

REGULATION OF INTERNATIONAL TRADE IN KOREA UNDER THE WTO MECHANISM

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This paper discusses the development of the trade laws of the Republic of Korea and the important features of the Foreign Trade Act (amended substantially in 1996) and demonstrates the legislative efforts made by the Korean Government to open the domestic market and establish the fair trade system and practices which have been demanded by WTO and major trading partners.

I INTRODUCTION

The foreign trade sector grew faster than the economy as a whole, so the foreign trade dependency of the Republic of Korea(Korea) has increased rapidly throughout the last three decades. Korea is a small country in its relative economic size and has many structural problems to be solved, as revealed in the recent financial crisis. However, considering its position in international trade, the Korean economy is not quite small enough to be exempt from the responsibilities imposed by the international organisations like the World Trade Organisation (WTO) and the Organisation for Economic Cooperation and Development (OECD). Particularly, the requirement, imposed by the International Monetary Fund (IMF) in exchange for the recent relief finance, to open the financial market of Korea has caused a great shock to Koreans. The market has been traditionally regulated and strongly protected in the light of the fact that its infrastructure is not yet on a par with other mature markets and Korean society is still unstable due to its unique political situation.

On the other hand, other partner countries and international organisations like the IMF, have often listed Korea as an unfair trader, and viewed the progress of Korea's liberalisation in the financial and commodity sectors as too slow. As a result, the new government led by Kim Dae Jung, the President of Korea, should face the challenges of

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opening its financial and commodity markets and make the necessary adjustments while reconciling 'socio-political' resistance to the drastic changes.

In Korea, the basic and comprehensive law for regulating international trade is the Foreign Trade Act, and the Ministry of Foreign Affairs and Trade makes the final decision in applying the laws of and regulations of international trade. Reflecting its industrial infancy during the early period of its economic development, Korea used to impose various restrictions on imports while strongly encouraging domestic companies to export.

Korea's international trade laws have been enacted and modified passively under direct and indirect trade pressures from trading partners like the United States or under the requirements set by international organisations, rather than by the government's voluntary compliance with internal public and private sector concerns.

II BRIEF HISTORY OF FOREIGN TRADE LAWS

A Early Years

Since Korea was released from the Japanese rule in 1945, foreign trade policy has been mainly focused on imports to secure the necessities of life, and it has hardly been possible to establish a comprehensive mechanism to promote foreign trade. The Korean government established a legal authority for the administration of foreign trade by declaring in its Constitution (amended in 1954) "Foreign business transactions will be under the control of the State according to statute," and enacted the Foreign Trade Act in 1957 as the first general law governing foreign trade in Korea.

The Foreign Trade Act 1957 was characterised by the adoption of a very restrictive trade system and incentives for export, such as export subsidies, favourable tax treatment, and priority in granting import licences. Due to the restrictive import policy import licences were very difficult to obtain from the appropriate authority. However, since Korean industries in the 1950s were still very underdeveloped, such export incentives could not bring about any visible progress in exports. Consequently, foreign trade policy was led by heavy regulation of imports, including the allotment of foreign aid funds to finance imports,¹ import quotas and high tariff rate systems.

1 Foreign aid was the major source of financing the nation's balance of payments deficits throughout the 1950s and the 1960s. In particular, foreign aid was virtually the sole source of foreign capital. More than 70% of imports were financed by foreign aid during the reconstruction period of 1953-1960 after the Korea War (1950-1953), which demonstrates how the Korean economy depended on foreign aid. See Il Sangong, *Korea in the World Economy* 96 (1993).

The Constitution of 1962 stated that "the state may regulate and coordinate foreign trade."² Thus, the role of government in international trade was changed from 'controller' to 'coordinator'. In 1967, Korea became a member of the General Agreement on Tariffs and Trade and participated in the Kennedy Rounds. The Korean government began changing the basic direction of its trade policy to move toward an open economic system, while still providing for international competitiveness, domestic consumer protection, and trade liberalisation. The Trade Transaction Act 1967 that replaced the Foreign Trade Act 1957 was enacted to pursue such policies.

The Trade Transaction Act 1967 established the restricted licensing system, under which an importer or exporter had to obtain a trading business licence from the government and an individual permission from the Ministry of Trade and Industry in order to import or export particular goods. The system by which the Trade Transaction Act 1967 controlled the approval of each international transaction and business licences has played an important role in regulating import and export since then. At that time, Korea was a developing country which needed to protect balance of payments, and the system was fully justified by article XVIII (b) of GATT. The system of export and import approval adopted by the Trade Transaction Act served as both *ex ante* and *ex post facto* foreign trade administration, meaning the Ministry of Foreign Affairs and Trade would check whether the import and export transactions were carried out properly in accordance with the related laws and decrees.

The import supervision system was introduced to supplement the import-liberalisation policy by helping protect infant domestic industries and achieve balance in international payments. Under this system, the Ministry of Foreign Affairs and Trade had the power to take certain measures to restrict the import of specific goods such as agricultural products or luxury items that might have an injurious effect on domestic industries.

Since 1970, the Korean economy has grown very rapidly and become one of the leading newly industrialised countries. In the meantime, the developed countries began to adopt 'neoprotectionism', whose principle of fair trade and mutuality required Korea to open up its domestic markets. Industrial and trade policy in Korea was changed to meet these changes in the domestic and world trade circumstances. The focus of Korea's economic policy began to move away from comprehensive protectionist measures and toward voluntary restraints and liberalisation.

2 South Korea Constitution art 119 (1987). This clause, modified in the 1987 amendments to the Constitution of Korea, currently states: "The State may regulate and coordinate the economy".

The Foreign Trade Act was enacted in 1986 and, to implement the Act, an Enforcement Decree³ and an Ordinance⁴ were concurrently issued by the President and the Minister of Foreign Affairs and Trade.

During the modification and enactment processes of the Trade Transaction Act 1967 and the Foreign Trade Act 1986, the government debated whether or not to retain the import and export licence system. It was concluded that the licence system should be retained on the basis that domestic traders would otherwise bring about destructive competition among themselves due to their lack of experience in international business. However, the licensing system might have operated against foreigners, because the Minister of Foreign Affairs and Trade had a discretionary power to examine various factors relating to foreign trade in granting licences to them (eg the effect on domestic industries). Measures to restrict the import or export of particular goods under the Foreign Trade Act 1986 were based on either procedures or qualifications.⁵ The Korean government regarded these restrictions as in harmony with the exception clauses: Article XX (General Exceptions),⁶ XXI (Security Exceptions),⁷ XVII (State Trading Enterprises),⁸ or XI (2) (General Elimination of Quantitative Restrictions)⁹ of GATT.

B Adjustment of the Foreign Trade Act to the New World Trade Mechanism

In 1988 Korea recorded total foreign trade of \$100 billion with the first trade surplus in Korean history and in 1990 ranked twelfth largest country in trade volume and accounted for 2% of the total amount of world trade.¹⁰ Since then, the system to regulate and administer foreign trade in Korea has been influenced by trade friction with and

3 Enforcement Decree of the Foreign Trade Act, Decree No. 12191 (1987), amended by Decree No 15296 (1997).

4 Ordinance to Administer Foreign Trade, Ordinance of the Minister of Trade and Industry No 87-17 (1987), amended by Ordinance No 97-32 (1997).

5 Eun Sup Lee "Regulation of Foreign Trade in Korea" (1996) 26 Ga J Int'l & Comp.L.145.

6 This provision lists general exceptions to the application of GATT, such as necessary measures to protect the health of humans, animals or plant life and public morals.

7 In this provision, security exceptions relating to member countries' security interests are listed.

8 This provision requires that all the member countries act in a manner consistent with the general principles of non-discriminatory treatment prescribed in GATT.

9 Here GATT provides that the general elimination of quantitative restrictions shall not be applied to import restrictions on any agricultural or fisheries product, imported in any form, necessary to the enforcement of certain government measures like the restriction of quantities of the domestic product permitted to be marketed or produced.

10 Hyun Jong Shin, Korea's Foreign Trade (in Korean) 87-89 (1992). Korea ranked 38th largest country in trade volume in 1971, 30th in 1975 and 20th in 1987.

pressure from partner countries like the United States, and by the requirements by international trade organisations. Trade friction with the United States, which was the largest export market for Korea, has been one of the most serious problems for the government of Korea in its attempt to expand foreign trade.

Complying with the pressure from the United States to phase out the restrictions on market entry, the Korean government has made a great effort to protect US intellectual property rights, liberalise its rigid import system especially for agricultural products, liberalise restrictions on foreign investment, and lower the tariff rate.¹¹ In 1990, the market average rate system was introduced to enhance the market mechanism's ability to determine the exchange rate. The United States often pointed out that, in the spirit of free trade, Korea must pursue an open market policy not with its words, but with deeds.¹² Deferring to this advice, Korea has continuously tried to open its domestic markets in pursuit of free trade, while pursuing the main objectives of Korean foreign trade policy: protecting domestic markets and promoting exports.¹³

Apart from the pressure by the United States to completely open Korean markets, some other reasons led Korea to substantially modify the Foreign Trade Act 1986. First, Korea was required to change its trade policy from protectionism to complete liberalisation by the WTO and its affiliation with OECD in 1996. These changes facilitated the survival of Korea's foreign trade policy programmes under the WTO system and harmonisation with the OECD provisions. Second, as the size of foreign trade in Korea increased from \$88 billion in 1987 to \$280 billion in 1996¹⁴ and its trade practices were diversified, the Korean government recognised that the former ex ante regulations were too inefficient to cope with the new trends. Korea needed an efficient system to manage international trade. Finally, as Korea's business enterprises secured larger international markets and advanced techniques, the provisions of the Foreign Trade Act needed to be modified to support those activities more effectively.

11 The average tariff rate of Korea has been lowered from 20.9% in 1980, to 11.4% in 1991, and to 7.9% in 1994. Dea Keun Lee, *International Trade of Korea* (in Korean) 353, 355 (1996).

12 Eun Sup Lee, "The Development of Laws to Regulate Foreign Trade in the Republic of Korea", 10 *The Transnational Lawyer* 293 (1997).

13 Above n 12.

14 Office of Statistics of Korea, *Monthly Statistics of Korea* (in Korean) 205 (March 1997).

III CURRENT REGULATION OF FOREIGN TRADE

A *The Foreign Trade Act of 1986 as Amended in 1996*

The Foreign Trade Act of 1986, amended in 1996,¹⁵ is composed of 60 articles and nine additional rules. The main contents of the amended Act are:

- 1 The Minister of Foreign Affairs and Trade can investigate practices relating to foreign trade and the difficulties encountered in overseas markets by Korean enterprises seeking the basic materials needed to establish the foreign trade promotion policy.¹⁶ This provision enables the government indirectly to support the overseas businesses of Korean enterprises by investigating unfair practices that may arise from the provisions of trade related laws and systems in partner countries. The investigation under this provision would be similar to the International Trade Commission's annual report in the United States.
- 2 The Minister can support foreign trade related associations when they promote cooperative efforts with foreign and local governments, institutions, or other associations relating to matters of foreign trade, industry, technique, or energy.¹⁷ Until recently, foreign transactions have been developed in Korea exclusively through negotiations and cooperative activities led by the government. However, activities initiated by private institutions and associations have recently been recognised as more desirable for the efficient promotion of foreign trade under the liberalised circumstances of WTO mechanisms. This provision supports activities advanced by the private sector, instead of pursuing the export-driven policy led by the government.
- 3 The import and export of goods and the incident receipt and payment should be made without any restrictions as long as these activities are consistent with the objectives of the Foreign Trade Act,¹⁸ that is, to contribute to the development of a strong national economy through the expansion of international transactions. The provision¹⁹ also declares that importers and exporters should implement foreign transactions in order to secure a good reputation in overseas markets and to maintain the 'free-trade order' on their own responsibility; this provision shows the direction of the subsequent trade related rules.

15 Foreign Trade Act, Law No 3895 (1986), amended by Law No 5211 (1996).

16 Article 8(3).

17 Article 9.

18 Article 13.

19 Article 13.

- 4 The import and export licence system and the registration mechanism, which had been understood by partner countries as barriers to foreign trade in Korea, were repealed and replaced with a simple notification system, by which those who are involved in international transactions are required only to notify the Minister of Foreign Affairs and Trade.²⁰

Concurrently, the positive system, adopted for approval of a particular import or export item, was substantially changed into a negative system²¹ whereby approval was automatically granted for all but a few designated items to protect living things, etc.²² This negative system as well as the notification system in foreign transactions can be construed as major practical examples shown by the Foreign Trade Act to be in line with the spirit of the WTO.

B Other Laws to Regulate Foreign Trade

Most countries have established laws which govern and support their international trade, but the methods used to operate such laws are different from one another. Reflecting its industrial infancy during the early period of development and other policy motives, Korea used to impose various restrictions and prohibitions on international trade as previously discussed. In addition to the Foreign Trade Act, Korea has enacted two other main laws governing international trade: the Customs Act and the Foreign Exchange Control Act.

1 The Customs Act

The Customs Act²³ seeks to gain revenue from customs through the imposition and collection of reasonable customs taxes, and the proper clearance of imported and exported goods.²⁴ The Minister of Finance and Economy is in charge of customs administration. The Minister's authority includes imposition and collection of customs and clearance through customs, and the Office of Customs Administration is delegated to exercise this authority.²⁵ Besides these two central organisations, there are three kinds of local administrative organisations including a customhouse, a customhouse branch, and a customs monitor station. The Customs Act can be classified as a substantive tax law

20 Article 10.

21 Article 13.

22 Article 14.

23 The Customs Act, Law No 1976 (1967), amended by Law No 5453 (1997).

24 Article 1.

25 National Government Organisation Act, Law No 2437, art 32 (1973), amended by Law No 3220 (1970).

that regulates the imposition and exemption of customs duties as well as a procedural law that regulates the process.²⁶ The main provisions of the Act are involved with the imposition, collection and reduction of duties, exemptions from duties, the regulation of bonded transportation and storage, and customs clearance and customhouse brokerage. Considering that the administration of customs duties and the regulation of customs are made concurrently, these provisions for customs clearance and customhouse brokerage are important because it is difficult to have an efficient administration of clearance and customhouse brokerage without the collection of customs duties. Customs clearance is an administrative processing of imports and exports according to the terms and conditions of import or export approval obtained from the administrative agencies, particularly if those items are restricted under the Foreign Trade Act. Accordingly, customs clearance plays a role in carrying out the government's regulations and policies of trade administration on the spot. Finally the Customs Act includes provisions for punishment and investigation into crimes committed against customs and clearance.

2 *The Foreign Exchange Control Act*

The Foreign Exchange Control Act,²⁷ the major piece of legislation regulating foreign exchange, purports to control foreign exchange and other transactions with foreign countries by attaining an equilibrium in the international balance of payments and by stabilising the value of the domestic currency.²⁸ Under these controls the Korean government has the power not only to establish foreign exchange rates²⁹ but also to license foreign exchange banks.³⁰

Korea is expected to limit the restrictions on foreign exchange transactions to a necessary minimum and promptly abandon any wilful administration and restrictions, in accordance with the spirit of the IMF and of the OECD. The government has already begun to review the substantial repeal of the Act for the deregulation of foreign exchange transactions in Korea since the financial crisis on December 1997. This should be realised very soon. However, the diversion problems caused by the reform in Korea may be more serious than those in other countries due not only to economic factors but also to non-economic factors (eg confrontation with North Korea). In the case of the substantial repeal or deregulation, a supplementary regulation to prohibit diversion by domestic

26 Eun Sup Lee, *supra* note 7, at 140, n 32.

27 Foreign Exchange Control Act, Law No 933 (1961), amended by Law No 5505 (1998), art 1.

28 Article 1.

29 Article 4.

30 Article 7.

residents should be secured considering Korea's peculiar political situation for the time being.

IV IMPORT RELIEF SYSTEM

A Introduction

The Foreign Trade Act of 1986 introduced a new kind of import relief mechanism to investigate industrial injuries from imports, which were not in line with the provisions of article XIX of GATT. Korea has utilised both tariff and non-tariff measures to protect domestic industries. Non-tariff measures have included a system to diversify the countries from which it imports, specifically avoiding the countries with which it had an excessive unilateral trade deficit.³¹ Tariff measures launched by Korea include antidumping duties, countervailing duties,³² and retaliatory duties.³³

The recently modified import relief provisions - articles 26 to 38 of the Foreign Trade Act amended in 1996 - provide for relief when domestic industry is injured or threatened seriously by a rapid increase in imports; this is almost in line with the provisions of WTO. This provision was adopted for the ex post facto protection of domestic industry with a view to liberalising international trade rather than protecting the infant industries. Additionally, Korea established a Trade Commission³⁴ within the Ministry of Foreign Affairs and Trade to guarantee objectivity and fairness in investigation.

The Foreign Trade Act does not state that the objective is construed a posteriori to prevent or remedy a serious injury to the domestic economy, and to facilitate the adjustment based on the Agreements on the Safeguards of WTO. The relief measures include various measures to assist the industry. It is required to be more transparent with respect to the object of the safeguards system in the Act.

31 Since 1978, Korea has adopted the policy of diversifying importing countries. However, this policy has been against the principle of non-discrimination of GATT or WTO and was repealed in 1997 according to the requirement of Japan after the financial crisis at the end of 1997.

32 Customs Act, *supra* note 25, art 10, 13.

33 Article 11. The minister of Finance and Economy can impose retaliatory duties on goods imported from any country which discriminates against goods imported from Korea.

34 Amended Foreign Trade Act above n 15 art 37-40. The Trade Commission was established by the Foreign Trade Act 1986. The Trade Commission consists of a Chairman and 6 members, one of whom is a permanent member. Members are appointed by the President on recommendation of the Minister of Foreign Affairs and Trade.

B Investigation of Industrial Injury from Imports

The criteria for relief under the Foreign Trade Act are the rapid increase of imports, the serious injury or threat to the domestic industry producing an article directly or indirectly competitive with the imported article and the causation between the increased imports and the serious injury.

The "rapid increase of import" means that the absolute increase in imports is larger than that of the other domestic production. In order to meet the causation requirement of the Act reflected from the Agreement on the Safeguards of WTO (article 4-2 (b)), it should be determined that increased imports are:

- (a) an important cause of serious injury; and
- (b) a cause that is not less than any other cause,

as the substantial cause requirement is interpreted in the United States Trade Act of 1974.

The Foreign Trade Act classifies qualified petitioners into two groups: persons interested in the domestic industry and the head of an administrative agency concerned; there is no category of qualified petitioner in the Agreement on the Safeguards of WTO. The Act does not include Parliament or an assembly within the qualified petitioners because the Trade Commission is not so formally and substantially independent of the Ministry of Foreign Affairs and Trade. The other terms like "domestic industry" and "causation" should be interpreted in line with internationally accepted norms, because the provisions of the import relief under the Act were made and modified in accordance with the free trade spirit of the WTO mechanism.

The total period of the investigation including the determination to commence the investigation is specified as 150 days in the Foreign Trade Act, 120 days in the United States, 10 months in European Union and 201 days in Canada. It would be desirable to reduce the period to 120 days or so for the prompt and efficient protection and remedy. The investigation methods of the Commission are presumed to be congruent with the provisions about the investigation procedures open to the public (article 3-1), the investigation by the objective assessment (article 4-2 (a)) and the confidential treatment of the confidential information (article 3-2) of the Agreement on the Safeguards of WTO. These are provided to secure the transparency, fairness and objectiveness in operating the international trade laws.

V SYSTEM TO MAINTAIN ORDER IN IMPORT AND EXPORT

Generally, the primary goal of maintaining order in imports and exports include the prevention and eradication of unfair trade practices (eg exporting and importing goods

whose country of origins are indicated falsely) and other acts that may contravene fair commercial practices. In Korea, one of the main goals behind the system to maintain order in the import and export market is the efficient restraint of excess competition among domestic exporters. While the restraint of excess competition has been one of the main aspects of Korea's trade policy since the Foreign Trade Act of 1957, maintaining the import and export order also remains in the forefront of Korean foreign trade policy as exemplified by the efforts to tighten regulations on unfair trade practices. The Foreign Trade Act of 1986 as amended in 1996 includes provisions to regulate unfair imports and exports, to encourage the expedient settlement of disputes in imports and exports, to prevent price manipulations and to protect the design of export goods.³⁵

The Foreign Trade Act empowers the Trade Commission to investigate unfair trade practices upon the petition by the persons concerned and related cooperatives or associations, and to recommend to the Minister of Foreign Affairs and Trade the making of a correction order or the levy of a surcharge.

VI CONCLUSION

Korea's foreign trade laws have not been effectively modified and enacted to cope with frequent fluctuations and external circumstances in international trade. This is due to its rapid economic growth and development which was propelled by the government's outward-oriented development strategy. However, the Foreign Trade Act includes many modifications designed to cope with the increase in trade volume, diversified modes of international transactions, and frequent fluctuations in the international economic order, as well as to meet requirements from trading partners and international organisations like WTO and OECD. Certain provisions, such as the adoption of the negative system for approval of imports and exports and the notification system of foreign trade business irrespective of their qualifications, can be regarded as the cornerstones of complete liberalisation in Korea's trade administration system.

The Foreign Trade Act, however, needs to be modified still further as soon as possible regarding the character of the Trade Commission. The Trade Commission is considered in Korea as an independent agency in its composition and operation, even though it belongs to the Ministry of Foreign Affairs and Trade. However, in view of potential criticism from trading partner countries about the Commission's independence and the fairness of its decisions, it would be desirable to make the Commission a completely independent and quasi-judicial agency with broad powers like the United States' International Trade Commission. Concerns about the function and authority of the Trade Commission have been raised since the enactment of the Foreign Trade Act in 1986. It

35 Eun Sup Lee, above n 5, 151.

seems that the government is preparing to make further modifications to the Act to address these questions in the near future.

Korea's domestic industries are undergoing tremendously volatile times as a result of increased competition caused by the rapid market opening as well as the steep increases in labour costs. Furthermore, the recent problem in the financial sector has been almost beyond the control of the government, and caused unexpected halts in production and grave instability of the market. Koreans have tended to perceive the trade pressures from other developed countries to open the market completely and the requirements set by the IMF and its major member countries, as too severe and premature. Such rapid deterioration of the Korean economy and the accompanying uncertainties caused Koreans to be seriously concerned about their economic situation.

In order to bridge the gap occasioned by the vast difference of positions between Korea and other partner countries or related organisations, the new government made definite decisions to open its market completely and to make the structural adjustments to industry, complying faithfully with the requirements from the foreign sector. In pursuing its trade policy to maintain the liberal economic system, which is freely accessible and nondiscriminatory to all trading partners, the Korean government is expected to modify the trade laws to be harmonise better with the international norms of a liberal global market system in the very near future.

LES MECHANISMES DE REGULATION DES ÉCHANGES COMMERCIAUX INTERNATIONAUX EN CORÉE DU SUD

Petit pays, à l'économie relativement modeste, la Corée du sud demeure dépendante des insuffisances tant institutionnelles que structurelles qui la caractérise. Ce faisant, elle reste vulnérable aux crises économiques. Toutefois, considérée dans la perspective des échanges internationaux, la Corée du sud joue un rôle suffisamment important pour qu'elle soit soumise aux règles et obligations posées par l'Organisation du Commerce International et l'OCDE. Ainsi, les mesures imposées par le FMI lors de la récente crise économique, ont profondément marqué la population coréenne.

En matière de commerce international, on a souvent reproché à la Corée du Sud son comportement protectionniste et depuis quelques années, le gouvernement coréen doit répondre à la demande de plus en plus pressante de ses partenaires économiques étrangers, de libéraliser et d'ouvrir ses marchés intérieurs tant financier que des biens de consommation.

Il s'agit là d'une véritable révolution qui bouleverse l'ensemble des structures économiques et sociales coréenne.

L'auteur constate que dans un premier temps les règles du droit interne coréen n'ont ni été conçues, ni même modifiées pour s'adapter aux fluctuations du commerce international.

Il a fallu attendre le Foreign Trade Act dans sa version de 1996, pour que soient prises en compte les obligations qui découlent des échanges commerciaux internationaux, telles qu'elles sont définies par les conventions internationales.

En pratique, il s'agit néanmoins d'une réforme qui reste timide et limitée dans ses effets car elle se heurte encore aux réticences d'une grande partie de la population coréenne.

