Anti-Competitive Practices as Trade Barriers Used by Korea and Japan

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TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 177

II. ANTI-COMPETITIVE PRACTICES IN DOMESTIC MARKETS ........................................... 178
    A. International Regulation ......................................................................................... 178
        1. Anti-Competitive Practices as Trade Barriers ......................................... 178
    B. Korea .................................................................................................................. 184
    C. Japan .................................................................................................................. 187
    D. Review ............................................................................................................... 194

III. ANTI-COMPETITIVE PRACTICES BETWEEN FRONTIERS ........................................... 195
    A. International Regulation ......................................................................................... 195
        1. Sanitary and Phytosanitary Measures ......................................................... 195
        2. Import Licensing ............................................................................................ 196
    B. Technical Regulation/Standards ........................................................................... 197
    C. Korea .................................................................................................................. 199
    D. Japan .................................................................................................................. 202
    E. Review ............................................................................................................... 204

IV. CONCLUDING REMARKS ............................................................................................ 206

I. INTRODUCTION

An important goal of international trade organizations like the World Trade Organization ("WTO") is to remove trade barriers among frontiers in order to secure free and fair opportunities for member countries. However, unfair and anti-competitive practices by private firms in the domestic markets can create further barriers to overcome, in addition to those trade barriers at the frontiers. As the major frontier barriers to international trade among the member countries have been reduced through multilateral negotiations under the General Agreements on Tariffs and Trade (GATT)/WTO system, there has been an increasing world-wide interest in other types of anti-competitive practices. With regards to these practices, Korea and Japan have traditionally been the target of criticism from their trade partner countries. This is because they have manipulated anti-competitive practices to protect their domestic markets, and

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their regulation of restrictive competitive practices have been loosened compared to their respective trade volumes.1

This paper is a comparative study of the anti-competitive practices used by Korea and Japan, analyzing their competition policies on the trade policies, considering the growing interest in anti-competitive practices and the criticism of the two countries. In this study, the term “anti-competitive practices” includes private restrictive business practices and their governmental regulations, which consequently hamper the flow of trade and competition and have been regarded as trade barriers.

This comparative study examines the difference in regulating the anti-competitive practices of Korea and Japan, and suggests some direction for the harmonization and establishment of common rules to regulate the practices of the two countries. This analysis will also imply 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 for a free trade area between the two countries in the near future.

II. ANTI-COMPETITIVE PRACTICES IN DOMESTIC MARKETS

A. International Regulation

1. Anti-Competitive Practices as Trade Barriers

Many attempts have been made bilaterally, plurilaterally, and multilaterally to regulate and eliminate unfair and anti-competitive practices, that act as trade barriers. For the purposes of this discussion, “trade barrier” means any kind of entry barrier to an importing countries’ domestic market which impedes the complete national treatment. One approach to eliminate trade barriers is to harmonize the conflicts between the trade policies and the competition policies, both which have recently received interest worldwide.2

Entry barriers to the importing countries’ domestic market is the focus of competition policy which is under the control of domestic competition authorities. However, it can also be understood as a matter of trade policy, from the viewpoint of

1. See Frederick M. Abbott, Prevention and Settlement of Economic Disputes between Japan and the United States, 16 ARIZ. J. INT'L & COMP. L. 185, 189-90 (1999). 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 (“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.

2. See Terence P. Stewart, U.S.-JAPAN Economic Disputes: The Role of Antidumping and Countervailing Duty Laws, 16 ARIZ. J. INT'L & COMP. L. 689, 736-39 (1999). 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.
the exporting countries' trade authorities. In principle, the basic purpose of trade policies and competition policies is the same: the improvement of economic efficiency and the consumer’s welfare-level. Thus the two policies share common objectives through non-discriminatory, transparent, rules-based regimes.

Unfortunately, in the course of enforcing the two policies, conflicts can occur when policies with conflicting priorities are imposed. Traditional discussions have focused on evaluating the effect of trade policy on domestic competition policy. More recently, as the trade barriers among major countries have been substantially removed, international trade institutes, such as WTO and Organization for Economic Cooperation and Development (“OECD”), have concentrated on the effects of domestic competition policy on trade policy.

The main purpose of international discussions on the effects of competition policy on international trade is to reduce the disparity between individual countries’ markets, and to secure a fair and free domestic market structure for access to the domestic market under the precondition that the trade barriers between the frontiers should be eliminated completely. In the absence of an effective competition law to regulate private anti-competitive practices in the domestic markets, the gains from liberalized trade may be undermined, or conversely, the absence of trade and investment liberalization will defer or prevents access to pro-competitive foreign goods.

It is unrealistic to treat international trade policies and competition policies separately, as there are many examples of how these two policies overlap. Thus,


4. See William H. Barringer, Competition Policy and Cross Border Dispute Resolution: Lessons Learned from the U.S.-JAPAN Film Dispute, 6 GEO. MASON L. REV. 459, 462 (1998) (demonstrating the different objectives of the trade laws and the competition laws in the United States). For example, “antitrust laws are intended to protect competition and, thereby, consumers...trade laws are intended to protect and enhance the positions of the U.S. competitors whether in the U.S. market or in foreign markets.” Id.


6. See Barringer, supra note 4, at 477 (explaining that, “at present, it is difficult to ascertain whether in fact restrictive 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. Id.

7. See Kennedy, supra note 3, at 586 (noting that “in connection with an agreement on competition policy, the argument runs that harmonization of national antitrust laws would have at least three salutary benefits. First, a WTO competition policy agreement that harmonized national laws would provide a more predictable legal environment within which multinational firms could operate. Second, WTO-national enforcement authorities. Third, harmonization under WTO auspices would avoid conflicting jurisdictional disputes and potential conflicting decisions by national enforcement authorities.”).

8. Id. at 587 (“the best method for removing these private barriers to market access, some argue, is through aggressive enforcement of competition laws. Consequently, competition law directed at private conduct is a natural complement to a set of international rules regulating government barriers to market access”).

anti-competitive practices have been highlighted as one kind of trade barrier which could, if not regulated appropriately, interrupt access to the domestic market of imported goods for foreign exporters.\(^\text{10}\)

2. *International Efforts to Regulate Anti-competitive Practices*

Since the 1948 attempts to establish international rules to regulate restrictive business practices\(^\text{11}\) with the Havana Charter for the International Trade Organization\(^\text{12}\) failed, efforts have been made in vain to create an international consensus on the regulation of anti-competitive business practices.\(^\text{13}\) Hereafter, discussions will focus on how international trade-related institutes have attempted to harmonize individual countries' competition policies, in an attempt to establish common regulatory rules.

The first attempt, was the International Trade Organization's ("ITO") plan to regulate restrictive business practices.\(^\text{14}\) The ITO regulations would have forced members to prevent business practices from hampering international trade that restrained competition, limited access to markets or fostered monopolistic control, or were harmful to the expansion of production or trade.\(^\text{15}\) The ITO charter would have provided a provision for consultation procedures in cases where member countries permitted a restrictive business practice, and also would have stipulated procedures for the ITO to investigate complaints raised.\(^\text{16}\)

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10. See Barringer, *supra* note 4, at 459-60. 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).

11. See Mitsuo Matsushita, *Essay, United States-Japan Trade Issues and a Possible Bilateral Antitrust Agreement Between the United States and Japan*, 16 ARIZ. J. INT'L & COMP. L. 249, 250 (1999) (arguing that "multinational enterprises could operate in 'the twilight zone' or 'no man's land' without being affected by national competition laws."). In such situations, "extraterritorial application of national competition laws is often ineffective and creates conflicts among nations." *Id.* That is part of the background for international cooperation in the competition policy being called for among the national authorities. *Id.*


13. Barringer, *supra* note 4, at 460 (explaining that "the alleged facts and related business practices at issue in the film dispute [between the United States and Japan] and the underlying disagreements as to the competitive effects of practices alleged, raise serious doubts about the ability of the world trading community to harmonize competition policy rules.").


15. *Id.* at 1092 (citing ITO Charter, *art.* 46(1), the kinds of practices that would have been subject to ITO investigation were "fixing prices, terms or conditions . . . ; excluding enterprises from, or allocating or dividing, any territorial market . . . or allocating customers, or fixing sales quotas . . . ; discriminating against particular enterprises; limiting production or fixing production quotas; preventing by agreement the development or application of technology or invention . . . ; and extending the use of intellectual property rights to matters which are not within the scope of such grants, . . . ").

Even though the ITO provisions were not written into the General Agreement, efforts to establish an agreement on restrictive business practices have continuously appeared. However, it was concluded that it would have been unrealistic to draw up a multilateral agreement to control international restrictive business practices, except for consultations to attempt to resolve allegations of restrictive business practices affecting trade. Since the implementation of the WTO mechanism, renewed interest has arisen in this matter and has forced the WTO to address the relationship between trade and competition policy.

Second, there have been OECD guidelines for multinational enterprises. The OECD guidelines were intended to be recommendations to multinational enterprises operating in member countries' territories, the observance of which

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18. 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 that has the effect of nullifying or impairing a concession 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 in 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 365-66 (2000).

19. The Decision of the Contracting Parties on Restrictive Business Practices, 1960 O.J. (L1015). That was the only effort of the GATT to address cartels and their effect on trade prior to the establishment of the working group in 1996 to deal with trade and competition policy. Barringer, supra note 4, at 463, n.22; see also James D. Southwick, Addressing Market Access Barriers in Japan through the WTO: A Survey of Typical Japan Market Access Issues and the Possibility to Address them through WTO Dispute Resolution Procedures, 31 Law and Pol'y Int'l Bus. 923, 964 (2000).

20. Abbott, supra note 1, at 185 (noting that even though the WTO mechanism moves the GATT system from a soft law to a hard law, there are important gaps in the WTO rule system.) One of the gaps is the "absence of minimum rules on the maintenance of competitive domestic markets." Id. (emphasis added).


22. See Singapore WTO Ministerial 1996: Ministerial Declaration (1996), available at http://www.wto.org/english/tratop_e/minist_e/min96_e/wtodec_e.htm (last visited Oct. 15, 2003) (noting that the 1996 ministerial conference in Singapore agreed to establish a working group to study issues relating to the interaction between trade and competition policy). The Doha Declaration in 2001, instructed working group to focus on clarifying core principles including transparency, non-discrimination and procedural fairness, 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 in developing countries through capacity building. WTO Doha Declaration, available at http://www.wto.org/english/tratop_e/dda_e/dohaexptended_e.htm.

was voluntary and not legally binding. Since the guidelines were suggested in 1976, several attempts to establish international rules to regulate the anti-competitive practices have been made, yet have not been realized. However, OECD member countries have recently become interested in the international regulation of these practices.

Third, there were efforts by the United Nations to regulate restrictive business practices. UNCTAD extended initial consideration to the matter of restrictive business practices in the 1970s. In 1980, the United Nations Conference on Restrictive Business Practices adopted a code of conduct, which is generally accepted as being the most detailed international agreement on the issue. According to this code, independent enterprises should refrain from certain practices which limit market access or otherwise unduly restrain competition and refrain from abusing their dominant economic position through certain practices. However, the code does not seem to have as much of an effect as the other attempts made by the United Nations to regulate business behavior.

Fourth, a draft of an international antitrust code was put forward. A group composed mainly of antitrust experts, and scholars from Germany, the United States, Japan, Switzerland and Poland proposed the Draft International Antitrust Code in 1993. The Draft Code (“Code”) required a minimum standard for

24. According to the 1976 OECD Guidelines on Multinational Enterprises regarding competition practices, enterprises should do as follows: "i) refrain from abusing a dominant position; ii) should not restrict purchasers, . . . to resell; iii) refrain from participating in . . . strengthening the restrictive effects . . . cartels or restrictive agreements which are competition—restrictive; and iv) be ready to consult and co-operate with competent authorities of countries concerned." Id.


26. See OECD, supra note 9.


28. Id. at 1095-96. Such practices included: "i) agreements fixing prices . . . ; ii) collusive tendering; iii) market or customer allocation arrangements; iv) allocation . . . to sales and production; v) collective action to enforce arrangements . . . ; vi) concerted refusal of supplies to potential importers; and vii) collective denial of access to an arrangement or association . . . ." Id.

29. Id. at 1096. Such acts included: "i) predatory behavior towards competitors . . . ; ii) discriminatory pricing or terms or conditions . . . ; iii) mergers, takeovers, joint ventures . . . ; iv) fixing the prices at which goods exported can be resold in importing countries; v) restrictions on the importation . . . ; and vi) when not for ensuring the achievement of legitimate business purpose . . . : (a) partial or complete refusals to deal . . . ; (b) making the supply . . . dependent upon the acceptance of restrictions on the distribution or manufacture of competing or other goods; (c) imposing restrictions . . . ; (d) making the supply . . . dependent upon the purchase of other goods or services from the supplier or his designee." Id.

30. See id. at 1097.

31. Matsushita, supra note 11, at 249, 250-51. This draft was different from the above three attempts in character from the viewpoint that the draft was not the multilateral type but the plurilateral one. This is not as comprehensive as a multilateral arrangement currently, however, plurilateral arrangement might be more feasible than a multilateral agreement in the competition law area.

32. See JACKSON, ET AL., supra note 12, at 1097 (citing the “Draft International Antitrust Code as a
national antitrust laws. The Code divided ‘business restraints’ into two groups: horizontal and vertical. It also included provisions for the control of abuse of a dominant position which adversely affects competition in any market. The International Antitrust Authority was to be established to implement the Code. An International Antitrust Panel was also to be created and to be operated like the GATT dispute settlement panel. The Code appears to be too specific, however, if it is developed into international rules to regulate the anti-competitive practices, it will be more effective than past proposals.

While those multilateral or plurilateral attempts have failed, the problem of the anti-competitive practices have increased in recent years. There has also been general consensus that the interface between trade and competition policies.


33. See BNA, supra note 32. The Draft stipulated four principles: “i) establishment of national laws to solve international competition problems; ii) national treatment; iii) establishment of minimum standards for antitrust rules and; iv) establishment of an international authority to settle disputes over antitrust issues.” Id.

34. JACKSON, ET AL. supra note 12, at 1097-98 (regarding the shapes of the horizontal and vertical restrictions).

35. See id. at 1099. These include: limiting production, markets or technical development to the prejudice of consumers, applying dissimilar conditions which place other trading parties at a competitive disadvantage and making the conclusion of contracts subject to acceptance of supplementary obligations. Id.

36. Id.

37. Id. at 1099.

38. Matsushita, supra note 11, at 251. Besides the above multilateral and plurilateral 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. Id. Work by the OECD’s Joint Group on Trade and Competition has identified five international options to improve the coherence between trade and competition policies: “enhanced voluntary convergence; enhanced bilateral co-operation between competition authorities; regional agreements containing competition policy provision; plurilateral competition policy agreements; and multilateral competition policy agreement.” OECD, Joint Group on Trade and Competition: International Options to Improve the Coherence between Trade and Competition Policies, at 2 (Feb. 9, 2000), available at http://www.olis.oecd.org/olis/1999doc.nsf/linkto/com-td-daffe-clp(99)102-final (last visited October 13, 2003).

39. SOUTHWICK, supra note 19, at 963-64. (according to the record to date on reaching agreements restricting anti-competitive practices and market structures, for example, in Japan, using GATT/WTO mechanisms has been generally unsuccessful. The EC raised in 1983 a complaint under Article XXIII: l(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.” ).

40. See SINGAPORE WTO MINISTERIAL 1996, supra note 22. 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 whether the TRIMs Agreement should be complemented with provisions on investment and competition policy . . .; ii) Articles 8, 31 and 40 of the Agreement on the Trade-Related Aspects of Intellectual Property Rights (“TRIPS Agreement”) address issues of anticompetitive practices . . .; iii) Articles VIII and IX of the General Agreement on Trade in Services (“GATS”) prohibit monopoly service suppliers from discriminating . . . and obligate WTO members to enter into consultations . . . on restrictive business practices of service suppliers.” KENNEDY, supra note 3, at 602-603.
is more important, due to the ongoing process of economic globalization.\footnote{OECD, Joint Group on Trade and Competition, \textit{supra} note 38. Besides the economic globalization, this consensus was triggered by other factors, such as trends toward regional integration, the rebirth of capitalism in Eastern Europe, the Latin American economic reforms, the creation of WTO, the new legal instruments for dealing with regulatory reform in open economics, and the growing number of competition cases involving more than one country. Kennedy, \textit{supra} note 3, at 587} Besides the international attempts to treat with this matter,\footnote{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. Abbott, \textit{supra} note 1, at 185.} 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 laws.\footnote{See Jackson, et al., \textit{supra} note 12, at 1078-89 (cases relating to extraterritorial enforcement of the U.S. Antitrust Laws).} For example, according to Section 301(d) of the United States' Trade Act of 1974,\footnote{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: "i) maintaining unjustifiable or unreasonable trade barriers...; ii) imposing discriminatory or other unjustifiable or unreasonable burdens or restrictions...; iii) granting export subsidies...; iv) imposing unjustifiable or unreasonable restrictions..." Alan C. Swan, \textit{Prevention and Settlement of Economic Disputes between Japan and the United States}, 16 \textit{Ariz. J. Int'l \\& Comp. L.} 37, 48 (1990). ("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.") Barringer, \textit{supra} note 4, at 460.} a government's toleration of systematic anti-competitive activities by/among private firms that have the effect of restricting access of the imported goods to the domestic market may be regarded as "unreasonable."\footnote{Ralph H. Folsom et al., \textit{International Business Transactions} 536 (1996).} 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 the domestic market for foreign companies.\footnote{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, \textit{Asil Holdo Corporate Counsel Committee Briefing on International Antitrust and U.S.-Japan Relations} (The American Society of International Law Newsletter), Sept. 1995.}

\textbf{B. Korea}

Anti-competitive practices in Korea are discussed from the viewpoints of competition policy, transparency and anti-import bias. During the dynamic period of economic growth and development from the 1960s to the 1990s, the Korean government traditionally promoted economic development much more
directly and positively than any other Asian country. This resulted in a greater disparity between which resulted in a greater disparity in income growth, prices, trade, and structural change. During this time, the government made major decisions with regards to the management of the Korean economy, and the condensed growth initiated by the government was achieved at the cost of retarding development of a national competition policy.

Since the financial crisis in 1997, which could be interpreted as being the critical turning point in Korean competition policy, Korea has taken positive steps to create a more open, market-oriented economy by breaking unproductive relations between the government, banks, and chaebol (conglomerates). Such relationships had been assessed as impeding competition and market access in Korea and resulting in excessive financial difficulties, over-capacity and uneconomic investments. However, the Korean government’s extensive involvement in the private sector during the process of corporate restructuring in the financial sector has sometimes been evaluated as creating additional impediments in progress towards a more market-based economy.

Despite the revision of the Monopoly Regulation and Fair Trade Law to enhance and broaden the Korea Fair Trade Commission’s (“KFTC”) authority, Korea’s enforcement of competition policy and the KFTC have generally been considered weak, compared with other policies and agencies in the Korean

48. See id. at 178-81 (discussing the roles of the government in Korean economic development).
49. David Richardson, Asian Financial Crisis (Economics, Commerce and Industrial Relations Group) June 29, 1998, available at http://www.aph.gov.au. (last visited Oct. 13, 2003). For the IMF funding of USD 21 billion to meet the financial problems in 1997, Korean government promised to take the package of measures to IMF: tight monetary policy with high interest rates 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 restrictions on foreign ownership; making it easier to dismiss workers. Id.
50. See WTO, Trade Policy Review—Korea: 2000 at 9 (2000), available at http://www.wto.org/english/tratop_e/trpr_e/tp138_e.htm (last visited Oct. 16, 2003) [hereinafter WTO: Korea]. Notwithstanding the seriousness of the Asian financial crisis in 1997 and the severity of the recession that followed, the Korean government has failed, by small and large, to resist protectionist pressures, opting instead for far-reaching market-based reforms. These reforms have been assessed to help pave the way not only for the remarkable recovery of the economy from the crisis, but for strong sustainable growth in the future.
51. Richardson, supra note 49. Korea’s financial problem in 1997 has been indicated as emerging as a number of highly leveraged chaebols become bankrupt as a result of over-investment in steel and cars, and weakened profitability with the cyclical downturn. The bankruptcies weakened the financial system with non-performing loans reaching 7.5 percent of GDP. The decline in stock prices further reduced the value of bank equity. All of these led to a sharp fall in external finance.
52. See WTO: Korea, supra note 50, at 9. “In the aftermath of the crisis in 1997, financial services have undergone far-reaching reforms aimed at increasing competition and rehabilitating the financial system... Rescue operations have reduced the number of banks but temporarily increased state involvement in these institutions.”
government. As a prerequisite for competition policy, the KFTC has to be established as an independent organization with proper authority, and must also apply the Monopoly Regulation and Fair Trade Law more evenly among domestic and foreign businesses.

Although Korea has made progress on transparency issues, the Korean government has been criticized for lacking transparency in rulemaking procedures and maintaining a regulatory system. Korean trade-related laws and regulations have also been criticized for lacking specificity. This system gives government officials room to exercise wide discretion in applying those laws and regulations, which results in inconsistency in their application and uncertainty in doing business. Internal office guidance developed by relevant government agencies, but rarely published, gives direction in the implementation of regulations. Although, information about planned or actual changes to laws and regulations are not adequately available.

Frugality campaigns in Korea, ostensibly directed at limiting individual consumption, and has traditionally been regarded as serving to discourage imports. While the Korean government is no longer directly involved in anti-import campaigns, and has taken various steps to discourage overt anti-import activity, social pressure along with the negative public image of imported consumer goods have impeded imports into Korea. Korea's past legacy of being

56. Id.
57. See WTO: Korea, supra note 50, at 2. Since the financial crisis in 1997, Korean government has made efforts to improve transparency in trade and investment policies by meeting regular GATT/WTO notification requirements as well as by simplifying and translating the regulatory framework into English as well as making parts of it available through a web-based computer network.
58. See USTR, NTE (KOREA), supra note 54, at 257. (criticizing Korean government for lacking transparency).
60. For example, imported food products in particular have been claimed to remain susceptible to capricious interpretation of ambiguously worded labeling and product categorization standards. See USTR, NTE(KOREA), supra note 54, at 256-66.
61. In Korea, frugality in individual life has long been regarded as a good moral virtue because of the traditional agriculture-based economy. There are many popular folktales showing how frugality leads to success.
62. See WTO: Korea, supra note 50. In 2000, Korea revealed that in Korea it would appear that frugality or anti-import campaigns run by civic groups have either ceased or been avoided. However, there have been anti-import campaigns led by the public organizations or trade associations; USTR, NTE (KOREA), supra note 54, at 258.
63. See WTO: Korea, supra note 50, at 258-59. For example, since 2000, the Korean government has tried to improve Korean attitudes toward foreign cars, including sponsoring the first-ever Korea Import Motor Show in Seoul, sponsoring a study to gain a better understanding of the foreign auto industry and educating Korean policymakers and consumers on these issues. In 2001, in an unprecedented action, the Korean President encouraged Koreans to consider buying an imported car. Seeking to eliminate the stigma associated with purchasing a foreign car, in an important symbolic step, the Korean Government also planned to purchase 100 imported cars in 2002 and 2003 for use as highway patrol cars for Korea’s National Police Agency, which would be more than one-third of the agency's fleet.
64. One study in 2002 indicated such attitudes weaken the competitiveness of the Korean auto industry. Id. at 277.
biased against imports along with Korea’s prevalent economic nationalism has been difficult to overcome.

C. Japan

Anti-competitive practices in Japan are discussed from the viewpoints of competition policy, transparency and exclusive business practices. Structural rigidity, excessive regulation and market access barriers characterize Japanese competition policy. There have been calls, both internally and externally, for the Japanese economy to be further opened up and deregulated. For most of the post-war era, the principal goal of Japan’s economic policy has been development and stability, and free competition has sometimes been seen as being inconsistent with that goal. Competition policies in such situations should have been treated as regulation policies, not as organizing principles for the economy, which has resulted in a regulation-based economy.

65. Id. at 257-58 (citing examples of anti-import campaigns led by public organizations or trade associations in Korea).

66. Tony A. Freyer, Restrictive Trade Practices and Extra Territorial Application of Antitrust Legislation in Japanese-American Trade, 16 ARIZ. J. INT’L & COMP. L. 159, 170-71 (1999). The U.S. government was concerned that the real cause of Japan’s continuing trade surplus with America during the 1980s the failure of effective Japanese regulation of oligopolistic industrial sectors which excluded outsiders from transactions through discriminatory devices in the distribution system, certain exclusionary business practices, and perceived rigidities in the pricing mechanism. Id.

67. While Japan has reduced its formal tariff rates on imports to very low levels, overregulation has lied at the heart of many market access problems faced by other countries. See USTR, NTE (JAPAN), 203 (2002) available at http://www.ustr.gov/reports/nte/2002/japan.pdf.

68. 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, which led to a domestic incentive for introducing deregulation. See Hiroko Yamane, Deregulation and Competition Law Enforcement in Japan: Administratively Guided Competition? 23 J. WORLD COMPETITION 3, 142 (2000).

69. Abbott, supra note 1, at 187. Economic stability has been regarded as presupposing a relatively high level of government intervention in business planning.

70. Consequently, Japan’s economy today suffers from overregulation 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, which has placed a priority on firm profitability through free market mechanism. 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 187-88.

71. Michael Wise, Review of Competition Law and Policy in Japan, 1 OECD J. OF COMPETITION LAW & POL’Y 71, 74 (1999) (reflecting the relative priorities of competition policy in Japan, “competition policy was assigned to a separate agency, independent of the government but politically not strong enough to promote its policies effectively).

72. Southwick, supra note 19, at 949. 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.
Despite the government’s recent focus on deregulation,\textsuperscript{73} in an attempt to respond to internal and external requirements,\textsuperscript{74} overregulation in Japan has been seen as hampering economic growth and raising the cost of doing business,\textsuperscript{75} restraining efficiency, restricting competition, and impeding imports and foreign investment.\textsuperscript{76} Regulations sometimes aim squarely at the entry of foreign goods and services in an attempt to protect the \textit{status quo} against market entrance, consequently stifling entrepreneurship and inhibiting risk-taking and innovation.\textsuperscript{77} Although the structural reform has been interrupted over the past several years due to the economic slowdown in Japan, the current Japanese economic situation is deemed to be capable of, as well as imperative, a shift in policy goals from “catch-up” development to consumer welfare.\textsuperscript{78} Trade partner countries, like the United States,\textsuperscript{79} have positively pursued a multi-faceted approach which has

\begin{itemize}
\item \textsuperscript{73} Japanese government, for example, has been working since 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 centerpiece of his drive to achieve bold regulatory reform in an expeditious manner.
\item \textsuperscript{74} \textit{Id.} at 194. According to the U.S.-Japan Regulatory Reform and Competition Policy Initiative [hereinafter Regulatory Reform Initiative] operated by the United States and Japan which has 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. Within the context of the Regulatory Reform Initiative, the United States continues to advocate the reform of laws, regulations, administrative guidance and other measures that impede access for U.S. goods and services into Japan.
\item \textsuperscript{75} See USTR, NTE(JAPAN), supra note 67, at 211. (indicating that in 2002 the Japanese Government had implemented a “foreign reference pricing” system for medical devices, which links prices in Japan to those prevailing in other developed countries. This approach has been assessed as being arbitrary because it sets a cap on prices without taking into full account the high cost of doing business in Japan.
\item \textsuperscript{76} Southwick, supra note 19, at 956. 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.
\item \textsuperscript{77} \textit{Id.} at 965. The characteristics of the Japanese government regulations or measures were assessed as follows:
\begin{itemize}
\item 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 . . . . The entrenched suppliers protected by such regimes most often are Japanese. . . . 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.
\end{itemize}
\item \textsuperscript{78} Wise, supra note 71, at 4.
\item \textsuperscript{79} Matsushita, supra note 11, at 249-50. From the 1950s to the 1970s the United States utilized traditional trade remedies in an attempt to ward off challenges by Japanese enterprises that exported in the U.S. market. From the 1980s, there has been an additional feature to the United States trade policy: the U.S. government has claimed that there were structural impediments in the Japanese market which prevented U.S. enterprises from gaining market access. Thus, major issues addressed by the United States government efforts toward market access barriers in Japan have been as follows:
\begin{itemize}
\item The market structure and business practice included restrictive distribution systems, entrenched buyer-supplier relationships, and a reluctance to deal; regulations and government practices restricting the approval of a new product or service, and government procurement practices
\end{itemize}
\end{itemize}
centered upon structural reform and deregulation,\(^8\) believing that an essential prerequisite for a vibrant economy is to secure a transparent, fair, predictable and accountable regulatory system.\(^8\) The inefficient and highly regulated Japanese distribution system,\(^2\) as well as the cumbersome customs processing\(^3\) have widely been recognized as significant trade and investment barriers.\(^4\) Distribution issues in Japan have been addressed by the trade partner countries through three basic approaches: “1) as a matter of competition law, 2) through deregulation of measures supporting restrictive distribution structures, and 3) through agreements calling upon the Japanese government to use administrative guidance and moral persuasion to loosen the tight relationships between Japanese producers and distributors.”\(^5\) In the year 2000, Japan abolished the Large-Scale Retail Store Law, which had long been an obstacle to foreign investors’ and exporters, and replaced it with the Large-Scale Retail Store Location Law (“SLL”). The new Law provides that regulation of large stores shall be based on the degree to which a large store establishment or expansion affects the local environment, and gives local governments the primary responsibility for the regulation of large stores.\(^6\) However, critics of the new SLL argue: “The new regime shifts the basis for store regulation from protecting small retailers to preserving the physical environment. On its face, the SLL appears to represent a liberalization of large store regulation. However, there is considerable skepticism favoring Japanese suppliers; and cartels and collusive industry behavior, including ‘private’ cartels as well as government measures requiring or allowing private regulations.\(^7\) As a result, the U.S. has required Japan to strengthen its monopoly act to remedy those barriers. Matsushita, \textit{supra} note 11, at 249-50.

80. Yamane, \textit{supra} note 68, at 145. One survey shows the following two effects of deregulation in Japan to be calculated: “i) an increase in consumption, as well as plant and equipment investment (demand effect); ii) the effect on users corresponds to a reduction of the individual financial burden due to lower prices.”

81. \textit{See USTR, NTE(JAPAN), supra} note 73, at 194.

82. Southwick, \textit{supra} note 19, at 927-28. 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 more specifically is that . . . the Japanese producers possess significant power in the market 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, be they foreign or domestic.

Id.

83. \textit{See USTR, NTE (JAPAN), supra} note 73, at 206.

84. Southwick, \textit{supra} note 19, at 928. Domination of the distribution system by Japanese producers can create a significant market access problem in Japan because of the cost, risk, and difficulty of establishing an alternative distribution network.

85. \textit{Id.} at 929.

86. \textit{USTR, NTE (JAPAN), }224 (2001) \textit{available at} http://www.ustr.gov/reports/nte/2001/japan.pdf There has been concern over the possibility for abuse or inconsistent application of the new law by local governments in charge of its implementation.
and fear that the new system may be more onerous and costly than was the Large-Scale Retail Store Law."

Regarding transparency issues as trade barriers, over the past several years Japan has taken significant measures to improve its regulatory system, however, additional measures have been required to achieve a level of transparency and accountability. With regard to the Japanese rule making process, even though public policy and regulations are made by and instituted through constant interaction with the private sector, few opportunities exist for interested parties who do not have special access to the authorities or related councils to have any input into the legislative process. To solve this problem, Japan adopted its first


88. *See* USTR, NTE (JAPAN), supra note 67, at 215-16. The measures in the Three-Year Program by the Japanese Government in 2001 for the transparency and accountability of the Japanese regulatory system, for example, include:

- The strict enforcement and promotion of the 1994 Administrative Procedure Law; increased transparency of administrative guidance; full and effective enforcement of the Law Concerning the Disclosure of Information Retained by Government Agencies; wide and effective use of Public Comment Procedures; introduction of the ‘No Action Letter’ system; comprehensive and objective evaluation of the regulatory process; and examination of the need, effects and cost of new proposed regulations.

*Id.*

89. *See* Southwick, supra note 19, at 925. The matters relating to transparency in Japan 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.

*Id.*

90. *See* USTR, NTE (JAPAN), supra note 73, at 203-05. (recognizing that authorities concerned must justify to the public the rationale for adopting, changing, or continuing new or existing regulations, and must be held accountable for their actions).

91. Ministries create deliberate councils (shingikai) to investigate some problem, draft legislation to deal with the problem, or recommend alternative means of dealing with the problem. The goal of this system is to gather expert opinion and provide an open forum. Bureaucrats frequently, however, use shingikai to diminish opportunities for open conflict in policy adjustments. Ken Duck, *Now That The Regulation Has Lifted: The Impact of Japan’s Administrative Procedures Law on the Regulation of Industry and Governance*, 19 FORDHAM INT’L L.J. 1686, 1699-1700 (1996). For instance, shingikai are considered to be often mere extensions of the ministry or agency overseeing their deliberation. 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). 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 for some reason or other.

92. Higuchi Norio, *Lecture on Japanese Information Disclosure*, Mar. 1992, cited by David Boling, supra note 91, at 3. In addition to being difficult to access the authorities in charge of legislations, it is difficult to access government information about business. This is in sharp contrast with the United States: ‘The American Freedom of Information Act... has worked so well that Japanese companies often obtain
government-wide Public Comment Procedures in 1999, which requires central government entities to give notice and invite public comments on draft regulations. However, it has been evaluated to have only had marginal impact on the substance of new regulations.

Administrative guidance in Japan has been accessed as a traditional tool of Japanese government policy and is the key to the lack of transparency. The Japanese legal environment has increased 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.” This ‘opaqueness’ inherent in this excessive or extensive use of informal directives or administrative guidance has traditionally been evaluated as impeding access to information about their American competitors through the United States Freedom of Information Act requests. However, American companies have no similar access.” Id. With regard to this matter, the following comment is notable: “Japanese government ... often exclusively possess economically strategic information ..., thus forcing smaller companies ... to hire former bureaucrats in order to gain access to important business information.” Id. at 4, n.16. This absence (and insufficient implementation) of a Japanese information disclosure law have been criticized as one kind of a non-tariff trade barriers. Id. at 4.

93. USTR, NTE(JAPAN), supra note 73, at 204.
94. Id. To make the Public Comment Procedures a useful and effective regulatory mechanism, the United States urges the Japanese Government in 2002 to:

“i) establish a centralized system that would allow parties to find solicitations of public comments ... preferably on the Internet; ii) require the use of a minimum 30 day comment period; and iii) undertake the legal steps necessary to incorporate the Public Comment Procedures into the Administrative Procedure Law, a move that would strengthen it from a mere guideline to a law.”

Id.

96. See Duck, supra note 91, at 1709-11. Various kinds of administrative guidance in Japan could be grouped into three categories: “i) promotion; ii) adjudicatory; and iii) regulatory. Out of these three, regulatory guidance has traditionally been used as a non-statutory means of regulating private conduct, particularly in areas that involve non-domestic trade, which has continuously been criticized due to a lack of transparency.”
98. Yamane, supra note 68, at 155. The chronic feature of administrative guidance in Japan has thus been described:

In Japan, the government has traditionally guided private enterprises ..., through highly complex systems of administrative guidance, ... Such guidance has been ultimately based on the Acts ..., but the response to administrative action has been quick, flexibility has been ensured, and administrative objectives have been achieved smoothly. The OECD report of 1999 has characterized this as ‘pragmatic incrementalism.’ Although the institution of administrative guidance has been reformed ..., the legacy of past traditions is ... difficult to change rapidly.
Japanese markets. The Administrative Procedure Law 1993 ("APL") requires that the government provide, upon request, in writing, a copy of administrative guidance to a private party, which is required to be amended so that all administrative guidance is issued in writing.

Trade barriers, in relation to transparency, also exist in the sphere of self-regulation by private organizations and special public corporations (tokushu hojin). In Japan, private sector regulations (min-min kisei) are regarded as playing an exclusionary role. Factors behind regulatory practices in the private sector include involvement of the public sector, such as administrative guidance, the absence of public rules to maintain fair competition in areas providing essential facilities, bid rigging, and a poor information disclosure system. Particularly, trade associations create government-business relationships through which government information has been channeled. Under such self-regulating system, for example, the Japanese Fair Trade Commission ("JFTC") "allows fair trade associations (essentially, private trade associations) to set their own promotion standards which may be stricter than required by the Commission through the self-imposed fair competition code." It has also been recommended that private regulations be transparent and monitored closely, and that the provisions providing exemption for fair trade associations from the Antimonopoly Act ("AMA") should be abolished.

Exclusive business practices, including corporate alliances and exclusive buyer—supplier networks, have been a crosscutting issue in trade relations with other trade partner countries. A key reason for the persistence of anti-competitive

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99. Duck, supra note 91, at 1687.
100. Id. at 1689. In response to criticism of Japanese regulatory practices and the shift of Japanese industrial base overseas, Japan established the Administrative Procedures Law. The design of the Law is to clarify regulatory procedures by promulgating uniform rules regarding government procedures for applications, dispositions, administrative guidance, and notifications.
101. See Boling, supra note 91, at 16 n.98. Although there was an optimistic reaction to the passing of APL, it has been criticized because it failed to reign in the use of administrative guidance and because corporations remain reluctant to take on the bureaucrats.
102. Yamane, supra note 68, at 150-58.
103. See USTR, NTE(JAPAN), supra note 73, at 222. They usually develop and enforce industry-specific ruling limiting or regulating, among other things, fees, commissions, rebates, advertising, and labeling for the purpose of maintaining orderly competition among their members, and often among non-members.
104. Id. at 223. By the end of 2002, there were 39 JFTC-authorized private premium codes. For example, under the Law Against Unjustified Premiums and Misleading Representations, overly restrictive limits especially by the "fair trade association" are imposed on the use of premium offers (prizes) and other sales promotion techniques. Foreign newcomers, with innovative sales techniques, are significantly impaired under such restrictions.
105. Id.
106. Id. at 222 (noting the typical type of exclusionary business in Japan).
107. Southwick, supra note 19, at 928. 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." Id.
108. Id. at 956 (indicating 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,
business practices in Japan is the historically weak antitrust enforcement record of the JFTC. The Commission’s record of reluctance to initiate formal investigations of market access, which concerns countries, stems from its practice of requiring a near-absolute proof of an ongoing competition law violation before it begins investigating, as well as from a natural resistance to foreign pressure. Arguably, such a high threshold for opening investigations masks a fundamental difference in the philosophy or capability of competition enforcement between Japan and other western countries like the United States. The Commission has routinely faced domestic and external criticism for its lack of bureaucratic clout and inability to exercise its enforcement powers aggressively. 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 in a bureaucratic approach to the law where “power is not shared with the courts.”

By constraining market mechanisms, exclusionary business practices would reduce the choices available to businesses and consumers, raise the cost of goods and services, discourage competitors from entering the Japanese market with innovations, and impede the development of new industries and technologies. These would eventually exact a heavy toll on the Japanese economy.

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.” For example, in 2001, legislation has provided for private actions to seek injunctions against alleged violators of the AMA in order to help reinforce the enforceability of the law. However, there has been concern about the insufficient provisions of the new legislation and the lack in capacity of the Japanese court system to implement the new legislation. USTR, NTE(JAPAN), supra note 73, at 202.

109. Southwick, supra note 19, at 924-25. The ability to treat with these types of barriers in Japan through WTO procedures is limited:

“The regulations of concern often make no distinctions between foreign and domestic businesses.... WTO dispute resolution generally is not able to address private anti-competitive or market-restrictive practices or structure.... 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....”

Id.

110. Wise, supra note 71, at 38. The JFTC’s record concerning market openness issues is known to be unclear. The JFTC has declared it would deal fairly and strictly with problems of market access, applying the principle of non-discrimination, but it has seemed to be difficult to identify law enforcement efforts with that focus. The adequacy of competition enforcement, including actions against impediments to market access, was major issue in trade negotiations with the United States, and has also been an issue in controversies with the European Union.

111. Southwick, supra note 19, at 974-75.

112. Id.

113. See USTR, NTE (JAPAN), supra note 73, at 202-03 (noting the factors to limit the effectiveness of the JFTC’s enforcement against hard-core AMA violations).

114. Harry First, Antitrust Enforcement in Japan, 64 ANTITRUST L.J. 137, 147 (1995), cited by Boling, supra note 91, 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.
D. Review

Japan and Korea have traditionally and commonly been criticized by their advanced trade-partner countries as having weak enforcement of competition policies, especially as compared with other trade related government policies. This might be the inevitable result of the fact that the predominant goal of the two countries' economic policy has been to secure development and stability. It has also been indicated that corporate restructure reform and deregulation has not been promoted by harmful side effects, specifically the government's extensive involvement in the private sector, especially in the case of Korea after its economy's initial recovery from the financial difficulties in 1997. The lack of transparency within the two countries has commonly existed in rulemaking and implementation of the trade and competition-related rules. Such lack of transparency gives regulators wide discretion. Regulations could be applied more adversely to the foreign firms than to the domestic firms, and impede predictability in doing business in their domestic markets.

Thus, Japan and Korea have faced demands because their competition policy, law, and enforcement should be operating in a more market-based direction notwithstanding their governments' sustained efforts to enhance their level of enforcement of competition-related policy and regulations. The reasons for such criticism may more or less be related to their respective governments' longstanding policy: giving relatively positive consideration to economic growth, rather than to the consumers' welfare level during the course of their economic development.

Additionally, the two countries have commonly been confronted with trade pressures from their trade partner countries. However, the requirements imposed on Japan seem to be more specific and concrete than those imposed on Korea. This difference may reflect the relative importance of the Japanese market for those partner countries and the far-more advanced level of Japanese economy. Japan and Korea's trade partners demand that the two countries' governments should pay more attention to competition policy in order to internally enhance the consumers' welfare level as well as to harmonize their policies externally with those of other advanced countries.

In Korea, frugality campaigns and the anti-import biased social atmosphere have traditionally been pointed out as being substantial impediments to international trade. Meanwhile in Japan, the exclusionary business practices have been regarded as significantly restricting the access of foreign businesses to the domestic market. 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 from

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115. For example, administrative guidance in Korea has not been published nor publicly noticed and has tended to be applied flexibly or arbitrarily to businesses, which is similar to Japan.
the viewpoint that the former atmosphere could be very temporary and extremely vulnerable to changes in the overall social atmosphere or consumption attitudes in Korea,\textsuperscript{116} 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.

III. ANTI-COMPETITIVE PRACTICES BETWEEN FRONTIERS

A. International Regulation

1. Sanitary and Phytosanitary Measures

The Uruguay Round Agreement on the Application of Sanitary and Phytosanitary Measure ("SPS Agreement") was created due to concern that elimination or reduction of agriculture-specific tariff and non-tariff measures\textsuperscript{117} would be circumvented by protectionist measures disguised in the form of sanitary or phytosanitary regulations in parallel with major agricultural trade negotiations.\textsuperscript{118} Before the SPS Agreement, food safety, animal, and plant health regulations were made under the Agreement on Technical Barriers to Trade 1979 ("TBT Agreement") and GATT,\textsuperscript{119} under which Members could introduce potentially trade-restrictive regulations in the pursuit of a "legitimate" objective.

Considering the concern about possible disguised restrictions on international trade under TBT Agreement and Article XX of GATT, the SPS Agreement provides an expanded and clearer set of rules and principles\textsuperscript{120} regulating the application of sanitary and phytosanitary measures.\textsuperscript{121} The SPS and TBT Agreement are complementary,\textsuperscript{122} but different in their design.\textsuperscript{123} The SPS

\textsuperscript{116} For example, in the field of motor vehicles, which has been indicated as the typical case to show the frugality campaigns and anti-import bias in Korea, market demand in 2002 increased in direct response to the President's public statements encouraging Koreans to purchase imported cars followed by the temporary tax-incentive measures. USTR, NTE (KOREA), supra note 54, at 257-58.

\textsuperscript{117} "As the importance of . . . [trade barriers] diminished . . . the world trading regime turned its attention to other issues . . . such as licensing requirements, safety and health standards, and other domestic measures that [restricted] the importation of foreign goods and services, or disproportionately disadvantage[ed] such goods and services once they entered the country. Such measures are [of course] much harder to identify and even harder to remove than simple tariffs and quotas." Michael K. Young, supra note 5, at 769.

\textsuperscript{118} "The SPS Agreement applies, inter alia, to measures to protect human life from risks arising from additives, contaminants, toxins or disease-carrying organisms in foods and beverages." JOHN H. JACKSON, ET AL., supra note 12, at 539.

\textsuperscript{119} GATT art, XX, General Exceptions.

\textsuperscript{120} The Agreement on Agriculture contains not only rule-based commitments, but also quantitative commitments to reduce protection while the SPS Agreement does not impose any quantitative and legally binding schedules of concessions.

\textsuperscript{121} Herewith, sanitary measures are those related to human or animal health, and phytosanitary measures deal with plant health. WTO, SPS Agreement, available at http://www.wto.org/english/thewto_e/whatis_e/eol/e/world.htm (last visited Oct. 15, 2003).

\textsuperscript{122} For example, the TBT agreement defines its scope in part through reference to the SPS Agreement. TBT Agreement, art. 1.5.
Agreement contains rules, principles, and benchmarks for WTO Members to ensure and to justify sanitary as well as phytosanitary measures not constituting disguised restrictions on international trade.\textsuperscript{124}

2. **Import Licensing**

The GATT\textsuperscript{125} deals with import licensing\textsuperscript{126} in a general manner. The Tokyo Round Import Licensing Code\textsuperscript{127} for preventing import licensing procedures from restricting international trade\textsuperscript{128} was revised to strengthen the disciplines on transparency and notifications in the WTO Agreement on the Import License. The main objectives of the WTO Agreement are to simplify, and bring transparency to procedures, to ensure fair and equitable application and administration, and to prevent procedures from being restrictive or distort to imports.\textsuperscript{129}

Members apply import-licensing procedures neutrally, and administer them in a fair and equitable manner.\textsuperscript{130} Applications or licensed imports are not to be refused for minor documentation errors\textsuperscript{131} or minor variations.\textsuperscript{132} Import licensing is divided into two kinds: automatic import licensing\textsuperscript{133} and non-automatic import licensing.\textsuperscript{134} Automatic licensing procedures are not to be administered in such a way as to have restrictive effects on imports and not to discriminate among those applying for licenses. Under such licensing any person meeting the legal

\begin{itemize}
  \item[123.] The differences between them are:
    \begin{itemize}
      \item First, while the SPS Agreement provides an affirmative defense explaining the general exceptions in the GATT, the TBT Agreement explains the obligations contained in the GATT. . . . Second, the scope of the SPS Agreement is well defined and relatively narrow, . . . the scope of the TBT Agreement is extremely broad and diverse. Consequently, the TBT Agreement contains mainly procedural requirements with few substantive obligations, . . . Agreement’s principal and not in significant contribution to the international trading system has been assessed to promote transparency and information exchange.
    \end{itemize}
\end{itemize}


\begin{itemize}
  \item[124.] See SPS Agreement, art. 2.3.
  \item[125.] GATT art. VI, Fees and Formalities Connected with Importation and Exportation.
  \item[126.] Import licensing means administrative procedures requiring the submission of an application or other documentation to the relevant authority as a prior condition for importation. WTO Agreement on Import Licensing, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/legal_e/world.htm (last visited Oct. 14, 2003).
  \item[128.] Id. at 431.
  \item[129.] WTO Agreement on the Import License, Preamble.
  \item[130.] Id. at art. 1.3.
  \item[131.] Id. at art. 1.7.
  \item[132.] Id. at art. 1.8.
  \item[133.] Automatic licensing procedures are defined as import licensing where the approval of the application is granted in all cases. WTO Agreement on the Import License, art. 2.1.
  \item[134.] Non-automatic import licensing is applied to administer trade restrictions such as quantitative restrictions subject to be within the WTO legal framework. Id. at art. 3.1.
\end{itemize}
requirements should be equally eligible to apply for and immediately obtain import licenses. Under non-automatic import licensing procedure, if a license is refused, the applicant, on request, shall be given the reason for refusal and shall have a right of appeal or review of the decision. Members are to publish in advance all relevant information, and are required to notify the Committee on Import Licensing of the relative information, in case of instituting licensing procedures or changing these procedures.

B. Technical Regulation/Standards

Recently the individual countries' policy for technical regulations and standards have become significant as the result of higher living standards worldwide, which have boosted consumers' demands for safe, high-quality, and environmentally friendly products. However, this may impede international trade by increasing the costs for producers and exporters as they comply with different foreign technical regulations and standards. Thus, divergent regulations among the countries may become technical barriers to trade. As a result, there has been an international effort to prohibit individual countries from adopting and applying technical regulations and standards to protect domestic industries.

The provisions of GATT 1947 contained only a general reference to technical regulations and standards. However, after years of work by the GATT working group, the plurilateral Agreement on Technical Barriers to Trade ("Tokyo Round Standards Code") was concluded in 1979 to limit the use of standards and technical regulations as trade barriers. The code laid down the rules for preparation, adoption, application of technical regulation standards, and conformity assessment procedures, which have been strengthened and clarified by the WTO Agreement on Technical Barriers to Trade ("TBT Agreement").

135. Id. at art. 3.5(e).
136. Id. at art. 3.3, 3.4, 3.5(b)-(d).
137. Such notifications should include information on substantial and procedural requirements in import licensing. Id. at art. 5.1-5.5.
138. Id. at art. 5.1-5.4
140. GATT 1947, arts. III, XI and XX.
141. See Richard Schaffer et al., supra note 144, at 338-39.
142. Herewith, technical regulations and standards set out specific characteristics of a product including a product's process and production methods. The difference between a standard and a technical regulation is that while conformity with standards is voluntary, technical regulations are by nature mandatory, which have different implications for international trade. Id. at 333.
143. Conformity assessment procedures are technical procedures such as testing, verification, inspection and certification-which confirm that products meet the requirements imposed by the regulations and standards. Non-transparent and discriminatory operation of such procedures may affect adversely the international trade. See id. at 334-35.
When importing products, non-compliance with a technical regulation of the importing country shall prohibit the sale in the domestic market, while non-compliance with a standard will affect the market share there. The objectives of technical regulations and standards are protection of human safety, health of animal and plant life, the environment, prevention of deceptive practices, technical harmonization, and trade facilitation.144

Technical barriers to trade generally result from the preparation, adoption, and application of different technical regulations and conformity assessment procedures which may have legitimate origins, such as differences in local tastes or levels of income, as well as geographical or other factors.145 Conformity assessment procedures may become obstacles to trade when they are stricter or more time-consuming procedures than are necessary to assess a product's compliance with the technical regulations of the importing country.146 Like in other WTO Agreements, under the TBT Agreement, the MFN and national treatment provisions apply to technical regulations and conformity assessment procedures.147

For many years, there have been international efforts working towards the international conformity of standards,148 which have had major impact on international trade, especially in the fields of industrial products. Considering the difficulties in securing approval for domestic products on foreign markets, the TBT Agreement strongly encourages WTO Members to adopt the mutual acceptance of conformity assessment results,149 and to arrive at a mutual understanding regarding the competence of the conformity assessment bodies.150 The Code of Good Practice151 contained in the TBT Agreement, which member countries must comply with, provides for transparency in preparation, adoption and application of standards by all public or private institutes.152

144. TBT Agreement. art. 2.2.
145. Regarding the reasons for complication and inhibition of international trade in relation with technical regulation, see JOHN H. JACKSON, ET AL., supra note 12, at 538-39.
146. They include information requirements, setting of facilities to carry out conformity assessment, and the selection of samples. TBT Agreement. art. 5.2.3, 5.2.6.
147. TBT Agreement. art. 2.1
148. They were led mainly by the International Standardization Organization, the International Electrotechnical Commission and the International Telecommunication Union. The most commonly known standard since 1987 is ISO9000, which is the standard used for assuring product quality through product design and manufacturing process. ISO14000 standards will provide guidelines for environmental management and labeling. Richard Schaffer, et al., supra note 144, at 338.
149. TBT Agreement. art. 6.3.
150. TBT Agreement. art. 6.1.
151. TBT Agreement. Annex 3, Code of Good Practice for the Preparation, Adoption and Application of Standards.
152. C.F. TBT Agreement, Code of Good Practice, Provision E.
C. Korea

Regarding the regulation on customs clearance, despite the steps the Korean Government has recently taken, import clearance, particularly of agricultural products, remains excessively regulated and procedures continue to be arbitrary. Such excessive and arbitrary regulation on clearance restricts access to Korean domestic markets resulting in added costs for both importers and consumers, which may be a breach of the SPS Agreement.

Classifications and their changes are often based on arbitrary standards, which is in breach of the provisions of the WTO Agreement, and at odds with other OECD member practices. Customs clearance applications have routinely been rejected on administrative grounds, in breach of the provisions stipulated in WTO agreement, which delays the customs clearance process. The Korean government entrusts local trade associations to certify or approve import documentation, and then requires importers to submit confidential business information and to pay an additional fee. Such practices could be construed as deviating from the spirit and principle of WTO Agreements. Korea, contrary to the international trend, also does not accept European Union Certificates of Origin despite Europe’s rapid change towards a single economic entity.

153. After WTO dispute settlement consultations with the United States between 1995 and 1999, the Korean government tried to reform its import clearance procedures by employing sanitary and phytosanitary measures:

1) expediting clearance for fresh fruits and vegetables; 2) instituting a new sampling, testing and inspection regime; 3) eliminating some non-science-based phytosanitary requirements; 4) revising the Korean Food and Food Additives Codes to be in conformity with CODEX Alimentarius standards; and 5) requiring ingredient listing by percentage for major, rather than for all, ingredients.

The Korean government streamlined customs clearance procedures by, inter alia, introducing an immediate release system and the progressive introduction of paperless clearance through a computer network linking customs office. USTR, NTE (KOREA), supra note 54, at 242-44.

154. (For example, the Korea Customs Service has been indicated frequently to classify blended products under the Harmonized System disadvantageously to the blended products imported, which usually has a higher tariff rate and has been indicated to be contrary to the international standards. USTR, NTE (KOREA), supra note 54, at 26.

155. See SPS Agreement, art. 2.3.

156. For the examples of misclassification for the products in Korea, see USTR, NTE (KOREA), supra note 54, at 244.

157. WTO Agreement on the Import License, art. 1.3.

158. USTR, NTE (KOREA), supra note 54, at 244.

159. WTO Agreement on the Import License, art. 1.7. Such administrative grounds have been, for example, wrong print, font size and erasure marks on the application.

160. For example, "[w]hile import clearance for most agricultural products required less than 3 to 4 days in other Asian countries, in Korea, import clearance for new products still typically takes 10 to 18 days, and 4 to 6 months if a food additive is not specifically recognized in Korea’s Food Additive Code for use in the product". USTR, NTE (Korea), supra note 54, at 242.

161. See id. at 244.

162. For example, it could be inconsistent with the provision of TRIPS to require the proper protection of business secrets submitted to the authorities concerned. See TRIPS, art. 39.3.
Further work is required to bring Korea’s food code standards up to international standards, to alter clearance procedures in primary food products so that they are based on science and are consistent with international trade rules and norms, and to introduce positively the fast track system in customs clearance.

Regarding technical regulation and standards, Korea has made efforts to reduce the impact of technical regulations and standards on trade and to bring them more into line with international rules since the financial crisis of 1997. However, Korea maintains standards and conformity assessment procedures, such as sampling, inspection, testing and certification, that deviate from international practices or norms and seemingly have an improper impact on imports.

Korea also allows data submitted for approval/certification to be protected upon written request, except when it is deemed contrary to the "public interest." This is in line with the exception to the non-disclosure obligation under the TRIPS Agreement. The definition of public interest, however, is so vague that it has given the concerned authorities room for wide discretion and the data that original exporters submitted have been released to local competitors.

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163. See SPS Agreement, art. 3.1.
164. See SPS Agreement, art. 2.2
165. For an example of improper classification of products followed by time-consuming approval procedures and onerous, cost-increasing examination procedures, see USTR, NTE (KOREA), supra note 54, at 245.
166. They were made through the revisions of the Processing Standards and Ingredient Specifications for Livestock Products in 2000, and of the Food Code, Food Additive Code, and Labeling Standards, in 2001. USTR, NTE (KOREA), supra note 54, at 239-247.
167. For example, Korea has not effectively adopted the “generally recognized as safe” standard. USTR, NTE (KOREA), supra note 54, at 245. Regarding this matter, the TBT Agreement encourages Members to use existing international standards for their national rules in technical-related regulations, standards, and conformity assessment procedures. TBT Agreement, art. 5.4.
168. See TBT Agreement (Preamble) (Desiring however to ensure that technical regulations do not create unnecessary obstacles to international trade); see also TBT Agreement art. 2.2.
169. This data requires extraordinary detail. See USTR, NTE (KOREA), supra note 54, at 246 (2003). See also TBT Agreement, art. 5.2.3 (requiring information in connection with conformity assessment procedures to be limited to what is necessary to assess conformity.)
170. The categorization of test data as a subject matter of intellectual property under Article 1.2 of the TRIPS Agreement does not mean that their protection shall be put on the same footing as other intellectual property rights. In particular, it does not indicate that such data should be protected through a grant of exclusive rights. Carlos Maria Correa, Public Health and International Law: Unfair Competition Under the TRIPS Agreement: Protection of Data Submitted for the Registration of Pharmaceuticals, 3 CHI. J. INT’L L. 69, 72 (2002).
171. The confidentiality of information about products submitted in connection with conformity assessment should be respected in such a manner that legitimate commercial interests are protected. TBT Agreement, art. 5.2.4.
172. Correa, supra note 175, at 76. The application of this exception is subject to a necessity test. In determining necessity, GATT/WTO rules and jurisprudence generally provide deference to member states to determine when a necessity arises, but often impose a heavy burden of proof on the member invoking.
173. This may allow these products to have their patents infringed upon and used for marketing in Korea. USTR, NTE (KOREA), supra note 54, at 246.
Korea has recently taken a number of steps to improve the business climate, particularly in pharmaceuticals and cosmetics, including implementation of self-regulation and improvements in labeling requirements. However, in some industrial sectors, the trade partner countries have been concerned about the vagueness of the provisions, the lack of transparency in the process, and local testing and standards requirements which are still onerous, slow and difficult compared with other countries, in arguable contrast with the provisions of SPS Agreement.

The Korean government implemented mandatory biotechnology labeling requirements for food products enhanced through biotechnology [known as genetically modified organisms ("GMO's") and for some processed foods with only vague and limited provisions. The requirements are suspected of leaving room for arbitrary and inconsistent interpretations by government officials, being far more burdensome than necessary to achieve its stated policy goal of providing Korean consumers with clear information, and appearing to raise national treatment concerns as well.

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174. See id. at 259-61. Korea has been seeking to cut health-care costs and has adopted a variety of new measures to achieve this goal, of which many seem to have failed. The Korean government often has developed such proposals in a seemingly piecemeal manner without adequate input from domestic or foreign stakeholders. This exemplifies a piecemeal manner of Korean government in relation with the measures in the area of pharmaceuticals.

175. See id. at 262 (outlining the improvement and its insufficiency in cosmetics sector.)

176. Self-regulation in the cosmetics sector of Korea has been more reasonable and loosened compared with government regulation, which differs from the Japanese private-sector regulation that has generally been criticized by the trade partner countries as demonstrated above. See id., at 261.

177. Id. at 247. For example, in 2002, mandatory Korean-language labeling of product type for most products was eliminated and foreign languages may be used on the label.

178. See id. at 257.

179. Id. These transparency-related problems continue to be serious problems for market entry in a wide variety of sectors, including agriculture, pharmaceuticals, telecommunications, and automotives.

180. See USTR, NTE (KOREA), supra note 54, at 246. (providing an example of requiring redundant local test data which might be expensive, inefficient, and scientifically unsound.) These practices might be in breach of the provisions of TBT Agreement, arts. 2.2, 5.4, and 6.1.

181. For Korea’s motor vehicle standards and certification procedures serving as market access barriers, see USTR, NTE (KOREA), supra note 54, at 246.

182. For the concerns about the packaging/labeling standards and promotional packing in several sectors raised by trade partner countries like the United States, see id. at 244-47.

183. See SPS Agreement, arts. 3, 7, and 8.

184. USTR, NTE(KOREA), supra note 54, at 247.

185. Technical regulations should not be more trade-restrictive than necessary to fulfill a legitimate objective and taking into account the risks that non-fulfillment would create. TBT Agreement, art. 2.2.

186. Members shall treat, in respect of technical regulations, products imported from other Member no less favorable than like products of national origin and from other countries. TBT Agreement, art. 2.1.
2004 / Anti-competitive Practices as Trade Barriers Used by Korea and Japan

D. Japan

Regarding the regulation on customs clearance, the Japanese government has been criticized by trade partner countries for anti-competitive practices relating to sanitary and phytosanitary measures that have improperly been manipulated to impede international trade, violating the obligations under the SPS Agreement. While Japan has made progress in establishing quarantine-related standards in agreement with internationally recognized levels, it is still necessary for it to remove the anti-competitive practices in relation with the sanitary and phytosanitary measures. Trade partner countries have sought to require the Japanese government to adopt transparent inspection procedures in order to reduce unscientific, excessive, unnecessary, and trade distorting requirements for some products. The Japanese government has begun to improve quarantine regulations, including implementation of a non-quarantine pest list, which seems to be an important positive step but not completely sufficient.

Despite progress in recent years, particularly under the Regulatory Reform Initiative, Japanese import clearance procedures are considered cumbersome in comparison with standards of other industrial countries, which results in trade

187. USTR, NTE (JAPAN), supra note 73, at 211. Japan has traditionally been assessed as being conservative on questions involving food safety, sanitary and phytosanitary standards, having many import standards that limit trade in farm and forest products. However, recently there appears to have been an increase in Japan’s use of standards and other administrative requirements to limit agricultural imports and a greater tendency to deviate from scientific principles in setting new import policies.

188. “Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade, and shall be enforced and adopted in order to minimize their negative effects on trade.” SPS Agreement Preamble, arts. 2.3.

189. Mainly through revisions of the Food Sanitation Law, Japan has been working to harmonize its national regulations with the provisions of the WTO Sanitary and Phytosanitary Agreement. See USTR, NTE (JAPAN), supra note 86, at 234.

190. For example, the Japanese government requires that a foreign country’s certified organic products are certified again by government-accredited organizations based in Japan after they have met third-party certification requirements for organic foods, which has been considered extremely burdensome to exporters. See id. at 236.

191. WTO members shall apply any sanitary or phytosanitary measures on scientific principles and shall not maintain them where relevant scientific evidence is insufficient. See SPS Agreement, art. 2.2.

192. Japanese quarantine requirements for fire blight, for example, include mandatory tree-by-tree inspections and a strict requirement of “buffer” zone, which have been asserted to unnecessarily raise costs and reduce competitiveness of imported apples in Japan. USTR, NTE (JAPAN), supra note 73, at 211.

193. For example, Japanese plant quarantine regulations require fumigation on a number of imported fresh horticultural products, which is particularly indicated to be detrimental to their trade. Japanese government, however, does not require fumigation of infected locally grown products. See id. at 212. These may be in breach of the concerned provisions of SPS Agreement Preamble, art. 2 (that mandates members to minimize the negative effects on trade).

194. WTO members shall recognize the concepts of pest-free area. SPS Agreement, art. 6.2.

195. For example, the exemption list in quarantine does not include common insects found on imported products, some of which are known to occur in Japan. USTR, NTE (JAPAN), supra note 67, at 225.

196. See id. at 219 (detailing the progress made by Japan).

197. See Matsushita, supra note 11.
disputes with other trade partner countries. Japan is required to adopt a system to reduce import clearance processing, to calculate dutiable import values on a “free on board” rather than a “cost, insurance, freight” basis, and to increase the import deminimi value for exemption from user fee.

Regarding technical regulation/standards, Japan has undertaken to simplify, harmonize, and eliminate restrictive standards in accordance with international practices. However, standards or certification-related problems unique to Japan, with no apparent scientific reasons, continue to obstruct access to Japan’s markets. The profile use of technical requirements in Japan is rooted in Japan’s protective attitude toward consumers, the historical role of the Japanese government in economic life, and the Japanese people’s acceptance of governmental regulation of business.

Several products, like genetically modified foods, dietary supplements, and food additives have traditionally been subject to disputes with other trade partner countries about disguised trade restrictions. With regard to biotechnology, Japan has adopted a largely scientific approach in its approval process for genetically modified foods with mandatory labeling requirements. Some processed food imported into Japan

198. See USTR, NTE (JAPAN), supra note 73, at 206.
199. This request is consistent with the risk management principles provided in Chapter 6 (Customs Control) of the International Convention on the Simplification and Harmonization of Customs Procedures (Revised TOKYO Convention), which encourages signatories to ease restrictive regulations. The Council of World Customs Organization adopted the revised texts and the Protocol of Amendment in June 1999. The amendments will be effective as soon as the Protocol enters into force, which requires the accession of 40 Contracting Parties to the 1973 Convention. See generally, the Revised Kyoto Convention, available at http://www.wcoomd.org/ie/en/topics-issues/FacilitationCustomsProcedures/kyoto/kyreport.htm (last visited Sept. 17, 2003). For the measures required for development, see USTR, NTE (JAPAN), supra note 73, at 206.
200. It is estimated that an increase in the deminimi value would facilitate clearance and decrease custom’s workload, especially at postal facilities. USTR, NTE (JAPAN), supra note 67, at 219. This measurement to increase the deminimi value will be in line with the guidelines in Chapter 4 (Duties and Taxes) of the Revised TOKYO Convention stating in part ‘the collection and payment of duties and taxes should not be required for negligible amounts of revenue that incur costly paperwork, both for customs administration and for the importer/exporter.’
201. Those safety or standards are sometimes supported by the concerned Japanese industries. USTR, NTE (JAPAN), supra note 86, at 223.
202. Id. at 211.
203. RICHARD SCHAFFER, ET AL., supra note 139, at 337.
204. For example, burdensome or restrictive approval procedures for new entrants of products or rates would be disadvantageous to innovation regardless of the nationality of the innovator. However, the bias against innovation seems to be a genuine bias against foreign suppliers. Potential WTO arguments for addressing this type of issue in theory might include violations of “national treatment” principles, “non-violation nullification or impairment,” or possibly arguments under the TBT Agreement or the GATS provisions on domestic regulation. Southwick, supra note 19, at 964-65.
205. The trade partner countries are concerned that mandatory labeling requirement to some GM foods would discourage consumers from purchasing them by reminding them of a health risk. According to the Japanese Government, the objective of this requirement is “to reassure consumers that these foods have been approved as safe by the Government of Japan.” USTR, NTE (JAPAN), supra note 73, at 212. These debates would be based on art. 2.2 of the TBT Agreement.
has at times been in conflict with Japan’s safety standards, although the food may have met international safety standards.

Japan allows producers of certain food products, like dietary supplements, to make nutritional and health benefit claims with the scientific data in marketing their products. However, trade partner countries raised concerns regarding the type of data that might be required to make such claims. The data requirements of the regulatory system are required to be reasonable and appropriate, and limited to that necessary to ensure safety and efficacy. Furthermore, regulatory decisions should be based on clear scientific grounds, taking into full consideration all available data and information.

The Japanese safety standards and regulations, which have been regarded as unique, should balance the need for data with the requirement to complete a timely safety review and adopt regulations to protect consumers without impeding international trade.

E. Review

With relation to customs procedures, while Japan has much room to improve the cumbersome procedures making clearance matters inefficient, Korea has been criticized due to its deliberate customs classifications, its rejection of customs clearance applications on simple administrative grounds, and the improper implementation of private clearance procedures. The two countries are required to improve the processing of import clearance, and to reduce or eliminate the excessive, discretionary, unnecessary and particularly trade-distorting quarantine requirements.

There is an international trend toward concentrating negotiations heavily on the issue of facilitating international trade. This trend is in line with the rapid

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207. For an example of Japan’s safety standards for food additives which may give rise to national treatment problems or disguised trade restrictions, see USTR, NTE (JAPAN), supra note 73, at 213.

208. See id. at 213.

209. Id.

210. TBT Agreement, art. 5.2.3.

211. See TBT Agreement, art. 2.2 (“...In assessing such risks, relevant elements of consideration are, inter alia: available scientific and technical information, related processing technology or intended end-uses of products.”).

212. For the details in the food products, see USTR, NTE (JAPAN), supra note 73, at 211-214.

213. See TBT Agreement, art. 2.2.

214. See Zviad V. Guruli, What Is the Best Forum for Promoting Trade Facilitation, 21 PENN ST. INT’L L. REV. 158 (2002) (“In general, trade facilitation is defined as:

Simplification and harmonization of international trade procedures with trade procedures being the activities, practices and formalities involved in collecting, presenting, communicating and processing data required for the movement of goods in international trade. This definition relates to a wide range of activities such as import and export

204
promotion of computerization in international transactions, and the conclusion and modification of the TOKYO Convention\textsuperscript{216} for the fast track system in customs clearance procedures, as well as the WTO Agreement on Import Licenses. In consideration of these trends, the two countries' governments should try to establish more reasonable and effective systems of customs procedures to reduce customs processing periods and fall in line with international standards.

Certain kinds of sanitary and phytosanitary measures taken in the two countries seem to be too burdensome, unnecessary and trade-distorting. However, there may be some scientific evidence for some measures when one considers the fact that many kinds of vermin from western countries have been spread all over the agricultural districts in Japan and Korea since the 1970s. These vermin are known to be resistant to agricultural chemicals and more detrimental to products as compared with local ones. Securing such measures with sufficient evidence will also be in line with the spirit of the WTO to protect the global environment.\textsuperscript{217}

In the case of Japan, government and NGOs have traditionally paid close attention to preserve the natural environment with strict laws and regulations\textsuperscript{218} applied internally as well as externally. Even though Japanese sanitary and phytosanitary measures might seem to be burdensome to imports and trade-distorting from the viewpoint of trade partner countries, they might not be so burdensome when compared with other regulations applied to domestic businesses. Both Japan and Korea should try to improve their sanitary and phytosanitary system not only to be more convenient to foreign exporters, but also to be more scientific and reasonable with sufficient and clear scientific evidence.\textsuperscript{219} The two countries should also concentrate on the long-standing investment into research and development toward their policy goal to preserve the environment and promote international trade in these sectors.

\textsuperscript{216} For a comprehensive overview of the work done by various international organizations in the area of trade facilitation, see Brian Rankin Staples, \textit{Trade Facilitation, available at} http://www1.worldbank.org/wbiep/trade/papers_2000/Bpfacil.PDF (last visited Oct. 15, 2003).

\textsuperscript{217} See supra note 204.

\textsuperscript{218} See Preamble of Agreement Establishing the World Trade Organization available at http://www.wto.org/english/res_e/anlgy_index_e/wto_agree_01_e.htm ("... while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development seeking both to protect and preserve the environment, ...").

\textsuperscript{219} According to the SPS Agreement, members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary or phytosanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendation. SPS Agreement, art. 3.
Korea and Japan’s technical regulations and standards deviate from international norms or are unique to the two countries for no apparent science-based reason. Such procedures may have a disproportionate impact on imports into their domestic markets.

Many of Korea’s technical barriers to trade consist of improper certification requirements; extremely vague provisions to protect submitted data; onerous local testing requirements; lack of transparency in the certification process; standards and certification procedures impeding market access; and improper and burdensome labeling requirements. Japan, meanwhile, is required to rectify or improve its labeling requirements, safety standards and regulations. Moreover, Japan must improve its data requirements, and regulatory decisions not based on scientific grounds. Both Japan and Korea have been similarly criticized for their standards, testing, labeling and certification systems and should work towards improving their systems so that they are in line with internationally accepted regulations.

Both countries have expressed concerns about the potential side effects of processed products, especially food products enhanced through biotechnology, without any concrete evidence as to their safety. These concerns reflect the general and traditional social atmosphere biased against technology and processed food products, particularly among the prewar generation. Considering this, both governments should try to establish more reasonable and science-based systems to satisfy consumer concerns and international requirements.

IV. CONCLUDING REMARKS

The anti-competitive practices of Japan and Korea can be grouped into three categories based on their underlying motivation: anti-competitive practices resulting from the underdevelopment of their legal systems; anti-competitive practices designed to protect domestic industries; and anti-competitive practices originating from and reflecting the cultural-social factors unique to the two countries.

The two countries’ governments should try to positively and strictly implement competition policies and regulations to avoid the anti-competitive practices originating from the underdevelopment of their legal systems and protectionist policies. To avoid cultural and social anti-competitive practices, the governments should establish concrete scientific evidence to support those practices. Such evidence would demonstrate that such practices are reasonable and fair to international trade, are necessary to sustain the specific public policy objectives, and are the inevitable reflection of the particular situation unique to their countries.

Coinciding with such internal efforts, both countries should externally establish clear interpretive rules for the international regulations under the WTO
Agreements. Any construction of the rules must consider fully the individual countries' specific cultural, social, political, and historical backgrounds. The establishment of such construction rules might seem to contradict recent trends in international trade-related regulations that move from soft law to hard law. However, for the practical and efficient formation of international trade and competition regulations, their uniform enforceability should properly be mixed with flexibility.

Many of Japan and Korea's competition or international trade-related laws have been enacted and modified passively due to the expressed or implied pressure from countries like the United States, and the requirements of international organizations like the WTO and OECD. These enactments or modifications were not voluntary responses to internal public and private sector concerns. This may have occurred in this manner because for the last forty years both countries' rapid economic growth and development were influenced by strong export-driven policies and dependence on foreign trade. However, under the WTO mechanism, both countries' competition and foreign trade regulations should be improved voluntarily and continuously to realize the blueprints for a liberalized global market system.

220. 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. . . .


221. Hard law refers to a system of norms as to which a relatively high expectation of compliance exists. Frederick M. Abbot, supra note 1, 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 n.44.

222. For example, the drafters of the GATT must have intended that Article XX (General Exceptions) be used to balance free trade policies with countries' overriding public policies. However, the more recent panel decisions are indicated to have narrowed the Article XX exceptions to the point where they are almost completely ineffective. A broader interpretation of the Article XX exceptions is necessary to give effect to its intended purpose. T. Alana Deere, Balancing Free Trade and the Environment: A Proposed Interpretation of GATT Article XX's Preamble. 10 INT'L LEGAL PERSP. 1, 37 (1998).

223. 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. Herewith, the degree of flexibility shall be limited by the requirement that technical regulations "should not become unnecessary obstacles to trade." See TBT Agreement, art. 2.2, 2.4. The 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.
The historical, political, cultural and social environments within the individual countries substantially affect competition policies or anti-competitive practices. This phenomenon makes it difficult to evaluate competition policy under uniform standards of international norms. In consideration of this point, this study is limited by the fact that the anti-competitive practices of both countries are comparatively reviewed from the viewpoint of established international trade norms or competition norms discussed but not yet established, without consideration of other external factors. An interdisciplinary analysis of the anti-competitive business practices of the two countries leading to the discovery of policy directions towards solving the trade and competition-related problems will follow this study. Such analysis could help foster the formation of free trade between the two countries.

224. 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 intercompany relationships. For the Japanese, it was ’hard to accept’ that competition ’produces losers.’

Freyer, supra note 66, at 168-69.

225. For example, there are good faith differences between countries concerning the desirable level of government intervention in the domestic and international 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 countries involve the behaviors of consumers, enterprises and political parties, which are deeply entrenched. Abbott, supra note 1, at 186.