

Symposium: The First Five Years of the WTO
January 20-21, 2000
Comments of Ted Posner on
Addressing Private and Public-Private Market Access Barriers

Jim Southwick does an excellent job analyzing the limitations of the existing international and U.S. legal regimes in dealing with the market access barriers erected through combinations of private and public measures in Japan. His presentation prompts several critical questions: What can be done to close the gaps in the international legal framework that Japan has exploited? Is there a role for Congress to play in closing those gaps? Is the Japanese experience unique, or does it represent a growing trend evidenced in other countries? In particular, are the problems he describes problems we are likely to encounter with greater frequency when China, and eventually Russia, enter the WTO?

On the subject of What is to be done, I would like to make three points: First, in confronting market access barriers of the variety encountered in Japan, the United States should develop the flexibility to draw increasingly upon both trade and antitrust expertise, rather than choosing one or the other. Second, Congress has a potentially important role to play in raising the political profile of “hybrid” (i.e., public/private) market access barriers and thus helping to harness both areas of expertise in appropriate cases. Third, circumstances that should generate greater congressional attention on hybrid market access barriers are beginning to coalesce.

The subject of how to tackle the sort of hybrid market access barriers we have seen in Japan has received a great deal of attention recently. It has been the subject of discussion in the International Competition Policy Advisory Committee (ICPAC). It has been studied by the OECD and the WTO. And it is the subject of a paper issued this past December jointly by the Antitrust and International Law & Practice Sections of the ABA.

1. What is clear in Jim's paper and in other discussions of this issue is that the problem does not fall neatly into either the international trade category or the antitrust category. What has made the Japanese barriers so difficult to confront is that they straddle trade and antitrust. While the problems are hybrids, the traditional solutions are purebreds. We tend to think in terms of either trade or antitrust. There has been little effort to date to draw on both areas of expertise in confronting a particular set of foreign barriers. (A prominent exception to the separation between the two approaches is the photographic film case in Japan. There, the United States pursued both trade remedies in the WTO and pressed the JFTC to exercise its antitrust enforcement authority.)

Jim's analysis would seem to counsel the development of flexibility in the way the United States approaches public-private market access barriers. Where foreign measures that involve both public and private components have the effect of blocking access to U.S. goods and services, we should be able to mobilize both trade and antitrust resources to confront the problem. While these areas of expertise may be housed in different agencies, there is no reason that they should not be able to join forces in appropriate cases.

An important step in bringing to bear both trade and competition resources is overcoming what appears to be an entrenched reluctance to apply U.S. law to anticompetitive conduct engaged in by foreign private parties. The authority to apply U.S. law to such conduct exists, but there are countervailing pressures to refrain from exercising that authority:

< Under the Foreign Trade Antitrust Improvements Act, the Department of Justice is authorized to apply the Sherman Act to foreign conduct that has a "direct, substantial,

and reasonably foreseeable effect . . . on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States.” 15

U.S.C. § 6a. Yet, in the 17 years that the FTAIA has been on the books, the Justice Department has applied it only twice to conduct affecting U.S. exports (C. Itoh case and Pilkington case). This is likely due to concerns about the ability to gather evidence necessary to make a case against foreign conduct affecting U.S. exports, as well as concerns about retaliation (including through blocking and clawback statutes) and undermining comity among enforcement agencies.

< Section 301 of the Trade Act of 1974 authorizes the Trade Representative to take enforcement action against “unreasonable” acts, policies, or practices of a foreign country, including “toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market.” 19 U.S.C. § 2411(d)(3)(B)(i)(IV). Yet, it is notable that in agreeing to the “toleration” language as part of the Trade and Competitiveness Act of 1988, House and Senate conferees emphasized that “their intent is not to regulate the business practices of foreign firms or to enforce upon foreign governments U.S. concepts of antitrust law.” House Conf. Rep. No. 576, 100th Cong., 2d Sess. at 570 (1988). The conferees went on to state that in considering whether to take action under the “toleration” provision, the USTR could take into account, among other factors, “whether the anti-competitive foreign

private activities are inconsistent with local (not U.S.) law.” Id.

< U.S. courts have begun to pave the way for enforcement of U.S. antitrust law against foreign anticompetitive conduct. See Hartford Fire Ins. v. California, 509 U.S. 764 (1993); United States v. Nippon Paper Indus., 109 F.3d 1 (1st Cir. 1997). However, no court has yet ruled on the issue of jurisdiction to apply the Sherman Act to anticompetitive conduct that affects export commerce only. Moreover, the Nippon Paper case well illustrates some of the evidentiary problems inherent in bringing an antitrust case against foreign defendants based on entirely foreign conduct. See United States v. Nippon Paper Indus., 1999 WL 515827 at *2 (D. Mass., July 16, 1999) (“Fundamental issues about language and meaning—which inferences were reasonable and which were not in light of Japanese culture and traditions—permeated the case.”). Nippon Paper was a fairly straightforward price fixing case. The evidentiary problems that ultimately contributed to a judgment of acquittal there suggest why the Justice Department may be reluctant to exercise its enforcement authority in more complicated foreign antitrust cases.

In addition to overcoming a reluctance to apply U.S. law to foreign private anticompetitive conduct, the goal of bringing both trade and competition expertise to bear in appropriate cases may require bridging an important difference of perspective between trade and competition authorities. As observed in the recent joint paper by the Antitrust and International Law and Practice Sections, foreign government action may be viewed very differently under trade law than under antitrust law. USTR’s inclination to exercise its authority is at its peak when foreign government involvement in market access

barriers is greatest. By contrast, the Department of Justice is least inclined to exercise its authority under such circumstances (due to the greater likelihood that the Foreign Sovereign Immunity Act, the foreign sovereign compulsion defense, or the act of state doctrine will preclude successful enforcement).

See Report of the ABA Sections of Antitrust Law and International Law and Practice Concerning Private Anticompetitive Practices as Market Access Barriers [hereafter “Sections Report:”] at 19-22 (Dec. 17, 1999).

2. In bringing about an approach to hybrid market access barriers that enables trade authorities and antitrust authorities to work together, there is a potentially important role to be played by Congress. First, Congress can enact legislation that establishes a mechanism for harnessing trade and competition resources in appropriate cases. Second, by elevating the political profile of market access barriers that contain both public and private components, Congress can move the Executive Branch to reevaluate the ways in which it deploys its resources.

An example of legislation that seeks to address the problem of foreign public-private barriers is a bill introduced last session by Representatives Houghton, Levin, and Thurman. The bill, H.R. 3393, contemplates referral of matters by USTR to the Department of Justice when, at the conclusion of certain investigations under section 301, USTR determines that there is evidence of anticompetitive conduct by foreign parties. Upon referral of a matter by USTR, the Department would be required to undertake an investigation under the Sherman Act, which it ordinarily would be required to complete within 180 days. At the conclusion of its investigation, the Justice Department would be required either to commence an action against foreign defendants in a U.S. court or explain to committees of

jurisdiction in Congress its reasons for refraining from doing so.

The mechanism established by H.R. 3393 could counteract the tendency of the Executive Branch to shy away from applying U.S. law to foreign private anticompetitive conduct that harms U.S. exports. Even if it does not result in a substantial increase in U.S. antitrust cases against foreign defendants, it should give greater leverage to the Justice Department in urging its foreign counterparts to enforce their own antitrust laws. Also, by requiring reports to Congress in referred cases that the Department declines to pursue, the bill will elevate the political profile of hybrid market access barriers. Further, the bill should accomplish the goal of bringing trade and competition resources together in appropriate cases since, in all likelihood, USTR and the Department of Justice would cooperate early in such cases, rather than have the Justice Department wait to begin its investigation until it received a formal referral from USTR. Finally, by increasing the likelihood of investigation by both USTR and the Department of Justice, the bill may generate leverage in U.S. efforts to negotiate the elimination of foreign public-private barriers.

Short of formal legislation, Congress can draw greater attention to hybrid market access barriers through the exercise of its oversight function. For instance, committees with trade jurisdiction as well as committees with antitrust jurisdiction could hold hearings on public-private barriers. By demonstrating heightened interest in these issues, Congress may persuade the Executive Branch to develop means of deploying its resources in ways that enhance flexibility in responding to hybrid barriers. Heightened congressional concern also may help to move foreign governments towards dismantling the barriers at issue, in the interest of preempting greater enforcement by U.S. trade and antitrust authorities.

3. In fact, a number of circumstances suggest that the time may be ripe for Congress to focus on the types of foreign market access barriers described in Jim Southwick's paper.

First, the public-private barriers are likely to take on an increasing prominence as the more conventional barriers to trade fall away. The fact that we are discussing this issue at all is a function of past success in eliminating tariffs and the more glaring non-tariff barriers. As long as those market access barriers remained in place, the harmful impact on U.S. exports of more complicated and novel barriers may have been less obvious.

Second, as the report of the Antitrust and International Law and Practice Sections points out, the sectors that are most vulnerable to private and public-private market access barriers also happen to be the sectors that are increasingly critical to the global economy. Thus the report states, "In a world in which access to proprietary technologies or to the facilities or services offered by a dominant supplier may be essential to effective participation in the market . . . both global trade policy and domestic competition policy seem likely to focus increasingly on private access-denying practices." Sections Report at 24.

Third, in the case of Japan, a number of the agreements negotiated to deal with market access barriers in particular sectors have either expired or are due to expire, and their success from the U.S. perspective has been dubious at best. Notably, the agreement on flat glass expired at the end of 1999. While the Government of Japan claims that the agreement achieved its goal of enhancing foreign access to Japan's flat glass market, the evidence is far from conclusive. It is not clear whether lower prices are the result of Japan's economic recession or increased imports. To the extent that imports have grown,

much of the increase may be attributable to imports from companies affiliated with Japanese flat glass manufacturers.

Similarly, the U.S.-Japan Auto and Auto Parts Framework Agreement is due to expire at the end of this year. However, its achievements to date have been mixed. Thus, USTR's April 30, 1999 "Super 301" report stated the following on the subject of auto and auto parts trade with Japan:

"Although initial results in many areas were satisfactory, recent progress toward achieving the Agreement's key objectives has been disappointing. Sales in Japan of autos produced by the Big Three in North America declined 34.5 percent in 1998, after declining 20 percent in 1997. Exports of US-made auto parts to Japan fell 7.5 percent in 1998, the first drop since 1991, and the continued fall off in new orders of US auto parts by Japanese manufacturers suggest that this decline is likely to continue."

Fourth, Japan is not alone. Private and public-private market access barriers have proliferated in recent years. Examples include Korea's "frugality campaigns," which have tended to create a bias among consumers against purchases of foreign products (1999 NTE at 289-90), the Government of Mexico's support of Mexican soft drink bottling companies' restrictions on purchases of high fructose corn syrup (USTR press release, May 14, 1999), and the Government of India's encouragement of Indian companies to prefer contracts with foreign companies willing to engage in counter trade (1999 NTE at 188). As the problem becomes more widespread, Congress is increasingly likely to take notice.

Finally, the factors counseling greater congressional focus on private and hybrid market access barriers are coming together at a moment when Congress is about to undertake its first intensive review of the costs and benefits of U.S. participation in the WTO. The five-year review of U.S. participation in the WTO will provide an important opportunity to highlight the institution's limitations in dealing with

particular categories of foreign market access barriers.

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In sum, Jim Southwick's analysis draws attention to an increasingly significant category of barriers to U.S. exports of goods and services. To confront those barriers effectively, the United States should develop flexibility in using trade and antitrust resources together. Congress can play an important role in bringing about this shift in the way we approach foreign market access barriers. Through legislation and through elevation of the political profile of the barriers that Jim describes, Congress can encourage the development of mechanisms that harness both areas of expertise. In fact, the U.S. experience with Japan, the greater proliferation of private and hybrid barriers, and the significance of such barriers to core sectors of the global economy strongly favor increased congressional attention to these issues.