New Issues at the World Trade Organization: Trade and Competition Policy and Trade and Investment Policy

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The IGE, with the IIE, has each year sponsored a conference on Korea and U.S. relations and we have very much profited from our four-year collaboration.

I am glad that Dr. SaKong did not read off the list of my past position because in fact there are a significant number of them and if they are read off, the feeling that you would inevitably get is that I must have been fired quite a few times or otherwise, I would not have held so many positions. But one of the positions I did hold was, on a leave of absence-basis, last year to be a consultant to the World Trade Organization in Geneva, where I worked on the new issues that were endorsed at the Singapore ministerial meeting of the WTO. In particular, the Singapore meeting endorsed the creation of two new working groups: one on trade and competition policy and the other on trade and investment policy. Now what is very interesting is that the trade and investment working group is supposed to report back to the OECD ministries in two years' time, with recommendations as whether or not the multilateral rules as administered by the WTO should be enlarged or amended to include the new rules pertaining to trade and investment.

What is interesting about this is that OECD is already in the process of negotiating such rules. This is the MAI(Multilateral Agreement on Investment), to which quite frequent reference has been made and of course, in the past weeks there has been

considerable reference to the MAI in the Korean Press. Both of the working groups are realizations of what is a growing consensus amongst trade policy specialists and that is in the current international economic environment, where there is an ongoing globalization of the world economy which in turn has been propelled by significant reductions in normal traditional trade barriers, that is to say, tariffs, and non-tariff barriers, such as quotas and OMAs(Orderly Marketing Agreement) and alike. With the reduction of these, there has been revealed that there are a whole host of what might be called behind the border measures that inhibit international commerce. And such measures include three categories: governmental, such as regulations, restrictions on activities that discriminate against international business. What is internalized by the government officials is that such measure where they inhibit international commerce, particularly where they inhibit the exports of another country, these already may be subjected to international trade laws, in particular, they might be in violation of GATT Article III, which is National Treatment or to be found to be falling under the so-called non-violation provisions of the GATT under Article XXIII.1.b. Those of you know something about the GATT and the trade law might say that those have been in existence since the 1947. What is new now is the very significant change in the dispute settlement procedures which were enabled by the conclusion of the Uruguay Round and which has resulted in a dispute settlement process which is less friendly to the country that is guilty to the discriminatory practices, and much more friendly to the complaining country. The change that this has brought about is absolutely enormous. I will give you an example with the instance of the U.S. dispute over auto parts with Japan. The U.S. trade representative threatened to invoke the very much feared Section 301 of the trade law against Japan if they did not increase the amount of U.S. auto parts imported by Japan. The

Japanese trade minister, Hashimoto, told Mr. Kantor that Japan will file a complaint with WTO that Section 301 is in violation of WTO obligations. After consulting his lawyers, Mickey Kantor withdrew the comment invoking the Section 301.

In view of Washington law, the section 301 is now non-operative, never to be invoked again, because of Hashimoto's mere threat to take this to WTO procedures, where in the opinion of expert to the U.S.T.R., the U.S. would have lost the case and would have been in the extremely embarrassing situation of either complying to the WTO panel of recommendation which would have revoked the Section 301 or stand in defiance of the WTO, which was something that U.S. was unprepared to do. In fact, in the last two years the U.S. has lost eleven WTO cases and has complied with every single one of those decisions. This is how powerful the new WTO procedure is and is greatly under-appreciated. WTO, under the new dispute settlement procedures and under existing rules is able effectively to reach government measures that inhibit international commerce. Incidentally, I do not think the Korean government has entirely internalized exactly how potent the WTO is in acting against untraditional domestic policies, that may have a discriminatory affect on international commerce.

The second category is private business measures or practices that might block access by foreign firms. If you look closely, at GATT law, it would appear that another provision of Article XXIII would apply to these: Article XXII.1.c. In fact, in 1960, the GATT working party ruled for a series of reasons, that GATT law could not be used against private business practices. WTO under the present rules can act against government measures, but not against private measures. The Trade and Competition Policy working group is about: to examine the situation and decide whether the rules should be changed, to give the WTO future power in this area. That is an unresolved issue.

There are in certain industries intrinsic economic factors that make those industries ones that are not susceptible to new entry by non-incumbent firms. There is very little that government policy can do about this. These are industries that are characteristically marked by very large cost of entry that are unrecoverable should the firm decide to exit it. An example: from how many firms can you buy electricity? No matter where you go, there is only one company from which you can buy electricity. That industry, by the nature of its intrinsic economics, is a monopoly in any given market and there is really very little that government policy or the WTO can do about that. Many analysts believe one very important international industry is in the process of becoming a so-called natural monopoly that will solely service the entire world market: market for large commercial aircraft. The Boeing Corporation is proposing to merge with MacDonnell-Douglass, the third and the weakest current seller of commercial aircrafts. The power to review this particular merger is being claimed not by the U.S. authorities, but by the Europeans who are, in part, concerned about the possible affects of the merger on the competitive status of their own airbus industries. The airbus industries is probably most global conceivable of industries, where mergers review is very much a domain of competition policy and the question of who has the authority. The Europeans are pursuing the merger review because the industry is a global market, despite the fact that the merging companies are based in United States. In the future, the development cost of the next generation of large airliner will be so big that probably only one firm will be able to undertake it. This likely implies the future merging of Airbus with Boeing. The question of who will regulate and review that particular merger is very interesting.

There is a general feeling among trade policy specialists that multilateral WTO rules should address these so-called "behind-the-

border" issues. There is a great deal of consensus as to that point, but less consensus as to exactly where do we go from there. This lack of consensus is in turn driven by philosophical differences that exist amongst various major governmental players in the world.

The philosophy generally held by the U.S. government regarding competition is that more competition, the better. More competition in the market will lead to lower prices, greater consumer choice, higher rate of technical innovation. Some Asian countries(Korea, Japan, and China) believe that competition is something that must be controlled, too much competition may be chaotic and ruinous. Recently, I have been observing happenings regarding foreign direct investment in the People's Republic of China. I noticed that they are concerned about things such as too many firms in an industry. This would never be the case in United States. Europeans are somewhere in between: competition is one way to achieve a goal, but not the only way. Depending on the circumstances, more competition may or may not be desirable. My impression is that Korea, in the past having sought to limit competition, is now moving in the direction of encouraging cautiously more competition in the sectors that were once restricted. And this in turn has engendered a shift in policy towards foreign investment and foreign firm entry into industries, going from severe restrictions on foreign entry to a cautious willingness to allow foreign investments to enter within Korea. My view of Korean policy is that you have not come to the American point of view, "the-more-competition-the-better", but you have moved away from the view that too much competition is necessarily ruinous: you are somewhere in between, towards the European view.

The MAI bears on all of this. The MAI started at the OECD, largely under U.S. initiative. The basic purpose is to foster liberalization towards foreign direct investment. The MAI is very

much in spirit that, in markets, more competition is better and that one way to achieve more markets is to liberalize policies towards foreign direct investments so as to allow new entry by foreign firms. It is important to keep in mind that this is the basic driving philosophy, at least of the American participation in the MAI, and the American government is the government that initiated this particular exercise. The MAI itself contains numerous provisions. These can be categorized into four basic categories. The first deals with provisions pertaining to the coverage of the agreement. The MAI is designed primarily to cover foreign direct investment, that is investments made by foreign investors in ongoing business activities in a country where the foreign investors assume managerial control. The issue is what other investments are covered under the MAI? How about portfolio and intangible investments? These issues of coverage is not fully resolved, but at the present moment, the trend seems to be towards a fairly wide coverage of the MAI.

The second deals with the provisions that pertain to investor protection, and in particular these include rules under which the governments can nationalize foreign investment, and the procedures and appropriate compensatory schemes that must accompany this. Nationalization of foreign investments is something that is really not a current event. We are in the era of privatization. An example is of Nissan, the Japanese automobile maker. Only few knows that Nissan is an expropriated American property. Nissan has its origins in Japanese subsidiary of the Ford motor company, which was nationalized by the militarist government in Japan during the 1930s. Why wasn't Ford's property given back after the war in the 1940s? If the MAI is adopted, that would be the rule: that it would be allowable to seize and nationalize properties of investors of the antagonist country, but it would be on the proviso that those investors must be compensated, or the

properties returned at the end of the war. But somehow, in the case of Nissan and many other electronic companies, including Nippon Electronics Corporation(NEC), are expropriated properties of U.S. and other foreign investors. The U.S. itself is not without this situation of sort. The Dupont Company, has its origins from the nationalization of German properties during the 1916-17 war. A U.S. firm called GAF is now the property of German firm BASF because a U.S. court determined that this was a firm nationalized during the second world war under a U.S. law that required its return. It was returned to the Germans in the 1980s. The point is that if the MAI comes into effect, the GAF treatment would be the world-norm. If it had been in effect 50 years ago, the structure of Japanese industry would be significantly different.

The real heart of the MAI is in the obligations of the nations that are hosts to foreign investment. These include such things as provisions pertaining to the right of establishment, national treatment, MFN(most favored nation), granting rights to foreign investors to transfer funds to pay dividends, place nationals in key positions, and a number of other obligations that would be required of the host countries. Now, each country that participates in the MAI is entitled to refuse to wholly accept these obligations and is allowed to enlarge a certain number of reservations and exceptions to these obligations. The main obligations are national treatment and requires foreign investors to be accorded under the national loan policy treatment, no less favorable than the not accorded domestic firms of similar characteristics. And MFN disallows discriminating against foreign investors by virtue of national origin. An example of the latter, if Korea were to open itself fully to foreign investments, but for the reasons of history decides to place some special restrictions on foreign investment from Japan. That, under the MAI, would be illegal. That would violate the most favored nation obligation of the MAI. You cannot

discriminate under the MAI on foreign investment on the basis of national origin as long as the national origin is another MAI participant country. Now what I would like to point out is that in Paris negotiations, the extent and number of resolutions that are allowable held up the completion of the MAI until the next year. Korea has registered over 40 resolutions. An average country registers around 11 to 12. Mexico, with 26, is the second highest. Korea is in an outlying position. There is a wide spread feeling amongst the negotiators that Korea should reduce its list.

The fourth major provision of the MAI has to do with dispute settlement: Who will have standing in the MAI to the dispute resolution procedures, which have yet to be fully established. There are two possibilities: the disputes can be brought to dispute settlement procedures only by governments, which is the case with the existing WTO procedures; alternatively, individual investors may have standing to bring disputes to dispute resolution. This would be the so-called investor-to-state dispute procedures. Such procedures already exist in the NAFTA, but not in the WTO. As far as I know, it is the only international agreement that has such a provision. On this matter, there seems to be a consensus moving within the OECD in direction in favor of investor-to-state dispute settlement procedure. Korea, as an outlier, opposes this. There are two places in the MAI negotiations that Korea stands apart from other negotiant countries. One is on the total number of national reservations to national treatment. The second is the Korean position on whether there would be allowed an investor-to-state procedure as a part of the MAI provision.

I would like to raise a general question. Is Korea's negotiating position in the MAI wholly consistent with the domestic program and domestic economic reforms that Korea is in the process of implementing? In particular, Korea has moved towards a policy of cautious endorsement of foreign participation in Korean

industries. Korea seems to seek all of the following from this participation.: Technology transfer, so as to bolster the technological capabilities of Korean firms where this capabilities are lacking. My observation says that Korea does not lack for technology. Korea also seeks technology spillover, slightly different from technology transfer. Korea seeks more competition in domestic markets. It also seeks to augment national saving through inward foreign investment to finance the current account deficit that Korea is now running and domestic investment requirements and the national saving that are generated to finance those requirements. All of these add up to a goal of Korea to use foreign direct investment as a means of increasing the domestic growth rates. The western views Korea's 6-7% annual growth as very satisfactory. Korea sees anything less than 6% is seen as recession. We would love to have your recessions, if those are indeed recessions. It is true, however, that Korea's growth has slowed down. What I would like to pose is whether there is a mismatch between these overall objectives and Korea's negotiating position in the MAI.

As an observer, I feel that negotiators have their minds set that their job is to concede as little as possible, to make fewest changes as possible. Korea is going through a period of rapid economic transformation and rapid policy reform. There is a whole different way of looking at international negotiation: instead of looking at it as a series of foreign demands that must be resisted, you can look upon it as a way of felicitating policy reforms that you want to make in any case. Felicitating it in the sense that sometimes it becomes a viable means to counter domestic opposition, especially opposition of political nature, by using an international obligation as the reason for implementing a reform that you believe that is in your best interest. Political opposition makes it difficult to implement. And I have wondered, in the whole negotiating process of participating in the MAI, if Korea may not be losing an

opportunity. That in this period of rapid economic reform, maybe what Korea should be doing is thinking less in terms of maximizing the number of reservations that it can get away with at OECD, rather instead asking which of the reservations were there to be dropped. Hence, put Korea under international obligations that would coincide with domestic economic objectives that Korea wants to undertake anyway. Hence, the MAI could be used as a way of felicitating domestic economic reform rather than something that is seen simply as a negotiating situation where there are obstacles to overcome. Overall, Korea under-appreciates the extent of domestic economic policy changes that may be required by virtue(of international participation), not only in the MAI, but also in the obligations of the WTO as well. Korea is under-prepared both for its WTO obligations and future MAI obligations. However, Korea is one where economic changes are occurring at a rapid rate and where there are great deal of congruence between these obligations and the reforms that Korea has already lost implementation. I think there is a challenge ahead to make these two fit in a more positive manner.

Discussions

Q This question is not directly related to the MAI, but at the beginning of your statement, you mentioned the case of disputes on auto parts between Japan and the United States. You also said that WTO disputes-settlement mechanism is much more effective and friendly toward the complaining country. Then why didn't United States take this case to the WTO in the first place, instead of Section 301, if you believed that the Japanese distribution was not competitive and was discriminatory against foreign competitions?

A I think that is a very good question. I think there are probably two reasons why not. The first was the personality of Mickey Kantor himself, who relishes bilateral confrontations. There are somethings about the personality of him, the way he conducted himself that he seemed to relish this. Beyond this ad homonum observation however, the best answer that I can give is that the United States' case would have been weak. Now it may have been weak for reasons that are in a sense wrong. I did note that there is 1960 GATT working party decision that was adopted by the GATT contracting parties and hence became part of trade law that no existing GATT article could be used as a basis for a complaint that private businesses were creating export foreclosure. That was essentially the U.S. complaint against Japan. It may have been a justifiable complaint: certain domestic courts of law may have been in operable complaint. Because of this peculiar situation in WTO law, it's a complaint that would not have had a high likelihood of success. The point I would like to emphasize is that I'm not claiming the U.S. had a reasonable nor an unreasonable case. I'm saying rather the WTO law, for reasons of historic peculiarity, is unequipped to deal with cases of this sort, vertical restraints of a private nature made foreclose exports. And indeed it is that very absence of the ability of the WTO to operate in that area, why the Trade and Competition Group was established.

Q Are there any specific reactions on the part of multilateral corporations on MAI and would MAI ease the entry of multilateral corporations into lower per-capita income countries of OECD such as Mexico and Korea?

A The answer to the question depends very much on what sorts of reservations and exceptions those countries have lodged and that is of indicated is an undecided issue. I must say that the spirit of the MAI is certainly in the direction of easing the entry;

that is what it is all about. The specific answer would depend on the reservations lodged by the individual country, but the general answer is, yes it would ease the entry.

Q 1) Environment and labor issues were the reasons why the United States postponed the MAI. Do you still believe that the MAI will be achieved with these issues included?
2) How would MAI affect Korea, both positive and negative aspects to the Korean economy.

A Personally, I don't think that the labor and environmental issues belong in the MAI at all. That is not to say that there is no validity to these issues; there may be, I just don't think this is the right place to be addressing these. And indeed, certain constituencies, in the united States, in the environmental and labor areas have really been trying to put these particular agenda into every international discussions in which the United States have been participating in. I find it somewhat unfortunate that the U. S. government has responded to these pressures in the way that it has. I just don't think that this is the right negotiating position for the United Sates to be taking. There is a rather significant amount of domestic political opposition within the United States to the MAI, some of it from labor unions and some of it from environmental groups. I suppose that the government is trying to assuage the opposition that is being generated in these groups by including a certain number of these issues in the negotiations. But nonetheless, I wonder whether this is the correct approach to it.

With regard to the Korean economy, I don't pretend to be an expert on the Korean economy. I do think that the acceptance of the MAI and inclusion of Korea in the MAI would facilitate the attainment of goals that Korea is already seeking, including technology transfer, more competition in restricted sectors. It might also open up the way for a constructive change in policy so as

to allow more merger and acquisition activities, and open up to more foreign investment. I am not an American expert in the Korean economy, so I can only make general observations.

Q Should the MAI ultimately be lodged in the WTO?

A I still think the answer is "YES". Some reasons I gave at the KIEP seminar last Fall are still valid. The usual objection to the MAI being in the WTO is that there is insufficient consensus amongst WTO members as to enable an agreement embodying so-called "high standards to be achieved". I have personally felt that from the beginning that this is a false argument from the very simple reason that the WTO does allow for a so-called plural-lateral agreement to exist. A plural-lateral agreement is one in which some but not all WTO members participate. So I thought that there never was an air-tight argument for these negotiations taking place in the OECD rather than the WTO. The fact is that the negotiations are taking place in the OECD. And one possible outcome is that the OECD agreement is, more or less intact, transferred into the WTO. I think this would be a good outcome if it were possible to do that. But at this point, 7 months after the KIEP seminar, we must exceed to two facts. One is that negotiations are taking place in the OECD. The second is that though there is a working group in the WTO, the working group thus far has yet really to even begin its substantive work. And so, while I think the WTO route might have been the better one to have gone down, one year after I have made that proclamation, events have moved in another direction, and I guess I am rather powerless to change that. The question now is whether the MAI, when completed, should move over to the WTO in the future, and I still think the answer is "yes".

Q To ensure against being sued by the foreign enterprises or

multilateral corporations, would the host countries be required to revise their domestic laws, especially if the foreign corporations have certain legal standing in the country. Do you think it is necessary to do that?

A If the OECD were to adopt the NAFTA model, the procedures that are established under NAFTA Chapter 11.b, there would not be a required change in domestic law. What is allowed here is that an investor brings a case against a host country and is heard by an international tribunal that is established under the existing rules of the International Center for the Settlement of Investment Disputes, already a part of the World Bank, to which Korea already participates. All NAFTA procedures do is change somewhat the proceedings, allowing an investor unilaterally to bring a case to the ICSID. The tribunal established under the World Bank ICSID makes a judgement, where if it finds a country in violation of its obligation, causing monetary loss to the investor, the tribunal can order compensation in monetary terms. However, it is not empowered to order a change to the domestic law. The country may or may not change its domestic law in response to the finding of the tribunal, but that is not required under the NAFTA procedures. This is a very conditional answer: that is, if MAI were to adopt the NAFTA procedures (that is the only model we have to go on), and if that model is adopted, then the answer is NO.

Q Could you comment on MAI's affect on technology transfer?

A The MAI does not prohibit, but rather encourages technology transfer.