in Japan*, *OECD Journal of Competition Law and Policy*, 4(2000). Arguably such a high threshold for opening investigations makes a more fundamental difference in the philosophy or capability of competition enforcement between Japan and other western countries. James D. Southwick, *supra* note 11, at 974-975. To make the matter worse, the provision of Japanese Antimonopoly Law has not only stultified the development of antitrust doctrines in Japan but at the same time it has allowed the JFTC to centralize the competition agenda, which results a bureaucratic approach to the law in which “Power is not shared with the courts.” Harry First, *Antitrust Enforcement in Japan*, 64 *Antitrust L. J.* (1995) cited by David Boling, *supra* note 228, at 14. Thus if the JFTC acts informally, which is after the case, it can “extinguish completely the private right of action... rather than proceeding to a formal decision”. *Id.*

the obstacles to M&A activity in Japan.²³⁵ The scarcity of qualified lawyers, auditors, and accountants needed for M&A activities also inhibits FDI.²³⁶

More specifically, partner countries urge Japan to consider measures that will assist with three key aspects of improving Japan's direct investment environment, including developing more active and efficient markets for M&As²³⁷ in order to enhance the productivity of capital in Japan and also to consider improving land market liquidity and foreign investors' access to land,²³⁸ and increasing the flexibility of Japan's labor markets.²³⁹

Japan has enacted new and revised legislation providing opportunities for foreign investors. For example, the *Industrial Revitalization Law* provides existing firms undergoing reorganization (both domestic and joint-venture) with tax and credit relief once the Japanese Government approves the firm's business restructuring plan.²⁴⁰ A new bankruptcy law (the *Civil Reconstruction Law*) also may provide investment opportunities as it encourages business reorganization, including spin-offs, rather than forced liquidation of assets.²⁴¹ Other legislative changes now provide for stock options for employees, a key issue for foreign firms wishing to attract high quality employees.²⁴² In addition, Japan has prepared legislation on corporate divestiture that will facilitate a company's streamlining efforts.²⁴³ New accounting rules are bringing Japan close to the international standard and to a degree have helped reduce extensive cross-shareholding among firms, as the new accounting rules identify non-performing asset and liabilities.²⁴⁴

The practices and barriers to the Japanese investment as cited above are not in step with Japanese economic development, which might be due to the government's traditional policy of protecting the domestic market. Some of the legal or administrative barriers could be eliminated or reduced easily under the current regulatory or deregulation reforms if they were enforced.²⁴⁵ However,

235 USTR, NTE(Japan), *supra* note 3, at 222 (2003).

236 *Id.*

237 For the U.S. proposals to improve the direct investment environments in the area of M&As in Japan, see *Id.*, at 222.

238 For the U.S. proposals to improve the land market liquidity in Japan, see *Id.*, at 238 (2002).

239 The United States stressed the need to improve labor mobility in Japan, recommending that Japan: i) introduce defined contribution pension plans; ii) deregulate fee-charging employment agencies; iii) liberalize Japan's labor dispatching business; and iv) ease excessively tight regulations. *Id.*, at 238-239.

240 *Id.*, 221 (2003).

241 *Id.*, at 221-222.

242 *Id.*, at 222.

243 *Id.*

244 *Id.*

245 Motivations for deregulation in Japan have changed over time. In the 1980s, deregulation meant privatization and administrative reform. Since the 1990s, however, the motivation came from a concern about industrial structures and international competitiveness. Concern for international competitiveness has been a

some barriers reflecting Japanese exclusionary business practices or social backgrounds would not be removed so easily. Particularly, practices reflecting the Japanese exclusionary business atmosphere seem unique, which are substantially different from those of Korea.²⁴⁶ Also many of those practices are difficult to evaluate with regard to the multilateral norms included in the WTO Agreements²⁴⁷ without pure investment regulations, which are currently treated bilaterally or plurilaterally with the concerned partner countries.

Review

The above analysis shows that the trade barriers in the service markets of the two countries have almost identical characteristics, scope and effectiveness, even though there are differences in the degree of the criticism against those barriers from their trading partner countries,²⁴⁸ which may reflect each market's economic value to their partners' foreign markets. For example, anti-competitive practices indicated by the Japanese trade partner countries in the Japanese service markets including the banking and insurance sector are very similar to those in the Korean service markets.

These practices reflect the policy objectives of the governments of both countries to put more emphasis on consumer protection or stability of financial institutes as compared to the institutes' competitiveness or operative efficiency, which are somewhat different from those of developed western countries. What is

domestic incentive for introducing deregulation. Hiroko Yamane, *supra* note 226, at 142.

246 Regarding the Japanese exclusionary business practices comparatively studied with Korean anti-import biased atmosphere, Eun Sup Lee indicated: "The anti-import biased social atmospheres in Korea and the exclusionary business practices in Japan are similar in having restrictive effects on foreign exporters and investors. However, they seem somewhat different ... the former atmosphere could be very temporary and extremely vulnerable to changes in the overall social atmosphere or consumption attitudes in Korea, while the latter practices might take time to change because they are the products of the long-standing commercial practices of the business society in Japan" Eun Sup Lee, *supra* note 118, at 21.

247 The matters relating to transparency in Japan, for example, would seem to be difficult to solve, through WTO procedures for example: "... , although basic legal rules often are plainly written in Japanese, the terms are very broad; the all-important details often are filled in through non-transparent administrative guidance and practice or through reliance on quasi-government advisory bodies or industry associations. This kind of reliance on non-transparent means ... can make it difficult to demonstrate in a WTO dispute settlement proceeding what rule the Japanese government is following. Furthermore, ... , it still would be necessary ... to further persuade the panel how the interaction between the governmental measures and the market situation restricts market access." James, D. Southwick, *supra* note 11, at 925.

248 There is basic and distinct difference in the practices in a few sectors including distribution industry of the two countries: an anti-competitive practice in Japanese distribution sector has traditionally been evaluated to be unique to Japan. See *Id.*, at 927-928.

important, however, is that such policy objectives reflect the overall social and cultural environments of the two countries which stress stability rather than productivity or efficiency of any institute.

This result is somewhat different from the study that the author made with respect to the two countries' commodity markets, which revealed that there were substantial differences between the anti-competitive practices of the two countries' market characteristics, scope and effectiveness : that is, some Japanese exclusive business practices in commodity markets were determined to be rooted in the intrinsic Japanese social environment which might be controlled by government policy and is different from that of Korea.²⁴⁹ Substantial part of investment barriers in Japan, which was indicated above, may also originate from those exclusionary business practices intrinsic to Japanese markets.

Considering the overall economic situations of the two countries - including the level of the development of the service and commodity markets of the two countries - this result, even though different from the commodity and investment markets, implies that the service markets are deeply affected by cultural factors as well. As viewed by international standards, the two countries' cultural backgrounds are almost the same, which makes their governments' policy objectives for their service market regulations very similar in their characteristics.²⁵⁰

For example, the Japanese excuse - from the viewpoints of the partner countries - for preventing foreign lawyers from participating in any type of litigation is that it is necessary to prevent Japan from becoming a litigious society,²⁵¹ seems to be the same as that of Korea. This excuse may seem ridiculous or unreasonable from the viewpoint of the market or profit-centered approach adopted by western countries. In both countries, however, people have traditionally been very reluctant to stand up in court, which has sometimes been accepted as a short cut to individual bankruptcy, particularly in civil cases. People very often deliberately assume economic losses instead of bettering their situation through legal action in court. Considering the cultural and social environment of the two countries, their governments are apt to be persuaded to protect their legal cultures from other western countries. There are many other situations in both countries' service markets, which reflect their particular cultural circumstances.

Regarding international regulations on the cultural aspects of trade in service, no cultural exceptions or provisions *per se* emerge from the text of GATS. This is in contrast with the case of GATT, where, even though it is far from being

249 See *supra* note 246.

250 Although it is difficult to show the empirical evidence to determine whether those reflecting the cultural-social factors are legitimate concerns or excuses for protectionism, the agreement further liberalizing the regulation of service sectors should address in depth cultural-social concerns of the parties to the agreements. See Orlando Flores, *supra* note 160, at 167 (stating the cultural concerns prompting, maybe, countries to limit foreign lawyers, scope of practice).

251 Japan said to Eye Easing Rules on Foreign Lawyers Practicing in Japan, *Int'l Bus. & Fin. Daily*, Mar.23, 1994, cited by Orlando Flores, *Id.*

sufficient to deal with the cultural aspects of trade, there are a few culture-related provisions in the GATT, that is, cultural exclusions such as Article XX(f) (protection of national treasures of artistic value), Article XIX (emergency action on imports of particular products), and Article IV (special provisions to cinematograph films).

In the WTO world, basically a rule-based society, the GATS's disagreement on cultural factors influencing trade on services makes the regulation of service trade by GATS inefficient and controversial among the member countries with different cultural and social backgrounds and circumstances. Complementary provisions reflecting the cultural differences among the member countries are expected to be incorporated into the GATS in the near future. Until such complementary provisions are made, the government of both countries should try to establish scientific and concrete evidence to support those practices that reflect their particular cultural-social environments. Such evidence could demonstrate the reasonableness and fairness of those factors to international trade, to be necessary to sustain specific public policy objectives, or to be the inevitable reflection of the particular situation intrinsic to their countries.

At the same time, it is advisable to establish the interpretation rules of the WTO Agreement that fully take into account the cultural and social environments unique to the member countries. These newly established rules would fully consider the individual countries' specific situations regarding the cultural²⁵², social, political, or historical backgrounds and atmosphere when they apply the WTO rules and regulations to certain countries. The establishment of such rules might seem to be contradictory to the recent trends of international trade-related regulations toward hard laws as in the case of the WTO regime from the GATT.²⁵³

252 The WTO has so far avoided looking beyond economic factors to address the lack of specificity regarding cultural products within international trade: "Its panels have largely to acknowledge that culture may have a dual nature.... The panels have also ignored the fact that cultural products may also have a conflicting nature.... This refusal to create specific rules for culture and cultural products could reveal the WTO's reluctance to believe that governments that employ protectionist measures are trying to preserve and foster the unique entity of culture...." Karsie A. Kish, *Protectionism to Promote Culture: South Korea and Japan, A Case Study*, 22 *U. Pa. J. Int'l Econ. L.* 161-162 (2001).

253 Hard law refers to a system of norms as to which a relatively high expectation of compliance exists. Frederick M. Abbot, *supra* note 3, at 196. "The principal evidence of this trend may be found in two areas. The first is in the progressive refinement of rules from the general to the specific. The second is in the transaction of the dispute settlement system from consensus-based to quasi-judicial. These two manifestations have occurred to some extent independently of one another. The phenomenon of rule refinement has been underway since the founding of the GATT, and was a major theme of the Tokyo Round negotiations which culminated in 1979". *Id* However, rule refinement does not always result in a significant reduction of the level of discretion allowed to national governments, as evidenced to some extent by the SPS Agreement. *Id*, at *fn.*44.

However, for the practical and efficient formation of international trade and competition regulations, their uniform enforceability should properly be mixed with flexibility,²⁵⁴ which, however, should be complemented with the adoption of strict rules of evidence.

It could also be said that current dispute settlement mechanisms under the GATS might not be sufficiently capable to resolve controversial disputes with respect to trade in services, which were established without sufficient consideration of the cultural aspects of trade in services. Even though sufficiently evaluating the anti-competitive practices in the service markets and anti-competitive TRIMs in terms of cultural and social factors as well as economic and political factors might be very difficult and complicated, such an undertaking is recommended in order to continue to promote international trade in services without serious cultural contradiction among the member countries under the WTO system.

Along with the incorporation of above provisions into GATS and the establishment of such construction rules, it is also advisable to improve the current WTO dispute settlement mechanism. One approach to improve the current dispute settlement mechanism is to establish an independent GATS dispute settlement body including a panel and an appellate body. The panel and the appellate body would be constituted with permanent members with the properly-specified qualifications to deal with the cultural, social, economic and political aspects of the disputes and appointed by the WTO through open - competition procedures.²⁵⁵ Thus the GATS dispute settlement framework would be operated like the well established domestic-like international court with a two-tier mechanism with reliable authority, which could provide a more predictable legal environment in coordinated international service markets.²⁵⁶

254 For example, in the case of the TBT Agreement, taking into account the existence of legitimate divergences of geographical and other factors between countries, the Agreement extends to the Members the regulatory flexibility to reflect the differences between them. There, the degree of flexibility is limited by the requirement that technical regulations “should not become unnecessary obstacles to trade”. See TBT Agreement, art 2.2, 2.4. These provisions extending flexibility to the application of the TBT Agreement could be expanded and applied more generally to the construction of the WTO Agreements concerned.

255 This constitution of panel of GATS dispute settlement body could also decrease the possibility of the United States to rely on unilateral measures under Section 301. See Alan Wm. Wolff, *supra* note 27, at 1027, “... the panel itself is likely to consist of busy diplomats with other, more pressing, responsibilities”.

256 One prominent author suggest “soft approach” through the non-binding panel to treat the disputes raised from competition policy, under which the parties to the dispute are allowed to select the members of the panel for two reasons: “First, an ad hoc selection mechanism allows the parties to tailor the panel to the specific issue in dispute. ... Second, because the losing party participates in the selection of the panel and because the panel will have particular expertise in the precise issue before it, panel findings will be more persuasive and legitimate” Jason E. Kearns, *supra* note 1, at 313. This approach may have merits to mobilize domestic and international political support for

The establishment of such an independent GATS dispute settlement body would also be helpful to establish clear construction rules of the provisions of the current WTO Agreements, which take into sufficient consideration the unique and specific situations of the individual countries.

Concluding Remarks

Many of Japan's and Korea's competition and international trade-related laws, particularly in the service and investment markets, have been enacted and modified passively due to the expressed or implied pressure from their trade partner countries like the United States and to the requirements of international organizations like the WTO and OECD. Trade pressure on both countries in the service and investment fields were particularly serious from the 1980s to the 1990s,²⁵⁷ during which both countries took various measures to open and liberalize their service markets. Thus such enactments or modifications were not a voluntary response by the governments of both countries to internal public and private sector concerns.

They may have occurred in this manner because the two countries' rapid economic growth and development during the past 40 years were influenced by their governments' strong export-driven policy (which was not balanced with the corresponding competition regulations), and their heavy dependence on foreign trade. However, under the WTO mechanism, both countries' competition and foreign trade regulations should be improved voluntarily and continuously to implement their plans in accordance with the liberalized global service and investment market systems, under which they could pursue their continuing trade policy objectives.

Competition policies or anti-competitive practices particularly in the service and investment markets are substantially affected by the historical, political, cultural²⁵⁸ or social fabrics or environments of the individual countries.²⁵⁹

reform, instead of creating an inflexible obligation to bring national laws into conformity with WTO commitments. *Id.*, at 317. However, it may appear inconsistent with existing dispute settlement mechanism of the totally successful WTO with the binding enforcement, which took almost half century for the GATT to accept it laboriously. *Id.*

257 For the detailed discussion on the trade friction between Korea and the United States in the field of service industry as well as the commodity field, see Eun Sup Lee, Regulation of Foreign Trade in Korea, 26 *Geo. J. Int'l & Com. L.* 155-159 (1996).

258 Tony A. Freyer has pointed out Japan's cultural distinctiveness, for example, in relation with competition policy, as follows, citing the analysis made by Naohiro Amaya [Harmony and the Antimonopoly Law, 3 *JAPAN ECHO* 85, 91 (1981)]: "... Americans ... argued that the distinctiveness of Japanese society constituted an illiberal, illegitimate barrier to their exports. ... the critics maintained that Japan's ideological or cultural distinctiveness encouraged collusive and anticompetitive practices ... proponents of such views agreed ... that the Japanese version of competition takes the form of solidarity within the company ... and burning enthusiasm for combat in inter-company relationships. For the Japanese, it was 'hard

It makes it difficult to evaluate competition policy under uniform standards of international norms as well as to produce internationally accepted uniform norms to regulate competition-related matters. In consideration of this point, this study is limited by the fact that the anti-competitive practices of both countries have been comparatively reviewed from the viewpoint of international trade norms or competition norms that have only been discussed but not yet established, without consideration of other external factors.

This study is expected to be followed by an interdisciplinary analysis of the anti-competitive business practices of the two countries to discover effective and cooperative policy directions for solving the trade and competition-related problems of both countries. Such an analysis will also suggest a direction towards more effective regulation of trade in services in the approaching WTO negotiations.

to accept' that competition 'produces losers.' ", Tony A. Freyer, *supra* note 69, at 168-169.

259 For example, there are good faith differences between / among countries concerning the desirable level of government intervention in the market place. These good faith differences lead to disputes concerning governments' actions: whether to protect against foreign competition, or to promote desirable national domestic policy goals. In addition, some differences between / among countries involve the behaviours of consumers, enterprises and political parties, which are deeply entrenched. Frederick M. Abbott, *supra* note 3, at 186.