

# Anti-competitive Practices in Service/Investment Markets used by Korea and Japan

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## I . Introduction

The World Trade Organization's (hereinafter WTO) ultimate purpose in the international trade regime is to level the frontiers among the trade partner countries by removing trade barriers in order to secure fair and free opportunities of competition for the member countries. However, unfair and anti-competitive practices in the domestic markets can provide a further means of protection in addition to frontier barriers. These anti-competitive practices in the domestic markets have been regarded as more important in the service and investment markets than in commodity markets due to their competition distorting effects. As the multilateral negotiations under the GATT/WTO system have reduced the major frontier barriers to international trade, there has been an increasing worldwide interest in the anti-competitive practices in domestic markets, particularly in the service and investment markets,<sup>1</sup> under the GATT/WTO mechanism.<sup>2</sup> With relation

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<sup>1</sup> For the more details, see Jason E. Kearns, International Competition Policy and the GATS: A Proposal to Address Market Access Limitations in the Distribution Services Sector. 22 *U. Pa. J. Int'l Econ.* 293-294, 296, 297 (2001) (stating, for instance, through the GATS framework, members ... have agreed to maintain appropriate measures to prevent ... from engaging in anti-competitive practices.) (Emphasis was added by the author).

to these practices, Korea and Japan have traditionally been targets of criticism from their affected trade partner countries<sup>3</sup> due to their manipulation of anti-competitive practices to protect their domestic markets, particularly their service/investment markets, and that the restrictive competitive practices have not been properly regulated compared to their respective trade volume and market size.

This study compares the anti-competitive practices used by Korea and Japan through the interpretation of anti-competitive practices under the WTO rules concerned: the interpretation is generally and implicitly affected by the international competition norms that have multilaterally been discussed. It analyzes their anti-competitive practices from the viewpoints of the effect of those practices on their international trade, considering the growing interest in them particularly in service markets, and the criticism being concentrated on these two countries. In this study, the term anti-competitive practices includes private restrictive business practices and governmental regulations of such practices, which hamper the flow of trade and fair competition, and have been regarded as trade barriers. This comparative study explores the differences in regulating the anti-competitive practices of Korea and Japan, and implies direction for the coordination and establishment of common rules to regulate the practices of the two countries, in the service and investment markets.

## **II. Regulation of Anti-competitive Practices**

### **A. Anti-competitive Practices as Trade Barriers**

Among the multiple international approaches to regulate unfair and anti-competitive practices as trade barriers, one approach is to reconcile the conflicts between trade and competition policy.<sup>4</sup> Herewith, trade barrier should be assumed to mean any kind of entry barrier to the domestic market, which impedes the complete national treatment.

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<sup>2</sup> Regarding the continuously emerging character of the new trade barriers, see Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 *Am. J. Int'l L.* 1, 3-4 (1997), cited by Jason E. Kearns, *id.*, at 285.

<sup>3</sup> 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 (herein after, NTE). For the more detailed information on this report, see Frederick M. Abbott, *Prevention and Settlement of Economic Disputes between Japan and the United States*, 16 *Ariz. J. Int'l & Comp. Law*, at 190 (1999).

<sup>4</sup> For the relationship between trade laws and competition laws under the GATT/WTO, see Terence P. Stewart, *U.S.-JAPAN Economic Disputes: The Role of Antidumping and Countervailing Duty Laws*, 16 *Ariz. J. Int'l & Comp. Law* 736 (1999).

Illustrated through multinational discussions on trade and competition policies, entry barriers to the domestic market of importing countries are primarily the matter of competition policy. Entry barriers can also be assumed to be a matter of trade policy from the viewpoint of the exporting country. In principle, the basic purpose of both trade and competition policies is the improvement of economic efficiency and consumer's welfare-level.<sup>5</sup> However, while enforcing the two policies, conflicts can occur when different policies with conflicting priorities are imposed,<sup>6</sup> and international concerns, particularly under the WTO framework, have recently been concentrated on the competition policy effects in trade policy.<sup>7</sup>

The main purpose of the international discussions on the effect of competition policy on international trade, specifically, on the use of anti-competitive practices as trade barriers,<sup>8</sup> is to reduce the disparity among individual country's market, and to secure a fair and free domestic market structure for access to the domestic market<sup>9</sup> under the precondition that the trade barriers between the frontiers should be eliminated completely.<sup>10</sup> Thus, anti-competitive practices have been highlighted as a trade barrier,<sup>11</sup> which, if not regulated appropriately, could interrupt access to the domestic market of imported goods and services for foreign exporters.<sup>12</sup>

Since the Havana Charter of the International Trade Organization in 1948 failed to establish international rule regulating restrictive business practices, multilateral

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

<sup>6</sup> For the potential conflicts between the trade laws and the competition laws in the United States, for example, 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.* 462 (1998).

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

<sup>8</sup> For the difficulty to evaluate the anti-competitive business practices as impediments to market access, see William H. Barringer, *supra note 6*, at 477.

<sup>9</sup> Mitsuo Matsushita, Prevention and Settlement of Economic Disputes between Japan and the United States. *16 Ariz. J. Int'l & Comp. L.* 250 (1999).

<sup>10</sup> For the potential agreement on competition policy which is the end of international discussions, Kevin C. Kennedy, *supra note 5*, at 586.

<sup>11</sup> For the difficulty to treat with the anti-competitive practices through the WTO mechanism, see James D. Southwick, Operation of the WTO Agreements in the Context of Global Commerce and Competition, Investment and Labor Markets, *31 Law & Pol'y Int'l Bus.* 925 (2000).

<sup>12</sup> For the most visible and well documented instance of such restrictive business practices affecting trade, see William H. Barringer, *supra note 6*, at 460.

or plurilateral efforts<sup>13</sup> have been made in vain<sup>14</sup> to regulate anti-competitive business practices.<sup>15</sup> While those attempts<sup>16</sup> have failed,<sup>17</sup> the issue of anti-competitive practices has been raised in recent years in other GATT/WTO contexts,<sup>18,19</sup> and there has been a general consensus<sup>20</sup> that the interface between trade and competition policies has become more important.<sup>21</sup>

Besides the international efforts to address this matter,<sup>22</sup> many developed countries have regulated various kinds of anti-competitive practices through expanding and applying the concept of fair trade provided in international or individual domestic trade laws, along with the extraterritorial application of their

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<sup>13</sup> They are the International Trade Organization's (ITO) plan to regulate restrictive business practices in 1948; OECD guidelines for multinational enterprises in 1976; various attempts by the United Nations to regulate restrictive practices in the 1970 and 1980; a draft of the international antitrust code in 1993. See John H. Jackson, et al., *Legal Problems of International Economic Relations*. 1090, 1102 (1995).

<sup>14</sup> For the important gaps in the WTO rule system, that is, the absence of minimum rules on the maintenance of competitive domestic markets, see Frederick M. Abbott, *supra note 3*, at 185 (1999).

<sup>15</sup> For the complexity of the international agreements on competition policy, see Jason E. Kearns, *supra note 1*, at 288–290.

<sup>16</sup> Besides the above international attempts, there have been bilateral attempts to regulate anti-competitive practices, which, currently, may be only possible form of agreement. Mitsuo Matsushita, *supra note 9*, at 251.

<sup>17</sup> Attempts to treat with anti-competitive practices and market structures, for example, in Japan, through GATT/WTO mechanisms have been completely unsuccessful. See James D. Southwick, *supra note 11*, at 963–964.

<sup>18</sup> See Ministerial Conference in Singapore in 1996, available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min96\\_e/wtodec\\_e.htm](http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm) (visited May 11, 2005). And Doha Declaration in 2001, available at [http://www.wto.org/english/tratop\\_e/dda\\_e/dohaexplained\\_e.htm](http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm) (visited May 9, 2005).

<sup>19</sup> For the, at least, three WTO agreements speaking directly to the issue of restrictive business practices, see Jason E. Kearns, *supra note 1*, at 294.

<sup>20</sup> For the discussions about WTO Agreement on Competition designed to deal with anti-competitive practices, see Hindly, *Competition Law and the WTO: Alternative Structures for Agreement on Fair Trade and Harmonization: Prerequisite for Free Trade*, cited by Jean-Francois, Bellis, *Anti-competitive Practices and the WTO: The Elusive Search for New World Trade Rules*, *New Directions in International Economic Law* 365–366 (2000).

<sup>21</sup> For some factors to trigger this consensus, see Kevin C. Kennedy, *supra note 5*, at 587.

<sup>22</sup> For the lack of clarity of the current WTO System to treat with trade disputes on the anti-competitive practices, see Frederick M. Abbott, *supra note 3*, at 185; Jason E. Kearns, *supra note 1*, at 297.

domestic competition laws<sup>23</sup> or positive comity.<sup>24</sup> For example, according to Section 301(d) of the Trade Act of 1974,<sup>25,26</sup> government toleration of private and systematic anti-competitive activities that effectively restrict access to the foreign markets may be regarded as 'unreasonable' acts.<sup>27</sup> The concept of reasonable or fair trade practice, which exceeds the scope of the tariff or non-tariff barriers at the frontiers, has become widely accepted basis of securing fair competition in foreign market.<sup>28</sup>

## B. Regulation of Trade in Services

As countries venture increasingly into one another's service markets, international efforts to deal with international trade in services also have increased<sup>29</sup> culminating<sup>30</sup> in the adoption of the General Agreement on Trade in

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<sup>23</sup> For the cases relating to extraterritorial enforcement of the U.S. Antitrust Laws, see John H. Jackson, et al., *supra note* 13, at 1078-1089; Merit E. Janow, Operation of the WTO Agreements in the Context of Global Commerce and Competition, Investment and Labor Markets: Panel II B: Operation of the WTO Agreements in the Context of Varying Types of National Regulatory Systems: Public, Private and Hybrid Public/Private Restraints of Trade: What Role for the WTO?, *31 Law & Pol'y Int'l Bus.* 978- 979 (2000).

<sup>24</sup> For the positive comity to substitute the extraterritorial application of the domestic anti-trust laws, see Merit E. Janow, *id.*, at 979.

<sup>25</sup> For the aggressive resent-oriented approach under Section 301 of the Trade Act of 1974, see William H. Barringer, *supra note* 6, at 460; Wolfgang W. Leirer, Retaliatory Action in the United States and European Union Trade Law: A Comparison of Section 301 of the Trade Act of 1972 and Council Regulation 2641/84, *20 N.C.J. Int'l L. & Comm. Reg.* 41 (1995), cited by Jeffrey Simser, GATS and Financial Services: Redefining Borders, *3 Buff. Jour. Int'l L.* 46 (1996).

<sup>26</sup> Regarding the negative effect of the WTO mechanism leading the United States to rely on unilateral measures under Section 301, see Alan Wm. Wolff, Operations of the WTO Agreement in the Context of Global Commerce and Competition, Investment and Labour Markets: Panel III C: Operation of the WTO in Context of Overall U.S. Trade Policy Objectives: America's Ability to Achieve Its Commercial Objectives and the Operation of the WTO, *31 Law & Pol'y Int'l Bus.* 1027 (2000).

<sup>27</sup> Ralph H. Folsom, Michael W. Gordon, *International Business Transactions*, 536 (1996).

<sup>28</sup> For the possible options for solving cases involving such anti-competitive practices, for example, in the United States, see Peter E. Ehrenhaft, Asil Holdo Corporate Counsel Committee Briefing on International Antitrust and U.S.- Japan Relations, *The American Society of International Law Newsletter* (Sept. 1995) (file-Lexis).

<sup>29</sup> For the GATS as the result of the first step to internationally regulate the trade in services, see J. Steven Jarreau, *Interpreting the GATS and the WTO Instruments*

Services (GATS).<sup>31</sup> Considering that many service industries are carefully regulated to protect public interest, the GATS simultaneously regulates trade barriers that distort competition or restrict access to markets,<sup>32</sup> and distinctively, requires legitimate policy objectives to be pursued and ensures the orderly functioning of markets.<sup>33</sup>

Consequently, restrictions on service suppliers in specified fields or discrimination against foreign suppliers are considered as barriers to service trade.<sup>34</sup> The regulations requiring compliance with technical standards or qualification requirements to ensure the quality of service and the protection of public interest are considered as necessary by the countries in question.<sup>35</sup> Multilateral negotiations have progressively liberalized GATS regulations by removing trade barriers in service markets, while not restricting the individual governments' authority to maintain and develop the necessary regulation to pursue their national policy objectives.<sup>36</sup>

Historically international trade has been viewed as involving only the movement of goods and services across national borders.<sup>37</sup> Trade in services under the GATS, however, should be much more comprehensive covering transactions which involve moving the factors of production as well as the services themselves

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Relevant to the International Trade of Financial Services: The Lawyer's Perspective, 25 *N.C.J.Int'l L. & Dom. Reg.* 70-71 (1999).

<sup>30</sup> Aly K. Abu-Akeel, Definition of Trade in Services under the GATS: Legal Implications, 32 *GW. J. Int'l L. & Econ.* 189 (1999).

<sup>31</sup> General Agreement on Trade in Service, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1B, The Results of the Uruguay Round of Multilateral Trade Negotiations - The Legal Texts 325, 33 *I.L.M.* 1667 (1994) [hereinafter GATS]. For a full text of agreements resulting from the Uruguay round, see Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments Results of the Uruguay Round 1 (1994), 33 *I.L.M.* 1125 (1994).

<sup>32</sup> For the purpose of Market Access under the GATS, see John Kraus International Chamber of Commerce, The GATT Negotiations: A Business Guide to the Results of the Uruguay Round, 43 (1994) cited by Ruth Ku, A GATT-ANALOGUE Approach to Analyzing the Consistency of the FCC's Foreign Participation Order with U.S. GATS MFN Comments, 32 *GW. J. Int'l & Econ.* 118 (1999).

<sup>33</sup> For the most intractable barriers in services, see Joel P. Trachtman, Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis, 34 *Column. J. Transnat'l L.* fn. 27 (1995).

<sup>34</sup> See GATS, *supra note* 31, at art. XVII.

<sup>35</sup> See *id.*, at art. VI (4).

<sup>36</sup> See *id.*, at Preamble.

<sup>37</sup> For the four levels of the differences between trade in goods and trade in services, see Aly K. Abu-Akeel, *supra note* 30, at 189.

across borders.<sup>38</sup>

With such an expanded definition of service trade,<sup>39</sup> GATS would be relevant to a wider range of domestic policies, regulations and measures<sup>40</sup> than GATT,<sup>41</sup> since they would affect<sup>42</sup> the supply of services which traditionally have not been touched upon by multilateral trade rules.<sup>43,44</sup> Enforcing domestic policy in the treatment of foreigners in their service activities,<sup>45</sup> for example, could be directly relevant to a country's obligations under the GATS. Thus, the obligations covered by GATS concerns not only the treatment of the service but also that of the service business or service supplier,<sup>46</sup> which, consequently, regulates the treatment of foreign investors.<sup>47</sup>

While all GATS provisions are important with regard to ensuring cooperation in opening service markets, application scopes of them are different from each other,<sup>48</sup> which sets the GATS apart from other agreements.<sup>49</sup> Thus, all clauses in

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<sup>38</sup> For the issues concerning the scope of applicability of GATS due to the improper definition of the service activities in GATS, see *id.*, at 189–190.

<sup>39</sup> For the background of all encompassing definition for modes of service supply, see Pierre Sauve, *Assessing the General Agreement in Trade in Services: Half-Full or Half-Empty*, 29 *J. World Trade* 125, 128 (1995), cited by Jeffrey Simser, *supra note* 25, at 49.

<sup>40</sup> The term measure covers any action taken by any level of government as well as by non-governmental bodies to which regulatory powers have been delegated, taking any form; a law, regulation, administrative decision or guideline or even an unwritten practice. GATS, *supra note* 31, at art. XXVIII.

<sup>41</sup> See, Ruth Ku, *supra note* 32, at 117.

<sup>42</sup> For the use of the term affecting, rather than other terms such as governing, see European Communities Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas) (available in 1997 WL 533, 133, 370, 380 May 22, 1997), cited by J. Steven Jarreau, *supra note* 29, at 51–52.

<sup>43</sup> Prior to the Uruguay Round, the Organization for Economic Cooperation and Development (OECD) established international frameworks (referred to as Codes ) for liberalizing trade in services, however, the OECD Codes did not provide a comprehensive multilateral agreement to liberalize trade in services. Jeffrey Simser, *supra note* 25, at 36–37.

<sup>44</sup> The domestic regulation of professional activities is the most pertinent example, GATS, *supra note* 31, art. VI (6).

<sup>45</sup> See GATS, *supra note* 31, at VI.

<sup>46</sup> See Jason E. Kearns, *supra note* 1, at 297.

<sup>47</sup> GATS, *supra note* 31, part I, Scope and Definition: Regulatory Implications. Thus GATS is the first multilateral treaty to regulate the treatment of foreign inverters.

<sup>48</sup> See GATS, *supra note* 31, at Part III.

GATS are grouped into two clauses: for example, while the most-favored-nation clauses<sup>50</sup> is a horizontal clause which is to be fulfilled in all sectors, the national treatment clause<sup>51</sup> is vertical, meaning that it is a conditional rule, the application of which depends on specific commitments<sup>52</sup> made by each country.<sup>53</sup>

In sectors of scheduled specific commitments, all measures of a general application affecting trade in services are to be administered in a reasonable, objective and impartial manner.<sup>54</sup> This obligation focuses on the manner in which measures are administered and not on their substance,<sup>55</sup> under which foreign service suppliers shall not be discriminated against or impeded in their work by the arbitrary or biased administration of the regulations.<sup>56</sup> Thus, the measures should be based on objective and transparent<sup>57</sup> criteria such as competence and the ability to supply the service, moreover, they should not be more burdensome than necessary to ensure the quality of the service.<sup>58</sup>

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<sup>49</sup> Mara M. Burr, Will the General Agreement on Trade in Services Result in International Standards for Lawyers and Access to the World Market? *20 Hamline L. Rev.* 673 (1997).

<sup>50</sup> For the most-favored nation principle under GATS contemplating a level competitive playing field, see J. Steven Jarreau, *supra note 29*, at 63 (Interpreting the EC-Bananas Panel reports, *supra note 42*); For the negative characteristics of the GATS with relation to MFN principle in GATS, see Jeffrey Simser, *supra note 25*, at 50-51 (stating "in GATS, ... Members are permitted to schedule exemptions from MFN application. The exemptions for MFN, ... , have been described as structural weakness. ... The compromises necessary to create the agreement were driven by political considerations, not purely by technical trade issues. If the goal of GATS was to create an all-encompassing principle-based agreement, the GATS might be adjudged a failure.").

<sup>51</sup> GATS, *supra note 31*, at art. XVII.

<sup>52</sup> Regarding the developing process of the Schedules of Specific Commitments, see Laurel S. Terry, GATS' Applicability to Transactional Lawyering and its Potential Impact on U.S. State Regulation of Lawyers, *34 Vand. J. Transnat'l L.* 1004 (2001).

<sup>53</sup> See Sandrine Cahn, Daniel Schimmel, The Cultural Exception: Does It Exist In GATT and GATS Frameworks? How Does it Affect or Is It Affected by the Agreement on TRIPS?, *15 Cardozo Arts & Ent. L. J.* 299 (1997).

<sup>54</sup> GATS, *supra note 31*, at art. VI.

<sup>55</sup> For the GATS principles deriving such obligation, see J. Steven Jarreau, *supra note 29*, at 66.

<sup>56</sup> Article VI(Domestic Regulation) is intended to prevent Members from denying, nullifying, or impairing GATS benefits to other WTO Members through the use of onerous domestic administrative measures. J. Steven Jarreau, *id.*

<sup>57</sup> For the transparency obligation under GATS, see *id.*, at 64.

<sup>58</sup> For this proportionability provision in GATS, see Joel P. Trachtman, *supra note 33*, at 88-89.



### C. Regulation of Treatment of Foreign Investment.

Since the Charter for the International Trade Organization (1948) containing provisions on the treatment of foreign investment failed to be ratified and only its provisions on commercial policy were incorporated into the GATT(1947),<sup>59</sup> the linkage between trade and investment has attracted little attention in the framework of the GATT,<sup>60</sup> which did not seem compatible to the globalization of modern economy.<sup>61</sup>

Perhaps the most significant development with respect to investment during the period before the Uruguay Round<sup>62</sup> was a ruling by the GATT in the dispute panel between the United States and Canada. In Canada Administration of the Foreign Investment Review Act<sup>63</sup>(FIRA), which was an example of a statutory scheme that provided for the negotiation of particularized requirements on a case-by-case basis,<sup>64</sup> a GATT dispute settlement panel decided that the local content requirements were inconsistent with the national treatment obligation of the GATT, but that the export performance requirements,<sup>65</sup> one of the most trade-distorting trade-related investment measures(TRIMs),<sup>66</sup> were consistent with GATT obligations.<sup>67</sup>

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<sup>59</sup> For the idea of negotiating a Multilateral Investment Treaty, see Jeswald W. Salacuse, Towards a New Treaty Framework For Direct Investment, *50 J. Air L. & Com.* 1005-09 (Arguing for a general agreement on direct investment), cited by Todd S. Shenkin, Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty, *55 U. Pitt. L. Rev.* 593 (1994).

<sup>60</sup> For the consideration of the foreign direct investment among the GATT members during the period through 1960 to 1981, see Terence P. Stewart, *supra note 4*, at 2056-57, cited by Robert H. Edwards Jr., Simon N. Lester, *Towards a More Comprehensive World Trade organization Agreement on Trade* 188 (1997).

<sup>61</sup> For the necessity to negotiate a multilateral investment treaty under the modern economy, see Todd S. Shekin, *supra note 59*, at 579.

<sup>62</sup> For the negotiating history for a resolution on International Investment for Economic Development, see Terence D. Stewart. *The GATT Uruguay Round: A Negotiating History* (1986-1992), 2056-2057, cited by Robert H. Edwards Jr., Simon N. Lester, *supra note 60*, at fn. 117, 120.

<sup>63</sup> For the more detailed information on Canada's FIRA, see Todd S. Shenkin, *supra note 59*, at 561-562.

<sup>64</sup> Robert H. Edwards Jr., Simon N. Lester, *supra note 60*, at 186.

<sup>65</sup> For the more details regarding these requirements, see John H. Jackson, et al. *supra note 13*, at 521.

<sup>66</sup> See Robert H. Edwards Jr., Simon N. Lester, *supra note 60*, at 191-192.

<sup>67</sup> For the various forms of TRIMs, see Catherine Curtiss & Kathryn Cameron Atkinson, The United States - Latin American Trade Laws, *21 N.C.J. Int'l L. & Com. Reg.* 111, 127 (1995); Patrick Low & Arvind Subramania, *TRIMs in the Uruguay Round: An Unfinished Business?*, represented at the Uruguay Round and the Developing

The panel decision in the FIRA case was evaluated to ensure that existing obligations under the GATT were applicable to performance requirements imposed in the context of investment so far as such requirements involve trade-distorting measures.<sup>68</sup> Simultaneously, the panel's conclusion that export performance requirements were not covered by the GATT also underscored the limited scope of existing GATT disciplines with respect to such trade-related performance requirements.<sup>69</sup>

During the Uruguay Round negotiations concerning trade-related investment measures,<sup>70</sup> strong disagreement among participants was revealed over the coverage and nature of possible new disciplines.<sup>71</sup> The resulting WTO Agreement on Trade-Related Investment Measures,<sup>72</sup> as a compromise, is essentially limited to the application of the trade-related investment measures of GATT provisions to national treatment<sup>73</sup> and quantitative restrictions of imports or exports,<sup>74</sup> and does not cover other measures, such as export performance and the transfer of technology requirements.<sup>75</sup>

Since it is based on existing GATT disciplines on trade in goods, the TRIMS agreement is not concerned with the regulation of service or foreign investment itself.<sup>76</sup> Consequently, the imposition of regulations concerning discrimination

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*Economics, A World Bank Conference*, Jan. 26-27, 5 (1995), cited by Paul Civello, *The TRIMs Agreement: A Failed Attempt at Investment Liberalization*, 8 *Minn. J. Global Trade* 99 (1999).

<sup>68</sup> Todd S. Sherkin, *supra note* 59, at 564.

<sup>69</sup> Robert H. Edwards, Jr., Simon N. Lester, *supra note* 60, at 191-192.

<sup>70</sup> For the categorized TRIMs for the new agreement by fitting TRIMs into the traffic light categories, see *id.*, at 210-211. This categorization is similar to Swiss government's proposal, made during the Uruguay Round negotiations, which divided TRIMs into the same three categories: prohibited, permitted, and actionable. *Id.*, at 211.

<sup>71</sup> For the two issues central to the TRIMs negotiations, see Terence P. Stewart, *supra note* 4, at 2081, cited by Robert H. Edwards Jr., Simon N. Lester, *supra note* 60, at 194, 196.

<sup>72</sup> Agreement on Trade Related Investment Measures, Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 1A, reprinted in the Results of the Uruguay Round of Multilateral Trade Negotiations-The Legal Texts, 163 (1994) (hereinafter TRIMs Agreement).

<sup>73</sup> TRIMs Agreement, *id.*, at art. III.

<sup>74</sup> *Id.*, at art. X I. For the more details about TRIMs Agreement's failure to cover more provisions, see Paul Civello, *The TRIMs Agreement: A Failed Attempt at Investment Liberalization*, 8 *Minn. J. Global Trade* 97 (1999).

<sup>75</sup> For the multilateral Agreement on Investment proposed by Organization for Economic Co-operation and Development as an alternative to inefficient TRIMs, see Paul Civello, *supra note* 74, at 123.

<sup>76</sup> For example, a local content requirement imposed in a nondiscriminatory manner on domestic and foreign enterprises is inconsistent with the TRIMs Agreement because

between domestic and foreign investors in TRIMs could not be treated multilaterally under the TRIMs Agreement<sup>77</sup> but bilaterally or plurilaterally under the regional agreements.

### III. Anti-competitive Practices in Korean Market

#### A. General

During the dynamic period of economic growth and development from the 1960s to the 1990s, the Korean government promoted economic development much more directly and positively than any other Asian country<sup>78</sup> resulting in a greater unevenness in income growth, prices, trade and in the pattern of structural change.<sup>79</sup> During this time period, the government has maintained a positive role in the management of the Korean economy,<sup>80</sup> and the condensed growth initiated by the government has been achieved at the cost of retarding development of a national competition policy,<sup>81</sup> which raises the costs of foreign service suppliers or investors to access and do business in the Korean service market.

In the service market, domestic regulation is more important and serious as the trade barriers than in commodities market.<sup>82</sup> Despite the Korean government's efforts,<sup>83</sup> Korean laws and regulations related to trade in services as well as to

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it involves discriminatory treatment of imported products in favor of domestic products. FIRA Panel Report, cited by Todd S. Shenkin, *supra note* 59, at 565.

<sup>77</sup> See Todd S. Shenkin, *id.*, at 566 (stating that the impact of this on foreign investors is that although their interests are directly affected by TRIMs imposed by host countries on their investments, they have no legal recourse under the TRIMs Agreement; only goods producers do).

<sup>78</sup> See Cho, Soon *The Dynamics of Korean Economic Development* 27-59 (1994) (giving a detailed analysis of Korean economic development from the 1960s to the 1990s), cited by Eun Sup Lee, Anti Competitive Practices as Trade Barriers used by Korean and Japan, 17 *Transnational Lawyer* 2, 184-185 (2004).

<sup>79</sup> *Id.*

<sup>80</sup> See Cho, Soon *Id.*, at 178-81 (discussing the roles of the government in Korean economic development), cited by Eun Sup Lee, *id.*

<sup>81</sup> *Id.*

<sup>82</sup> See GATS, *supra note* 31, at art. VI.

<sup>83</sup> See, for example, *WTO, Trade Policy Review-Korea: 2000* at 9 (2000), available at [http://www.wto.org/english/tratop\\_e/tp138\\_e.htm](http://www.wto.org/english/tratop_e/tp138_e.htm) (last visited May. 14, 2005) ("... Korean government has made effects to improve transparency in trade and investment policies...").

trade in goods have generally been criticized for lacking specificity<sup>84</sup> and transparency<sup>85</sup> in the rulemaking procedures and in maintaining regulatory systems.<sup>86</sup> Internal office guidance, for example, developed by relevant government agencies but rarely published<sup>87</sup> gives direction in the implementation of regulations, and the adequate information about planned or actual changes to laws and regulations is not available.<sup>88</sup> This system gives governmental officials leeway to exercise wide discretion in applying those laws and regulations,<sup>89</sup> resulting in inconsistency in their application<sup>90</sup> and uncertainty in doing business in Korea.<sup>91</sup>

Korea maintains restrictions in some service sectors through a negative list, in which foreign investment is prohibited or severely circumscribed through equity or other restrictions, which is in line with the GATS spirit and disciplines to allow the member countries to make scheduled specific commitments.<sup>92</sup>

## B. Non-financial Service Markets

Among the world's 12 largest advertising markets, Korea maintains one of the most highly restricted markets. Although the Korean government has ended the monopoly of sales of advertising time<sup>93</sup> and implemented some market-oriented measures in recent years,<sup>94</sup> some anti-competitive practices<sup>95</sup> have shackled the

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<sup>84</sup> See Eun Sup Lee, Safeguard Mechanism in Korea Under the WTO World, *14 The Transnational Lawyer* 2, 355 (2001).

<sup>85</sup> See GATS, *supra note* 31, art. III.

<sup>86</sup> For the detailed criticism raised by the United States, See USTR, NTE (Korea), *supra note* 3, at 257 (2003).

<sup>87</sup> See GATS, *supra note* 31, at art. III.

<sup>88</sup> Eun Sup Lee, *Anti-competitive Practices as Trade Barriers used by Korea and Japan*, presented at Ritsumeikan Asia Pacific Conference held by Ritsumeikan Asia Pacific University, Japan on Nov. 28-29, 2003, 12 (2003).

<sup>89</sup> See GATS, *supra note* 31, at art. III.

<sup>90</sup> See GATS, *id.*, at art. II, XVII.

<sup>91</sup> See USTR, NTE(Korea), *supra note* 3, at 311 (2004).

<sup>92</sup> GATS *supra note* 31, at Part III (Specific Commitments).

<sup>93</sup> Under the GATS, monopolies and exclusive service supplies are approved in principle, see GATS, *supra note* 31, at art. VIII.

<sup>94</sup> These measures include the Global Standard system offering advertising airtime in various time-lengths and providing more purchasing flexibility, USTR, NTE (Korea) *supra note* 3, at 305 (2004).

<sup>95</sup> These practices are regulated under the GATS. See GATS, *supra note* 31, at art. VIII, IX.

flexibility of advertisers to respond to their immediate market needs.<sup>96</sup>

Regarding the advertising censorship procedures, anti-competitive practices due to censorship have been reported:<sup>97</sup> advertising materials must be submitted in fully produced film format rather than as storyboard, which significantly increases the risks and costs of developing new advertising campaigns and introducing new brands. These practices may be in breach of the provisions prohibiting the unnecessary restriction to trade in services<sup>98</sup> as well as the provisions affording protection to materials submitted under the GATS<sup>99</sup> and TRIPs;<sup>100</sup> products that have been tested and approved in other countries must be re-tested in Korea, which may be inconsistent with the provisions of the GATS<sup>101</sup> as well as other WTO provisions.<sup>102</sup>

In some product categories, e.g., cosmetics, the approval of advertising copy in advance of airing or publication from the trade associations is required, the guidelines for the application, however, are vague, and, during the approval process, information on the future marketing activity, including the introduction of new products is revealed to their competitors.<sup>103</sup> Before and after demonstrations of product effectiveness for cosmetics and pharmaceuticals, are prohibited as claims of direct efficacy for pharmaceuticals and over-the-counter medicines.<sup>104</sup> These requirements and prohibitions are relevant to the applications and interpretations of the provisions on domestic policy objectives provided in GATS,<sup>105</sup> provisions on General Exceptions (to protect human life or health) in GATS,<sup>106</sup> and also provisions of TRIPs.<sup>107</sup>

In the field of direct selling, the Korean government has tried to improve the Door-to-Door Sales Act (hereinafter, DDSA),<sup>108</sup> which includes changes to the provision that have expanded selling companies' liability for their independent

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*, at art. VI 4 (Domestic Regulation).

<sup>99</sup> *Id.*, at art. III *bis* (Disclosure of Confidential Information).

<sup>100</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights (herein after, TRIPs), Apr. 15, 1994, Marakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments-Results of the Uruguay Round vol. 31,33 I.L.M.112 (1994) art. 39 (Protection of Undisclosed Information).

<sup>101</sup> GATS, *supra note 31*, art. VI.

<sup>102</sup> For example, see WTO Agreement on Technical Barriers to Trade, art. 6.3.

<sup>103</sup> USTR, NTE (Korea), *supra note 3*, at 305 (2004).

<sup>104</sup> *Id.*

<sup>105</sup> GATS, *supra note 31*, at art. VI.

<sup>106</sup> *Id.*, at art. XIV.

<sup>107</sup> TRIPs, *supra note 101*, at art. 39.

<sup>108</sup> Law No. 5982 (1999). available at [http://lawquis.hihome.com/law-korean\\_version](http://lawquis.hihome.com/law-korean_version)

contractors.<sup>109</sup> This improvement is required for the development and competitiveness of the newly emerging domestic direct selling industry as well as the foreign suppliers that have traditionally been competitive. Anti-competitive practices, however, including penalties for violating the DDSA, a minimum requirement for capital paid, restrictions in price, and limitations on payouts for multilevel compensation companies,<sup>110</sup> which are, allegedly, unique to Korea,<sup>111</sup> could bring about disputes concerning transparency,<sup>112</sup> national treatment<sup>113</sup> or policy objectives.<sup>114</sup>

The Korean film industry's strict screen quota system is considered discouraging to trade, cinema construction, the expansion of film distribution in Korea, and the overall competitiveness of the Korean film industry.<sup>115</sup> Korea's insistence on keeping its strict screen quotas has been a topic of dispute in bilateral and multilateral trade negotiations, which, nevertheless, could be approved under the provisions of current GATT<sup>116</sup> and GATS,<sup>117</sup> but has been controversial in terms of progressive liberalization.<sup>118</sup>

Korea restricts foreign activities in the free TV sector by limiting monthly broadcasting time, maintaining annual quotas for broadcast motion pictures, animation and popular music, as well as the prohibition of foreign investment for territorial television operations,<sup>119</sup> which could become a controversy between the domestic policy objectives<sup>120</sup> argued by the Korean government and the national treatment<sup>121</sup> claimed by the partner countries.

Korea restricts foreign participation in the cable TV sector through annual

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<sup>109</sup> Korea's Fair Trade Committee, Press Release Materials, 1 (July 16, 2002).

<sup>110</sup> DDSA, *supra note* 107, at art. 10.

<sup>111</sup> See USTR, NTE (Korea), *supra note* 3, at 252 (2003).

<sup>112</sup> GATS, *supra note* 31, at art. III.

<sup>113</sup> *Id.*, at art. XVII.

<sup>114</sup> *Id.*, at Preamble, "... in order to meet national policy objectives ...", art. VI.

<sup>115</sup> Korea maintains screen quotas on imported motion pictures, requiring that domestic films be shown in each cinema a minimum number of days per year (currently, 146 days with reductions to 106 days possible if certain criteria are met). USTR, NTE (Korea), *supra note* 3, at 305 (2004).

<sup>116</sup> GATT General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 stat. A-II T.I.A.S. 1700, 55 U.N.T.S. 194 (hereinafter GATT) GATT1947 was incorporated into the 1994 World Trade Organization Agreement. art. 3, 10, 4.

<sup>117</sup> GATS, *supra note* 31, at art. XIV (a).

<sup>118</sup> *Id.*, at art. VI.

<sup>119</sup> USTR, NTE (Korea), *supra note* 3, at 305-306 (2004).

<sup>120</sup> GATS, *supra note* 31, at Preamble, art. VI.

<sup>121</sup> See *id.*, at art. XVII.

quotas,<sup>122</sup> which limit market access and the development of Korea's film and animation industries. The Korean government also restricts foreign ownership of cable television-related systems, program providers, and foreign participation in satellite broadcasts. These restrictions could basically be in accordance with the frameworks and requirements of the GATS,<sup>123</sup> however, have become controversial with trade partner countries in terms of progressive liberalization.<sup>124</sup>

The Korean professional service market has been an important target of trade disputes with trade partner countries particularly since the financial crisis in 1997.<sup>125</sup> Regarding legal services,<sup>126</sup> despite the Korean government's efforts to liberalize the market,<sup>127</sup> it has been criticized for not providing for foreign legal consultants,<sup>128</sup> thus creating serious difficulties in working for foreign lawyers<sup>129</sup> employed by local firms.<sup>130</sup>

With regard to the accounting field, Korea restricts the establishment of foreign accounting firms<sup>131</sup> and foreign Certified Public Accountants (herein after, CPAs)

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<sup>122</sup> USTR, NTE(Korea), *supra note* 3, at 306 (2004).

<sup>123</sup> See GATS, *supra note* 31, at art. XIV, XVI.

<sup>124</sup> See USTR, NTE(Korea), *supra note* 3, at 306 (2004).

<sup>125</sup> See *id.*

<sup>126</sup> The empirical study of the effects of the deregulation of legal services in Great Britain provides some insights into the potential benefits of terminating a cartel in a legal services market in Korea. See Simon Domberger & Avrom Sherr, The Impact of Competition on Pricing and Quality of Legal Services. *9 Int'l Rev. L. & Econ* 41, 59 (1989), cited by Michael J. Champman, Paul J. Tauber, Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services under the General Agreement on Trade in Services, *16 Mich. J. Int'l L.* 955 (1995).

<sup>127</sup> These include the amendment not only of the Lawyer Act to permit foreigners to be licensed to practice law in Korea in 1996, but also of the Regulation in Foreign Investment in 1977 to allow for foreign investment in the legal sector. USTR, NTE(Korea), *supra note* 3, at 307 (2004).

<sup>128</sup> Regarding the reason of the scope of practice restriction to foreign lawyers for protecting the public, see *5 Minn. J. Global Trade* 165 (1996); John Haley, The New Regulatory Regime for Foreign Lawyers in Japan: An Escape From Freedom, *5 UCLA Pac. Basin L. J.* 1, 14 (1986), cited by Orlando Flores, Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA, Richard Abel, *Transnational Law Practice*, *44 Case W. Res. L. Rev.* 151 (1994).

<sup>129</sup> For the shapes of the regulation of foreign lawyers in Korea, see Orlando Flores, *id.*, at 164, 167, 168, 170.

<sup>130</sup> For the rationales upon which Korean authority relies to restrict access to foreign attorneys, see Michael J. Champman, Paul J. Tauber, *supra note* 127, at 952-953.

<sup>131</sup> They include the requirement of a minimum number of Korean-certificated accountants/partners employed. *Id.*

are required to fulfill the same requirements as Korean CPAs:<sup>132</sup> accounting firms in Korea are prohibited from making an investment in or providing a debt guarantee to any other firm in excess of 10 percent of the accounting firm's paid-in-capital.<sup>133</sup> These restrictive requirements justified currently under the GATS provisions<sup>134</sup> are required to be reviewed from the viewpoints of the productivity and efficiency of Korean accounting industry, and policy objectives.<sup>135</sup> Regarding the engineering industry, although there are no legal restrictions on foreign engineering services, procuring agencies (national, local and private) may specify particular conditions on a discretionary basis depending on the nature of the project,<sup>136</sup> which may raise the national treatment<sup>137</sup> and transparency<sup>138</sup> issues.

Anti-competitive or unfair trade practices discussed above might be the subjects of the trade disputes regarding the issue whether they deviated from the spirit of the WTO provisions concerned and international norms discussed, however, some parts of them are affected by the social or cultural circumstances specific to Korea. The social and cultural aspects of those practices or measures are too complicated and controversial to be justified under the current WTO provisions.

### C. Financial Service Markets

Despite the Korean government's effort to improve the financial market,<sup>139</sup> foreign-based, non-financial organizations in Korea are required to follow burdensome and costly procedural requirements for financial transactions<sup>140</sup> that are incompatible to Korea's level of development and financial sophistication: virtually all inter-company transfers are subject to certification, which is a cumbersome, and unnecessary requirement, particularly for transactions between

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<sup>132</sup> i) obtaining Korean certification; ii) completing a two-year internship; and iii) registering with the Korean Public Accountants Association. USTR, NTE(Korea), *supra note 3*, 306 (2004).

<sup>133</sup> *Id.*

<sup>134</sup> GATS, *supra note 31*, at art. XVI.

<sup>135</sup> See *id.*, at art. VI.

<sup>136</sup> USTR, NTE(Korea), *supra note 3*, at 305 (2004).

<sup>137</sup> See, GATS, *supra note 31*, at art. XVII.

<sup>138</sup> See *id.*, at art. III.

<sup>139</sup> As a condition of its IMF economic stabilization package, for example, Korea agreed to bind its OECD commitments on financial services market access in the WTO and Korea's revised schedule of WTO financial services commitments entered into force in 1999. USTR, NTE(Korea), *supra note 3*, at 307 (2004).

<sup>140</sup> See GATS, *supra note 31*, at art. VI.



subsidiaries,<sup>141</sup> which seems to reflect the positive policy objectives of the Korean government to regulate the improper internal transactions particularly of the conglomerates.<sup>142</sup> Even after most foreign exchange transactions were liberalized in 2001,<sup>143</sup> foreign exchange transactions of the foreign bank and financial subsidiaries have been regulated.<sup>144</sup>

Almost all of restrictions imposed by Korean government on financial market and foreign exchange transactions seem to reflect Korea's unique domestic situation. These restrictions are difficult to justify in the face of the policy objectives<sup>145</sup> or procedural requirements<sup>146</sup> provisioned by the GATS. For example, policy decisions on the complete liberalization of exchange transactions would be required to consider the political or social situation unique to a peninsula divided into two politically controversial regimes, besides the economic or legal considerations which are sufficient for other countries to take in the same decision making.<sup>147</sup> These policies could desirably be justified under the GATS provisions on policy objectives with sufficient rationale and evidence. However, it would be difficult to establish the sufficient rationale and evidence for those restrictions, particularly, without clear construction rules of the WTO provisions to take into account such particular situations of the member countries.

In the insurance industry, which has been the central target of trade disputes with the United States from the 1980s,<sup>148</sup> the regulatory environment for foreign insurance companies has improved considerably since Korea implemented a series of regulatory changes following its 1996 OECD accession, some of which, including expanded market access and national treatment commitments, have been incorporated into the 1997 WTO Financial Services Agreement.<sup>149</sup>

The ambitious restructuring of the Korean insurance industry has been encouraged since the 1997-98 financial crisis<sup>150</sup> through the newly established

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<sup>141</sup> USTR, NTE(Korea), *supra note* 3, at 307 (2004).

<sup>142</sup> See, Eun Sup Lee, Anti-Competitive Practices as Trade Barriers Used by Korea and Japan: Focusing on Service and Investment Markets, 16 *Bond Law Review* 1, at 146.

<sup>143</sup> See Foreign Exchange Transactions Law, Law Number 5550 (1998), available at <http://lawquiz.com/law-korean-version> cited by USTR, NTE(Korea), *supra note* 3, at 307 (2004).

<sup>144</sup> USTR, *id.*

<sup>145</sup> GATS, *supra note* 31, at Preamble.

<sup>146</sup> *Id.*, at art. VI.

<sup>147</sup> See *id.*, at Preamble, art. VI.

<sup>148</sup> See Eun Sup Lee, Regulation of Foreign Trade in Korea, 26 *Georgia J. Int'l & Com. L.* 1, 156-158 (1996).

<sup>149</sup> USTR, NTE(Korea), *supra note* 3, at 307 (2004).

<sup>150</sup> For the Korean financial crisis in 1997, see Economics, Commerce and Industrial Relations Group, 29 June 1998, David Richardson, Asian Financial Crisis, available at

Financial Supervisory Commission<sup>151</sup> (hereinafter, FSC), the Korean government's financial watchdog and center for financial reform,<sup>152</sup> by way of insolvency or implementing workout programs<sup>153</sup> supervised by the FSC.

In the banking industry, despite the Korean government's positive efforts at restructuring since the financial crisis,<sup>154</sup> the International Monetary Fund (hereinafter IMF) and the U.S. government have strongly urged Korea to privatize state-owned banks, which would allow market forces to more efficiently allocate financial resources and increase investor confidence in the Korean economy.

Korea has been criticized for continuing to restrict the operations of foreign bank branches based on branch capital requirements.<sup>155</sup> Foreign banks are subject to the same lending ratios as Korean banks, which require them to allocate a certain share of their loan portfolios to Korean companies other than the top four *chaebol* conglomerates as well as to small and medium enterprises. Although foreign investors may legally become majority owners of Korean banks, this has proven to be difficult in practice.<sup>156</sup> Thus, all banks in Korea suffer from a non-transparent regulatory system and are particularly required to seek approval before introducing new products and services – an area where foreign banks are most competitive, which may be in breach of the GATS provisions on transparency<sup>157</sup> and national treatment.<sup>158</sup>

In the securities industry, despite the Korean government's liberalization,<sup>159</sup> foreign securities firms in Korea have allegedly encountered some non-

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<http://www.aph.gov.au> (visited May 9, 2005).

<sup>151</sup> The Korean Government: is gradually liberalizing foreign entry into the life and non-life insurance markets; has lifted some restrictions on partnering with Korean insurance companies and hiring Korean insurance professionals; and has liberalized insurance appraisals and activities ancillary to the management of insurance and pension funds, since the financial crisis. USTR, NTE(Korea) *supra note* 3, at 307-308 (2004).

<sup>152</sup> Eun Sup Lee, Regulation of Insurance Contracts in Korea, 13 *The Transnat'l Lawyer*, 5 (2000).

<sup>153</sup> A workout program is a voluntary, out of court debt- restructuring framework, which may or may not involve government supervision.

<sup>154</sup> For the more details, see USTR, NTE(Korea), *supra note* 3, at 308 (2004).

<sup>155</sup> These restrictions limit: loans to individual customers; foreign exchange trade; and foreign-bank capital adequacy and liquidity requirements. USTR, *id.*

<sup>156</sup> USTR, *id.*

<sup>157</sup> See GATS, *supra note* 31, at art. III.

<sup>158</sup> See *id.*, at art. XVII.

<sup>159</sup> For the Korean government's liberalization measures, see USTR, NTE(Korea), *supra note* 3, at 309 (2004).

prudential<sup>160</sup> barriers to their operations.<sup>161</sup>

Some trade partner countries insist the Korean government's measures in the financial sector are anti-competitive. The accusation of anti-competition against the Korean government in the financial sector reveals different priorities: For example, the Korean government's basic policy has been to give a higher priority to stabilizing the markets, and to protect public interest, as compared to promoting market mechanisms or efficient allocation of resources, which is different from other advanced western countries where market functions are strongly pursued by the governments.<sup>162</sup> The Korean government's positive restrictions to foreign exchange transactions could also show the same situation.<sup>163</sup>

The recognition of such differences in policy objectives among the member countries may be one rationale for GATS strengthening the importance of domestic regulations in the service sector, which differs substantially from GATT in the commodity sector.<sup>164</sup>

#### D. Investment Markets

The Korean government has been strongly committed to creating a more favorable investment climate and to facilitating foreign investment since the financial crisis in 1997, but additional steps are required to fully achieve this goal. The 1998 Foreign Investment Promotion Act<sup>165</sup> expanded business sectors open to foreign investment; expanded tax incentives;<sup>166</sup> simplified investment procedures; and established Foreign Investment Zones.<sup>167</sup>

The Korean government is required to automatically approve a foreign

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<sup>160</sup> For the provision about prudential measures as the prudential curve-out, see Wendy Dobson & Pierre Jacquet, *Financial Services Liberalization in the WTO* 76 (1998), cited by J. Steven Jarreau, *supra note* 29, at 67.

<sup>161</sup> For the proper measures created for prudential reasons, see Jeffrey Simser, *supra note* 25, at 57.

<sup>162</sup> See Eun Sup Lee, Regulation of Insurance Contracts in Korea. 13 *The Transnat'l Lawyer*, 34-35 (2000).

<sup>163</sup> See Eun Sup Lee, *supra note* 143, at 146.

<sup>164</sup> See GATS, *supra note* 31, at art. VI.

<sup>165</sup> Law No. 5559 (1998) as amended by Law No. 6643 (2002), available at <http://lawquiz.hihome.com/law-koreanversion>.

<sup>166</sup> Currently, two remain fully closed to foreign direct investment (FDI), including television and radio stations and 27 remain partially closed. USTR, NTE(Korea), *supra note* 3, at 39 (2004).

<sup>167</sup> USTR, NTE(Korea), *supra note* 3, at 309 (2004).

investor's notification unless the activity appears on an explicit negative list<sup>168</sup> or is related to national security, the maintenance of public order or the protection of public health, morality or safety, which are generally excused under the WTO mechanism.<sup>169</sup> Since 1998, foreigners have been permitted to engage in hostile takeovers and may purchase 100 percent of a target company's outstanding stock without consent of its board of directors. Traditionally, this has been a sore point with trade partner countries considering the Korean government proclaims an open policy for inward foreign investment.<sup>170</sup>

Capital market reforms have eliminated or raised the ceiling in aggregate foreign equity ownership, on individual foreign ownership and on foreign investment in the government, corporate and special bond markets, and have liberalized foreign purchases of short-term financial institutions.<sup>171</sup> However, the Korean government still maintains foreign equity restrictions with respect to investments in various state-owned firms and many types of media, including cable and satellite television services and channel operators, as well as schools<sup>172</sup> and beef wholesalers. These restrictions may be evaluated case by case under the criteria of policy objectives<sup>173</sup> or domestic regulations<sup>174</sup> provisioned in WTO Agreements without pure investment-specified provisions.

The Korean government removed restrictions on the direct purchase of land by foreigners<sup>175</sup> through the 1999 revision of the Alien Land Registration Acquisition Act.<sup>176</sup> Non-Koreans, however, still cannot produce certain agricultural products for commercial purposes, nor can agriculturally-zoned land be taken out of agricultural production, which might be regarded as investment barriers to foreigners<sup>177</sup> and might be controversial in relation with policy objectives under the GATS<sup>178</sup>

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<sup>168</sup> This requirement, for example, may be relevant to the spirits of the GATS provisions (Part III, Specific Commitment) applied to scheduled specific sections in which positive regulations are imposed by negative methods.

<sup>169</sup> GATT 1994, *supra note* 117, at art. X X; GATS, *supra note* 31, at art. X IV.

<sup>170</sup> USTR, NTE(Korea), *supra note* 3, at 309 (2004).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See GATS, *supra note* 31, at Preamble.

<sup>174</sup> See *id.*, at art. VI.

<sup>175</sup> As of August, 2004, foreigners are reported to own 17% of big buildings with more than 11 stories in Seoul. In Asia, the most attractive property market is reported to be Japan where US dollars 784 billion worth of properties are earmarked for foreigners. Korea has US dollars 4901 billion worth of properties available for foreign investment. The Korea Times, October 12, 2004, available at <http://times.hankooki.com>

<sup>176</sup> Law No. 5656 (1999), available at <http://lawquiz.hihome.com/law-koreanversion>

<sup>177</sup> USTR, NTE(Korea), *supra note* 3, at 309 (2004). These kinds of regulations are, of course, beyond the application of WTO provisions while they are not related to the goods trade.

<sup>178</sup> See GATS, *supra note* 31, at art. VI.

considering the traditional Korean policy in the agricultural sector. While the more liberalized Korean investment regime has increased foreign investors' interest in Korea, additional changes<sup>179</sup> are required by the trade partner countries to improve Korea's attractiveness as a destination for foreign investment.<sup>180</sup>

Assessing objectively the Korean government's policy for the liberalization and deregulation of the inward foreign investment market is difficult without internationally accepted regulatory mechanisms. As for now, the investment environment in Korea seems anemic to the foreign investors and is not so attractive as the government's ambitious policy to improve it.<sup>181</sup>

#### IV. Anti-competitive Practices in Japanese Market

##### A. General

For the majority of the post-war era, the principal goal of Japan's economic policy has been development and stability.<sup>182</sup> Free competition has sometimes appeared to be inimical to that goal.<sup>183</sup> Competition policies in such situations should have been treated as regulation policies, not as organizing principles for the economy,<sup>184</sup> which has resulted in a regulation-based economy.<sup>185</sup> Consequently, Japan's economy today suffers from over regulation and its concomitant inefficiency, while at the same time Japanese social and labor conditions are

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<sup>179</sup> They include a more transparent and predictable regulatory environment, more sustained intellectual property protection, significant progress on structural reform and the opening of markets, and enhanced labor-market flexibility. USTR, NTE(Korea), *supra note 3*, at 309–310 (2004).

<sup>180</sup> *Id.*, at 310.

<sup>181</sup> For the gap between the government's policy and the practical environments of the foreign direct investment in Korea, see Kil Sum Kim, M&A as Violent Gale (Korean), <http://kilsp.jinbo.net/publish/98/981202.htm> (visited May, 9, 2005).

<sup>182</sup> Economic stability has been regarded as presupposing a relatively high level of government intervention in business planning. Frederick M. Abbott, *supra note 3*, at 187.

<sup>183</sup> See *id.*

<sup>184</sup> For the relative priorities of competition policy in Japan, see Michael Wise, Review of Competition Law and Policy in Japan, *OECD Journal of Competition Law and Policy*, 4 (2000), cited by Eun Sup Lee, *supra note 143*, at fn. 195.

<sup>185</sup> For the criticism against the Japanese competition policy, see James D. Southwick, *supra note 11*, at 949.

relatively stable, which is different, for example, from the case of the United States.<sup>186</sup> Albeit Japan recently focused on deregulations<sup>187</sup> responding to internal and external requirements,<sup>188</sup> over-regulation in Japan had been seen as continuing to hamper economic growth, raising the cost of doing business, and impeding imports and foreign investment, particularly in the service markets.<sup>189</sup> Regulations would sometimes aim squarely at the entry of foreign services to protect the *status quo* against market entrance<sup>190</sup> stifling entrepreneurship, and inhibiting risk-taking and innovation.<sup>191</sup>

As one of the leading markets in the world, the Japanese service and investment market has traditionally been the core target of trade disputes with other trade partner countries including the United States,<sup>192</sup> even under the WTO mechanism.<sup>193</sup> The highly regulated, inefficient system<sup>194</sup> in the Japanese distribution markets, for example, has widely been acknowledged as a significant trade and investment barrier.<sup>195</sup> Distribution issues in Japan have been addressed by the trade partner countries through basic approaches focusing on: aspects of competition law, deregulation of measures supporting restrictive distribution structures, and agreements calling upon the Japanese government to use administrative guidance and moral persuasion to loosen the tight relationships between Japanese producers and distributors.<sup>196</sup> The central issue with regulatory barriers raised in the disputes is seemingly a bias against new entrants, new

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<sup>186</sup> Frederick M. Abbott, *supra note 3*, at 187-188.

<sup>187</sup> For the structural reform of the Japanese government, see USTR, NTE (Japan), *supra note 3*, at 252-256 (2004).

<sup>188</sup> For the U.S.-Japan Regulatory Reform and Competition Policy Initiative operated by the United States and Japan for bilateral efforts to promote comprehensive deregulation and structural reform in Japan, see *id.*, at 244-256.

<sup>189</sup> See *id.*, at 252-256.

<sup>190</sup> For the partner countries' concerns about the law enforcement effects of the Japanese Fair Trade Commission relating to market access, see Eun Sup, Lee, *supra note 78*, at fn. 110.

<sup>191</sup> For the characteristics of the Japanese government regulations or measures, see USTR, NTE(Japan), *supra note 3*, at 252-256.

<sup>192</sup> For the last decade as the least contentious period in U.S.-Japan trade relations in a generation, see Alan Wm. Wolff, *supra note 26*, at 1024 (2000).

<sup>193</sup> For the comments on the fitness of the WTO to treat with Japan's special trade barriers, see *id.*, at 1025-1026.

<sup>194</sup> For the difficult situation of foreign companies in getting access to distribution in Japan, see *id.*, at 927-928.

<sup>195</sup> Domination of the distribution system by Japanese producers can create a significant market access problem in many industries in Japan because of the cost, risk, and difficulty of establishing an alternative distribution network. *Id.*, at 928.

<sup>196</sup> *Id.*, at 929.

products, and lower prices, which may appear in regulations that are simply too rigid or vague.<sup>197</sup>

## B. Non-financial Market

With regard to professional services, the ability of foreign firms and individuals to provide professional services in Japan has been hampered by a complex network of legal, regulatory and commercial practice barriers.<sup>198</sup> In the accounting and auditing services market, foreign service providers have allegedly faced a series of regulatory and market access barriers in Japan which impeded their ability to serve this important market: They include foreign Certified Public Accountants'(CPAs)registration system as members of the Japanese Institute of Certified Public Accountants, prohibition of foreign CPAs' audit activities, prohibition of audit corporations' providing tax-related services, and other requirements which are burdensome particularly to foreign CPAs.<sup>199</sup>

Regarding legal services, foreign lawyers have sought greater access to Japan's legal services market and full freedom to associate with Japanese lawyers (*bengoshi*) since the 1970s.<sup>200</sup> However, strong opposition from the Japan Federation of Bar Associations (*Nichibenren*) and a reluctant Japanese bureaucracy has largely thwarted this objective.<sup>201</sup> In Japan, one of the largest legal markets in the world, foreign and local lawyers face strict regulation.<sup>202</sup> Since 1987, Japan has allowed foreign lawyers to establish offices and advise on matters concerning the law of their home jurisdictions in Japan as foreign legal consultants, subject to imposed restrictions.<sup>203</sup>

While Japan has liberalized several restrictions of foreign lawyers, the most critical structural deficiency in Japan's international legal services sector is that the severe limitations are imposed on the relationships between Japanese lawyers and

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<sup>197</sup> James D. Southwick, *supra note* 11, at 956.

<sup>198</sup> See James D. Southwick, *supra note* 11, at 928, 956.

<sup>199</sup> For the more details, see Eun Sup Lee, *supra note* 143, at 153-154.

<sup>200</sup> For the substantial pressure from the United States and the EU on Japanese officials to reduce restrictions on foreign lawyers, see Michael J. Chapman, Paul J. Tauber, *supra note* 127, at 961, fn. 116.

<sup>201</sup> For the cultural concerns to limit foreign lawyers' scope of practice apart from the fear of lack of qualifications, Karen Dillon, *Unfair Trade?*, *Am. Law* 54 (1994), cited by Orlando Flores, *supra note* 129, at 167.

<sup>202</sup> Orlando Flores, *id.*, at 124.

<sup>203</sup> Special Measures Law Concerning the Handling of Legal Business by Foreign Lawyers. Law no.66 as amended, i.e. Foreign Lawyers Law. The Law basically conditions the ability of a foreign lawyer to practice in Japan on reciprocal treatment of Japanese lawyers in the foreign lawyer's home country. James D. Southwick, Michael J. Chapman, Paul J. Tauber, *supra note* 127, at 961.

registered foreign legal consultants.<sup>204</sup> Foreign lawyers are allowed to form limited partnerships, called specified joint enterprises (*tokutei kyodo kigyō*) instead of allowing *bengoshi* and foreign lawyers (*gaiben*) to form partnerships, but they are highly regulated, which does not provide the framework needed for effective teamwork between *bengoshi* and *gaiben*; nor will further adjustments to that system meet the needs of foreign lawyers in Japan.<sup>205</sup>

Foreign lawyers are required to follow strict accounting guidelines in order to share offices, and the joint enterprise can give only limited advice on Japanese law.<sup>206</sup> Japanese lawyers can form partnerships with individual foreign lawyers, but not with a foreign lawyer's law firm.<sup>207</sup> The restrictions on foreign lawyers to employ or form partnerships with local lawyers severely handicaps a law firm's ability to serve its clients, and inhibit the growth of international law firms because they force branch offices to farm out work locally.<sup>208</sup> Besides, the required annual residency of 180 days and the limit to only one office in Japan,<sup>209</sup> combined with the high cost of maintaining an office in Tokyo, effectively keeps most foreign lawyers out of practice in Japan.<sup>210</sup>

In addition, education, language, and cultural differences have worked to keep foreign lawyers from establishing a larger presence in Japan.<sup>211</sup> With regard to determining a legal professionals' form of association, it is advisable to encourage them to best serve their clients' needs and to establish a legal environment that is conducive to international business and investment and that supports deregulation and structural reform.<sup>212</sup> Thus, it is recommended that foreign lawyers be allowed to hire Japanese lawyers; to provide advice on so-called third country law (that is, the law of a country other than the one that is a foreign lawyer's home jurisdiction) on the same basis as Japanese lawyers; and to establish professional corporations, limited liability partnerships (LLPs) and limited liability corporations.<sup>213</sup> It is further

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<sup>204</sup> Out of the industrialized countries, Japan's regulations on foreign lawyers are indicated to be the most stringent and discriminatory. Michael J. Chapman, Paul J. Tauber, *id.*, at 960.

<sup>205</sup> See, Karen Dillon *supra note* 202, at 52, cited by Orlando Flores, *supra note* 129, at 169.

<sup>206</sup> Karen Dillon, *id.*, at 55, cited by Orlando Flores, *id.*

<sup>207</sup> Karen Dillon, *id.*, at 52, cited by Orlando Flores, *id.*

<sup>208</sup> Bob Rossi, NAFTA Won't Open Doors for Lawyers; Despite Negotiations, Limits on Foreign Law Practices Will Remain, *Legal Times*, Oct. 25, 1993, at 8, cited by Orlando Flores, *id.*

<sup>209</sup> Kenneth S. Kilimnik, Lawyers Abroad: New Rules for Practice in a Global Economy, 12 Dick. J. Int'l L. 323 (1994) cited by Mara M. Burr, *supra note* 49, at 685; USTR, NTE(Japan) *supra note* 3., at 256 (2004).

<sup>210</sup> Kenneth S. Kilimnik, *id.*, cited by Mara M. Burr, *id.*

<sup>211</sup> Mara M. Burr, *id.*

<sup>212</sup> USTR, NTE(Japan), *supra note* 3, at 255 (2004).

<sup>213</sup> *Id.*, at 221 (2003).



recommended that the *Nichibenren* and the mandatory local bar associations provide *gaiben* with effective opportunities to participate in the development and enforcement of all laws and rules that affect them.<sup>214</sup>

Many of the anti-competitive practices indicated by the trade partner countries in the Japanese accounting and legal services markets seem to be established and operated to maintain the domestic markets, especially when considering the demands from the Japanese and foreign multinational enterprises' activities in Japanese markets,<sup>215</sup> which is similar to the situation in Korea. There may, however, be specific instances when such anti-competitive practices are affected by the cultural or social circumstances peculiar to the two countries.

### C. Financial Market

With respect to the insurance industry, Japan's private insurance market<sup>216</sup> is the second largest in the world after that of the United States.<sup>217</sup> The Japanese insurance sector is regulated by the Financial Services Agency (hereinafter, FSA),<sup>218</sup> which was established in 1998. The FSA is in charge of all aspects of financial regulation in Japan, including inspection, supervision, and surveillance of financial activities related to banking and securities business in addition to insurance, the function of which is similar to Korea's Financial Supervisory Service<sup>219</sup> established after the financial crisis in 1998.<sup>220</sup>

As the Japanese government has pursued further deregulation and liberalization in this sector, and despite the noteworthy success in this sector, a number of controversial issues have been raised by trade partner countries: These include further liberalization and expansion of the insurance market, as well as the

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<sup>214</sup> *Id* ; After more than 15 years of urging by the foreign legal community, Japan enacted legislation in 2003 that substantially eliminates restrictions on the freedom of association between foreign and Japanese lawyers, effectively permitting partnership and employment relationships between foreign and Japanese lawyers, which will be followed by the implementation of the new system of Joint Law Firms (*kyodo jigyo*). USTR, NTE(Japan), *supra note* 3, at 255, 271 (2004).

<sup>215</sup> The scarcity of qualified lawyers, and accountants needed for, for example, M&A activities is indicated to inhibit FDI to Japan. USTR, NTE(Japan), *supra note* 3, at 272 (2004).

<sup>216</sup> The Japanese insurance market is composed of private insurers, a large public sector provider of postal life insurance products (Kampo), the National Public Health Insurance System, and a web of mutual aid societies (Kyosai), USTR, NTE(Japan), *supra note* 3, 268 (2004).

<sup>217</sup> *Id*.

<sup>218</sup> The Kampo and the Kyosai are excluded from regulation by the FSA. *Id*.

<sup>219</sup> See, Eun Sup Lee, Regulation of Insurance Contracts in Korea, 13 *The Trans'l Lawyer*, 6 (2000).

<sup>220</sup> Eun Sup Lee, *supra note* 143, at 156.

introduction of new products such as variable annuities and possible expansion of sales of such products by banks.<sup>221</sup> The trade partner countries have required the Japanese government to adopt the policy of increasing competition as a basic principle of regulatory reform,<sup>222</sup> and to provide the foreign and domestic insurance industry meaningful opportunities to be informed of comment and exchange views with Japanese officials<sup>223</sup> regarding the development or revision of guidelines or regulations. Such opportunities are provided through such means as public comment procedures<sup>224</sup> and participation on government advisory groups.<sup>225</sup>

The FSA is also required to shorten standard approval periods and to move to a quicker, less-burdensome file – and – use system for certain insurance products.<sup>226</sup> Partner countries are concerned about the policyholder protection corporations, which are mandatory policyholder protection systems created by Japan in 1998 to provide capital and management support to insolvent insurers.<sup>227</sup> Despite their strong and stable presence in the Japanese insurance market, foreign insurers continue to have serious concerns about the transparency and fairness in funding framework.<sup>228</sup>

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<sup>221</sup> USTR, NTE(Japan), *supra note 3*, 270 (2004).

<sup>222</sup> For the motivations for deregulation in Japan from the 1980s to 1990s, from the viewpoints of the trade partner countries, see Hiroko Yamane, Deregulation and Competition Law Enforcement in Japan: Administratively Guided Competition?, 23 *Journal of World Competition* 3, 142 (2000).

<sup>223</sup> For the bureaucrats' use of the deliberate councils, that is, *shingikai* to diminish opportunities for open conflict in policy adjustments, see Ken Duck, Now That the Regulation of Industry and Governance, 19 *Fordham Int'l L.J.* 1699–1700 (1996); 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).

<sup>224</sup> Japan adopted its first government–wide Public Comment Procedures in 1999 to solve the problem that even though public policy and regulations are made by and instituted through constant interaction with the private sector, few opportunities exist for interested parties having no special access to the authorities or related councils to have any input into the legislative process. USTR, NTE(Japan), *supra note 3*, at 204 (2003). However, it has been evaluated to have only marginal impact on the substance of new regulations. See *id.*, at 254 (2004).

<sup>225</sup> *Id.*

<sup>226</sup> In Japan, for example, life insurance is regulated through control of rate estimation factors, which restrict effective price competition among insurance companies, which is similar to the case of Korea. In the United States, life insurance is regulated through indirect rate controls. See, Eun Sup Lee, Efficient Regulation of the Insurance Industry to Cope with Global Trends of Regulation and Liberalizations, 13 *Bond Law Review* 1, 59 (2001).

<sup>227</sup> USTR, NTE(Japan), *supra note 3*, at 270 (2004).

<sup>228</sup> Eun Sup Lee, Anti–Competitive Practices as Trade Barriers used by Korea and Japan. Focusing on Service and Investment Markets, 16 *Bond Law Review* 1, 157 (2004).

Those concerns and practices raised by trade partner countries as trade barriers to Japanese financial markets are similar to those of Korea: they are in part evaluated as trade barriers operated intentionally to protect the domestic markets, however, substantial parts of them are seemingly rooted in consumer-protection or market-stability oriented policy.

#### D. Investment Market

Although most direct legal restrictions on FDI have been eliminated, bureaucratic obstacles remain, including the occasional discriminatory use of bureaucratic discretion,<sup>229</sup> particularly through the use of administrative guidance.<sup>230</sup> While Japan's foreign exchange laws currently require only *ex post* notification of planned investment in most cases, a number of sectors (e.g. agriculture, mining, forestry, fisheries), which have traditionally been the national strategic industries in Japan, still require prior notification to government ministries.<sup>231</sup> More than government-related obstacles,<sup>232</sup> however, Japan's low level of inward FDI flows<sup>233</sup> reflects the impact of exclusionary business practices<sup>234</sup> and high market entry costs.<sup>235</sup>

Difficulty in acquiring existing Japanese firms, as well as doubts about whether such firms, once acquired, can continue normal business patterns with other Japanese companies<sup>236</sup> makes investment access through mergers and acquisitions

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<sup>229</sup> For the ability to treat with these types of barriers in Japan through WTO procedures, see James D. Southwick, *supra note* 11, at 924-925.

<sup>230</sup> For the increasing effectiveness of administrative guidance in Japanese industrial policy, see Frank K. Upham, *Law and Social Change in Post War Japan*. 169 (1987), cited by Ken Duck, *supra note* 224, at 1703.

<sup>231</sup> USTR, NTE(Japan), *supra note* 3, at 221 (2003).

<sup>232</sup> For the government - related obstacles in Japan from the viewpoints of competition policy and transparency, see Eun Sup Lee, *Anti-competitive Practices as Trade Barriers used by Korea and Japan*, 17 *The Transactional Lawyer* 2, 187-192 (2004).

<sup>233</sup> Despite being the world's second largest economy, Japan continues to have the lowest inward FDI as a proportion of total output of any major OECD nation. In 2000, for example, Japan's total cumulative stock of FDI totaled only 1.1 percent of GDP, compared with 12.5 percent for the United States and 29 percent for the United Kingdom. USTR, *id.*, at 271 (2004).

<sup>234</sup> For the exclusive business practices in Japan as a crosscutting issue among trade partner countries, see James D. Southwick, *supra note* 11, at 974-975.

<sup>235</sup> For the private anti-competitive practices that could undermine the benefits of regulatory reform in Japan, see James D. Southwick, *supra note* 11, at 956.

<sup>236</sup> A key reason for the persistence of anti-competitive business practices in Japan to result in these doubts is indicated to be the historically weak antitrust enforcement

(M&As) more difficult in Japan than in other countries.<sup>237</sup> Even though the pressure of economic restructuring and the surge in M&As have weakened, to a certain degree, *keiretsu* relationships,<sup>238</sup> for example, U.S. investors cite the lack of financial transparency and disclosure as well as differing management techniques as the obstacles to M&A activity in Japan.<sup>239</sup>

More specifically, partner countries urge Japan to consider measures that will assist key aspects in improving Japan's direct investment environment, including developing more active and efficient markets for M&As<sup>240</sup> in order to enhance the productivity of capital in Japan, improving land market liquidity and foreign investors' access to land,<sup>241</sup> and increasing the flexibility of Japan's labor markets.<sup>242</sup>

Japan has enacted new and revised legislation providing opportunities for foreign investors. For example, the Industrial Revitalization Law provides existing firms undergoing reorganization (both domestic and joint-venture) with tax and credit relief once the Japanese government approves the firm's business restructuring plan.<sup>243</sup> A new bankruptcy law (the Civil Reconstruction Law) also may provide investment opportunities as it encourages business reorganization, including spin-offs, rather than the forced liquidation of assets.<sup>244</sup> Other legislative changes now provide for stock options for employees, a key issue for foreign firms wishing to attract high quality employees.<sup>245</sup> In addition, Japan has prepared legislation on corporate divestiture that will facilitate a company's streamlining efforts.<sup>246</sup> New accounting rules are bringing Japan close to the international standard and to a degree have helped reduce extensive cross-shareholding among firms, as the new accounting rules identify non-performing asset and liabilities.<sup>247</sup>

The practices and barriers to the Japanese investment as cited above are not in

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record of the Japanese Fair Trade Commission. USTR, NTE(Japan), *supra note* 3, at 252 (2004).

<sup>237</sup> *Id.*, at 272.

<sup>238</sup> For the more detail of the exclusive buyer-supplier relationship, that is, *Keiretsu* relationships, see James D. Southwick, *supra note* 11, at 928, cited by Eun Sup Lee, *supra note* 78, at fn. 107.

<sup>239</sup> USTR, NTE(Japan), *supra note* 3, at 272 (2004).

<sup>240</sup> For the U.S. proposals to improve the direct investment environments in the area of M&As in Japan, see *id.*

<sup>241</sup> For the U.S. proposals to improve the land market liquidity in Japan, see *id.*, at 238 (2002).

<sup>242</sup> *Id.*, at 238-239.

<sup>243</sup> *Id.*, 221 (2003).

<sup>244</sup> *Id.*, at 221-222.

<sup>245</sup> *Id.*, at 222.

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

step with Japanese economic development, which might be due to the government's traditional policy of protecting the domestic market. Some legal or administrative barriers could be eliminated or reduced easily under the current regulatory or deregulation reforms if they were enforced.<sup>248</sup> However, some barriers reflecting Japanese exclusionary business practices or social backgrounds could not be removed so easily.<sup>249</sup> Particularly, the practices reflecting the Japanese exclusionary business atmosphere seem unique, which are substantially different from those of Korea.<sup>250</sup> Additionally many of those practices are difficult to evaluate with regard to the multilateral norms included in the WTO Agreements<sup>251</sup> without pure investment regulations, which shall currently be treated bilaterally or plurilaterally with the concerned partner countries.

## V. Review

The above analysis shows that the trade barriers in the service market of the two countries have almost identical characteristics, scope, and effectiveness, even though there are differences in the degree of the criticism against those barriers from their trading partner countries.<sup>252</sup> This may be indicative of each market's economic value to their partners' foreign markets. For example, anti-competitive practices indicated by the Japanese trade partner countries in the Japanese service markets including the banking and insurance sector are very similar to those in the Korean service markets.

These practices reflect the policy objectives of both governments to emphasize consumer protection or stability of financial institutes rather than the institutes' competitiveness or operative efficiency, somewhat different from developed western countries. What is important, however, is that such policy objectives reflect the overall social and cultural environments of the two countries which stress stability rather than productivity or efficiency of any institute.

This result seems somewhat different from the study that the author made with

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<sup>248</sup> See Hiroko Yamane, *supra note 222*, at 142.

<sup>249</sup> See Eun Sup Lee, *supra note 78*, at 194-195.

<sup>250</sup> For the Japanese exclusionary business practices comparatively studied with Korean anti-import biased atmosphere, Eun Sup Lee, see *id.*

<sup>251</sup> See James, D. Southwick, *supra note 11*, at 925.

<sup>252</sup> There is basic and distinct difference in the practices in a few sectors including distribution industry of the two countries: an anti-competitive practice in Japanese distribution sector has traditionally been evaluated to be unique to Japan. See *id.*, at 927-928.

respect to the two countries' commodity markets,<sup>253</sup> which revealed that there were substantial differences between the anti-competitive practices of the two countries' markets; that is, some Japanese exclusive business practices in commodity markets were determined to be rooted in the intrinsic Japanese social atmosphere which might not be controlled easily by government policy and is different from that of Korea.<sup>254</sup> Substantial parts of service and investment barriers in Japan which are particularly related to the private markets without policy consideration may also originate from those exclusionary business practices intrinsic to Japanese markets.

Considering the over-all economic situations of the two countries, including the level of the development of the service and commodity markets of the two countries, this result, even though different from the commodity and investment markets, implies that the service markets are deeply affected by cultural factors as well. As viewed by international standards, the two countries' cultural backgrounds are almost the same, which makes their governments' policy objectives for their service market regulations very similar in their characteristics.<sup>255</sup>

For example, the Japanese excuse - from the viewpoints of the partner countries-for preventing foreign lawyers from participating in any type of litigation is that it is necessary to prevent Japan from becoming a litigious society,<sup>256</sup> which seem to be the same as that of Korea. This excuse may seem ridiculous or unreasonable from the market viewpoint or profit-centered approach adopted by western countries. In both countries, however, people have traditionally been very reluctant to stand up in court, which has sometimes been accepted as a short cut to individual bankruptcy, particularly in civil cases. People very often deliberately assume economic losses instead of bettering their situation through legal action in court. Considering the cultural and social atmosphere of the two countries, their governments are apt to be persuaded to protect their legal cultures from other western countries. There are many other situations in both countries' service markets, which reflect their particular cultural circumstances.

Regarding international regulations on the cultural aspects of trade in service, no cultural exceptions or provisions *per se* emerge from the text of GATS. This is in contrast with the case of GATT, where, even though it is far from being sufficient to deal with the cultural aspects of trade, there are a few culture-related provisions in the GATT.<sup>257</sup>

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<sup>253</sup> See Eun Sup Lee, *supra* note 78, at 177-208 (analyzing the anti-competitive practices of the two countries dividing into those in domestic markets and those between frontiers).

<sup>254</sup> See *id.*, at 194-195.

<sup>255</sup> See Orlando Flores, *supra* note 129, at 167 (stating the cultural concerns prompting, maybe, countries to limit foreign lawyers, scope of practice).

<sup>256</sup> Japan Said to Eye Easing Rules on Foreign Lawyers Practicing in Japan, *Int'l Bus. & Fin. Daily*, Mar.23, 1994, cited by Orlando Flores, *id.*

<sup>257</sup> They are cultural exclusions such as Article XX(f) (protection of national treasures of artistic value), Article XIX(emergency action on imports of particular products), and Article IV(special provisions to cinematograph films). These exclusions,

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

At the same time, it is advisable to establish the interpretation rules of the WTO Agreement that fully take into account the cultural and social environments unique to the member countries.<sup>258</sup> These newly established rules would fully consider the individual countries' specific situations regarding the cultural, social, political, or historical backgrounds and atmosphere when they apply the WTO rules and regulations to certain countries.

The establishment of such rules might seem to be contradictory to the spirits embodied into recent international trade-related regulations toward hard laws as in the case of the WTO regime from the GATT.<sup>259</sup> However, for the practical and efficient formation of international trade and competition regulations, their uniform enforceability should properly be mixed with flexibility,<sup>260</sup> which, however, should be complemented with the adoption of strict rules of evidence. Even though it might be very difficult and complicated to evaluate sufficiently the anti-competitive practices in the service markets and anti-competitive TRIMs in terms of cultural and social factors as well as economic and political factors, such an undertaking is recommended in order to continue to promote international trade in services without serious cultural contradiction among the member countries under the WTO system.

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however, are not sufficient to consider the specific cultural/social backgrounds of circumstances of the individual member countries.

<sup>258</sup> For the lack of specificity regarding cultural products within international trade, see Karsie A. Kish, *Protectionism to Promote Culture: South Korea and Japan, A Case Study*, 22 *U. Pa. J. Int'l Econ. L.* 161-162 (2001).

<sup>259</sup> Hard law refers to a system of norms as to which a relatively high expectation of compliance exists. Frederick M. Abbot, *supra note* 3, at 196.

<sup>260</sup> Regarding this, it has been suggested: "For example, in the case of the TBT Agreement, taking into account the existence of legitimate divergences of geographical and other factors between countries the Agreement extends to the members the regulatory flexibility to reflect the differences between them. There, the degree of flexibility is limited by the requirement that technical regulations should not become unnecessary obstacles to trade ... These provisions extending flexibility to the application of the TBT Agreement could be expanded and applied more generally to the construction of the WTO Agreement concerned" Eun Sup Lee, *supra note* 143, at fn. 254.

Along with the incorporation of the aforementioned provisions into GATS and the establishment of such construction rules, it is also advisable to improve the current WTO dispute settlement mechanism: One approach to improve the current dispute settlement mechanism is to establish an independent GATS dispute settlement body including a panel and an appellate body. The panel and the appellate body would be constituted of permanent members with the properly-specified qualifications to deal with the cultural, social, economic and political aspects of the disputes, and appointed by the WTO through open - competition procedures.<sup>261</sup>

Hence the GATS dispute settlement framework would be operated like the well established domestic-like international court with a two-tier mechanism with reliable authority, which could provide a more predictable legal environment in coordinated international service markets.<sup>262</sup> The establishment of such an independent GATS dispute settlement body would also be helpful to establish clear construction rules of the provisions of the current WTO Agreements, which take into sufficient consideration the unique and specific situations of the individual countries.

Another way of stating the situation would be that current dispute settlement mechanisms under the GATS might not be sufficiently capable to resolve controversial disputes with respect to trade in services, which were established without sufficient consideration of the cultural aspects of trade in services.

## VI. Concluding Remarks

Many of the competition and trade-related laws in Japan and Korea, particularly in the service and investment markets, have been enacted and modified passively due to the expressed or implied pressure from their trade partner countries and to the requirements of international organizations like the WTO and OECD. Trade pressures on both countries in the service and investment fields were particularly serious from the 1980s to the 1990s,<sup>263</sup> during which both countries took various measures to open and liberalize their service markets. Thus, such enactments or modifications were not a voluntary response by the governments of both countries to internal public and private sector concerns.

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<sup>261</sup> This constitution of panel of GATS dispute settlement body could also decrease the possibility of the United States to rely on unilateral measures under Section 301. See Alan Wm. Wolff, *supra note* 26, at 1027 (stating "that the panel itself is likely to consist of busy diplomats with other, more pressing, responsibilities.").

<sup>262</sup> For the other soft approach through the non-binding panel to treat the disputes raised from competition policy, see Jason E. Kearns, *supra note* 1, at 313.

<sup>263</sup> For the detailed discussion on the trade friction between Korea and the United States in the field of service industry as well as the commodity field, see Eun Sup Lee, Regulation of Foreign Trade in Korea, 26 *Geo. J. Int'l & Com. L.* 155-159 (1996).



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

Competition policies or anti-competitive practices, particularly in the service and investment markets, are substantially affected by the historical, political, cultural<sup>264</sup> or social fabrics or environments of the individual countries.<sup>265</sup> This makes it difficult to evaluate competition policy under uniform standards of international norms as well as to produce internationally accepted uniform norms to regulate competition-related matters. In consideration of this point, the fact that the anti-competitive practices of both countries have been comparatively reviewed from the viewpoint of international trade norms or competition norms that have only been discussed, but not yet established, without consideration of other external factors limits the research.

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

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<sup>264</sup> For the Japan's cultural distinctiveness in relation with competition policy, for example, see Tony A. Freyer, *Prevention and Settlement of Economic Disputes Between Japan and the United States*, 16 *Ariz. J. Int'l & Comp. Law*, 168-169 (1999).

<sup>265</sup> For the good faith difference among countries, for example, see Frederick M. Abbott, *supra note 3*, at 186.