TRADE AND COMPETITION POLICY IN A GLOBAL ECONOMY: CONVERGENCE OR DIVERGENCE

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I. INTRODUCTION

Recently, there are hot debates on the interrelationship between trade and competition policy in the context of the globalization of markets. This area has a long history and there have been a vast volume of papers, proposals, conferences on the interface between these trade and competition policy. After such an intensive discussion among outstanding researchers and practitioners, very different opinions are still being posed on how to deal with this issue, because this issue is necessarily accompanied with political, economical, legal problems at both domestic and international level. However, in accordance with the globalization progressed, a deep interpenetration of national economies of individual nations have become so closely intertwined that the traditional dichotomy between a domestic economic policy and foreign/international economic policy has become less meaningful.

Trade and investment liberalization, the development of international competition, regulatory reform and rapid technological developments have obviously contributed to this globalization process. All of these developments have changed fundamentally the conditions for competition. Markets have become more open and interconnected, and competition is increasingly transcending national boundaries and penetrating deeply into national markets. The process of trade and investment liberalization has to a certain extent shifted the emphasis from trade restraints by national governments to competition restraints by private companies as obstacles to international investment and trade flows. This has led to an increased awareness of inter-linkages between trade and competition policies.

Today, I would like to address interface issue between trade and competition policies from the perspective of policy objective and how the challenge of globalization would have implications for the relationship between these policies.

II. Trade and competition policy: complements or substitutes?

Theoretically speaking, both policies have a common foundation as reference point: the theory of free trade and the theory of perfectly competitive market for the attainment of economic efficiency in resource utilization. The analysis typically starts from there by
identifying possible sources of market failures or imperfections and their consequences for achieving the economic welfare and resource utilization goals. Of course, in the real world, the circumstances are far from the ideal first-best world, and the terms of both “trade policy” and “competition policy” are used in a various meaning among nations, and practical economic policy mix of each nation is usually different from “pure” consistency in light of maximization of national economic welfare, aside from distribution concern, various market failures and distortions and accompanying cost of reallocation of resources. In addition, from a dynamic economic perspective, some reliable scholars support that industrial policy can be successful in the initial stage of development, and during these earlier stages of economic development, it may be necessary to shield LDC firms from foreign competition, adopting “infant industry” policies. Accordingly, nations in the real world face the policy question “should competition be encouraged even in relatively earlier stages of development?”.must be always raised in a more realistic framework, while promoting the value of competition generally has seemed to gain an established position.

A number of clear distinctions between trade policy and competition policy have been raised and these differences have characterized the consequence of development of each policy. Among the distinctions, the following is the most basic and important: Trade policy is “international” in nature and addresses government-imposed barriers to trade and investment in contrast with competition policy that addresses privately erected barriers to competition. Because of this nature of trade policy, it is only natural that trade and investment liberalization have been progressed through the diplomatic negotiations among nations, stamped with “mercantilistic” export interest. This means to stress “market access” concern and balance among nations and has formed the reciprocity principle for the framework of trade liberalization as seen in the GATT/WTO. Thus trade policy, at least in a practical meaning, concerns export interest of supplier groups as a distinct objective, as well as enhancing national economic welfare.

In contrast, competition policy is originally “domestic” in nature and concerns national economic welfare within the jurisdiction primarily. Targets of the regulation happen to include foreign business entities, and as above-mentioned, the globalization has increased the cases where anti-competitive behaviours could have cross-border effects. Thus, except for the case of the United States, it is thought that market access concern itself could not justify an extraterritorial application of competition law, whereas market access concern is generally thought to be very important by the jurisdiction of that market. Accordingly, competition policy has been enforced under national law in accordance with each nation’s ability and incentive without any effective
international adjustment and/or control, aside from various conflicts among sovereignty on the extraterritorial application of its national law.

Although the globalization process has made this distinction to a certain extent less meaningful and national competition policy enforcement as a governmental action has become more and more “trade policy” concern as seen in Japanese *keiretsu* problem or messy consequences of Kodak-Fuji dispute under the WTO, this basic distinction between trade and competition policy should be kept intact(Scherer, 1994). On the other hand, there is strong argument that market access concern should be placed at the central position in the competition policy agenda(Fox, Rosenthal). As we know, only two thirds of the WTO members have a competition law or are in the process of establish one. In countries which have not chosen to introduce such a domestic instrument, domestic anticompetitive practices may block market access and foreclose foreign competitors (Comanor and Rey, 1996). The case of lax or ineffective competition law enforcement would lead to the same result. From the trade policy field, it is the problem to be solved after traditional governmental trade barriers such as tariffs and quotas have been eliminated. However, even assuming that the value of competition has generally accepted among nations, there still exists a variety of economic policy mix choice as a practical policy instrument level among them, partly depending on the stage of economic development and maturity of economy. From this understanding, market access concern should not assure sufficient justification for international competition policy agenda of any binding nature nor extraterritorial application of national competition law. Even thinking so, there still exists a definite functional complementarity between two policies to progress the value of competition in a global economy.

On the other hand, considering the anticompetitive effect of foreign/global suppliers’ practices on domestic markets, it is clear that private international anticompetitive practices or monopolization by global firms of domestic markets can prevent economic development and that failure by developing countries to have adequate means to fight such practices exposes them to significant costs and setbacks on the road to economic development (Jenny, 2002). This concern would lead to the policy implication that each countries should have a competition law to regulate such business practices. This conclusion does not contradict the one on market access concern. The point that be stressed is that each nation should be given a policy mix choice to realize competition in its society. At least, a reciprocal balance of mercantilistic market access concern solely could not be a good reason to bring a binding international competition policy into the global economy.
III. Interface issue: Current legal position and applicability of reciprocity

In spite of the tentative conclusion stated in Section II, there are curious evidences to promote binding international competition rules. Considering current WTO Agreement, certain international competition rules are already set in either intentionally or accidentally, even in a haphazard and unclear way. While one should be cautious for the accidental ones because there is always a risk of incurring a transaction cost between the members in dispute to make clear what the obligations really mean, these competition rules are obviously incorporated from the policy concern of trade liberalization.

National Treatment
It is very ordinary interpretation that discipline of GATT Article III on domestic regulation reach competition law. That means, Article III prohibits members from applying its competition law in a manner that discriminate against imported products. The wording of Article III contains “all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use”. And the WTO Appellate Body in Japanese tax on alcoholic beverages case stated firmly that “Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production.”

From the market access concern, there still is very difficult problem remained. Although Article III is able to reach regulatory actions such as a competition law enforcement by governments, there are very few cases where the domestic competition law at issue explicitly provide to discriminate against foreign products. As the legislations are not facially discriminatory in almost all cases, one would find it very difficult to prove de facto violation of national treatment obligation because even what constitutes “discrimination” in the case of competition law would be very controversial. Furthermore, more critical cause of the market access problem is not the discrimination against foreign businesses, but a lax competition law enforcement itself. In that case, market structures and incumbents’ behavior in combination with lax competition law enforcement disadvantage new entrants. More often than not, foreign companies find themselves in the position of new entrants, but there may also be at least some domestic companies in a similar position. Then it is difficult to produce a strong de facto national treatment argument.
Non-Violation Claim

GATT Article XXIII:1 provides the right of claim in cases where it is alleged that a member country’s laws or measures applied, whether or not it conflicts with the obligation, results in “nullify or impair” the benefit accruing under the Agreement. As far as the application (or arguably failure of application) of competition law falls under “measures” in the meaning of Article XXIII:1, competition policy enforcement could be the coverage of the WTO at least theoretically. Nonetheless, in reality, one would find a similar difficulty in the case of Article XXIII non-violation claim, because in order to succeed in the case, a complainant have to prove the governmental measures were put in place after the most recent round of multilateral tariff negotiation. Furthermore there is no legal presumption between practices at issue and “nullification and impairment” of the benefit, and the complainant also prove causality between them.

This article came into prominence in the Kodak-Fuji case where the US alleged that the Japanese government had applied its fair trade laws including competition laws in such a way as to allow Fuji to exclude Kodak from certain distribution network, especially by not allowing Kodak to use the wholesalers Fuji controlled. In its decision, the WTO Panel appears to have to adopted a fairly wide but strictly legalistic interpretation of the GATT text. This dispute revealed that it would be very hard to use Article XXIII non-violation claim in competition cases. On the other hand, the WTO Panel made it clear at least that, while there had to be some governmental involvement, WTO laws did not rule out the possibility to address the action taken by private parties.

State Trading Enterprises/Monopolies and Exclusive Service Suppliers

GATT Article XVII authorizes members to maintain state trading enterprises, even monopolies, so long as they do not discriminate between home and foreign goods in their purchases and sales. The word “state” need not necessarily refer to ownership. Rather, it depends on the extent to which an enterprise, even if it is a private entities, has been bestowed exclusive or special rights by government.

GATS Article 8 provides a corresponding obligation for the service sector and the more. Article 8 requires that, where the member has agreed to open a certain service sector to trade, a supplier which retains a monopoly in a related market must not “abuse its monopoly position” when dealing in that market. Article 9 provides that “Members recognize that certain business practices of service suppliers ⋅⋅⋅ may restrain competition and thereby restrict trade in services. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating
Telecom Annex/Reference Paper on Basic Telecom

In the field of telecommunications, the GATS annexed a special agreement which provides more specific right and obligation for that sector. In addition, the negotiation on the basic voice telecom continued after the end of the Uruguay Round and “Reference Paper” was agreed in 1997 which spelled out in more detail what these obligations entailed, including cost-based access of new operators to incumbents’ networks. This accomplishment has been appreciated as a first, but sector-specific, set of competition rules for the international system.

TRIPs Agreement

Intellectual Property rights are intended to foster innovation, industry and competition. In that meaning, TRIPs Agreement of the WTO by itself could be deemed as a kind of international competition policy rules, which requires all WTO members to adopt patent and copyright laws along the lines of developed countries. Also, the TRIPs Agreement specifically refers to competition policy. It allows members to take appropriate steps, such as compulsory licensing, when they can show that an anti-competitive abuse has occurred (Art. 31, 40). Among other key issues are the treatment of parallel imports, vertical restraints and the international exhaustion of intellectual property rights.

Thus the WTO Agreement, as stated above, already contains competition policy concern, even in a form of fragmentary coverage. If international competition rules could be on agenda and a competition policy of each nation become an object of international negotiation just as other governmental measures that impede trade liberalization, the next question is whether reciprocity could become an effective vehicle for members to commit themselves with binding competition rules. Reciprocity involves one country’s lowering of barriers if, and only if, another country reciprocates. As we know, reciprocity would be workable only if it could limit competition against foreign companies of a specific country that fails to enforce its competition policy instrument. But it is not a likely scenario. Otherwise, a member refrain from extraterritorial application in exchange for a partner’s commitment on competition policy enforcement? Not likely, either.

Rather, it has been proposed that certain elements of the TRIPs model could be useful for the establishment of such a multilateral framework on competition. As with the
TRIPs Agreement, an international competition framework could endorse the broad principles of non-discrimination, national treatment, most favored nations and transparency.

Another but related question is whether there should be a risk of race-to-the-bottom in competition policy field. Two opposing views exist. The first view is that without international competition rules countries will select those internal and external policies that maximize domestic welfare at the expense of global welfare. In terms of competition policy, “it can be argued that a race to the bottom could take place, leading to lax competition policies”. Trachtman provides the more general view that regulatory competition lowers the level of regulation to render its compliance less costly and that a firm will move to other jurisdictions with lower regulatory costs (Trachtman, 1993). In contrast, there is an opposing view that a race to the top in competition policy can occur because “nations face strong incentives to implement vigorous competition policies” (Iacabucci, 1996). Which view predominates? Trachtman’s race-to-the-bottom argument brings pollution or tax havens to our mind. Then are competition law havens realistic? The answer would be no. Many factors determine the location of industry, and a lax competition policy regime is unlikely to be an important determinant of the location decisions for new plants. Moreover, the effects doctrine allows extraterritorial application of other countries’ domestic competition laws reach any anticompetitive behaviours among companies located in the competition havens which have cross-boundary effects. As far as this concerns, locating to the competition havens strategy would have no meaning.

Accordingly, assumed risk of race-to-the-bottom would not offer any justification for international competition rules, neither TRIPs model approach which provides a minimum threshold of competition policy would risk race-to-the-bottom among nations.

IV. Conclusion

Trade and competition policy has been much more inter-linked as the globalization process deepens. Although both policies are functionally complemented, market access (trade policy) concern by itself would not justify international competition rules of any binding nature nor extraterritorial application of national competition law. Only possible justification for international competition rules is consensus among nations. As of now, however, there seems insufficient consensus in the world about appropriate competition policies to try and harmonize law through the WTO or other international institutions. More moderate and constructive way to achieve the objective would be
education and development of human resources for better understanding of the value of competition for economic development.

As a policy tool in place of extraterritorial application of national competition law to realize market access concern, the enhanced web of bilateral or regional cooperation of competition authorities is best available. Especially, positive comity is an important development even though it is only as a voluntary basis. The heart of positive comity is that one jurisdiction refers a matter to another, in the expectation that the receiving jurisdiction will investigate the claim and is better able to do so. This is a policy tool that has some room for development. The crucial point is that this mechanism requires a degree of trust and confidence by the referring authorities that the referred jurisdiction will undertake a serious investigation. It also depends on the ability and experiences of referred authorities including compulsory investigation power, independency, and so on. There are now over seventy countries in the world with competition laws and authorities. Positive comity mechanism could be a useful policy tool in the near future, through a capacity building cooperation and sharing experiences of competition policy enforcement among nations.

Other development is bilateral or regional trade agreements that contain competition provisions altering or supplementing national competition policies. This approach is also premised that the agreement among the negotiating parties has reached.

Finally, when international negotiation on multilateral competition rules is on agenda, TRIPs model approach will be available without any risk of race to the bottom I believe.

REFERENCES:

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