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# **Legal and Institutional Issues of Korea-EU FTA: New Model for Post-NAFTA FTAs?**

**Dukgeun Ahn**

**Graduate School of International Studies/Law School  
Seoul National University**



**GSIS**

GRADUATE SCHOOL OF INTERNATIONAL STUDIES  
SEOUL NATIONAL UNIVERSITY

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## II. Overview of Korea's FTA Negotiation

### 2.1 Development of Korea's FTA Policy and Negotiation

<Table 1. FTA Situation for Korea as of October 2010>

FTA Partner	Status of Negotiation
<b>Chile</b>	2004.4.1 entry into force
<b>Singapore</b>	2006.3.2 entry into force
<b>EFTA (Switzerland, Norway, Liechtenstein, Iceland)</b>	2006.9.1 entry into force
<b>ASEAN</b>	2006.8.24 Framework Agreement 2007.6.1 Agreement on Goods entry into force 2009.5.1 Agreement on Services entry into force 2009.9.1 Agreement on Investment entry into force
<b>India</b>	2010.1.1 entry into force
<b>US</b>	2007.6.30 signed
<b>EU</b>	2009.10.15 provisionally signed
<b>Peru</b>	2010.9. concluded and expected to sign in early 2011
<b>Japan</b>	2003.12.22 negotiation began 2004.11.1 negotiation suspended
<b>In Negotiation</b>	Canada, Mexico, <b>Gulf Cooperation Council</b> (Saudi Arabia, Kuwait, UAE, Bahrain, Oman, Qatar), Australia, New Zealand, Columbia, Turkey
<b>In Preparation</b>	China, MERCOSUR, Russia, <b>Southern African Customs Union</b> (South Africa, Botswana, Lesotho, Namibia, Swaziland), Israel



## II. Overview of Korea's FTA Negotiation

### 2.2 Special Features of Korea's FTA Policy

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#### A. Comprehensive "WTO plus" approach

- ❖ In addition to market access for trade in goods, emphasis on service trade, investment, trade remedy issues, technical regulation, government procurement, intellectual property protection, cultural cooperation and so on.
  
- ❖ Modification of FTA trade remedy rules

#### Article 6.2 of the Korea-Singapore FTA:

3. Notwithstanding paragraph 1, the Parties shall observe the following practices in anti-dumping cases between them in order to enhance transparency in the implementation of the WTO Anti-dumping Agreement:
- (a) when anti-dumping margins are established on the weighted average basis, all individual margins, whether positive or negative, should be counted toward the average; and
  - (b) if a decision is taken to impose an anti-dumping duty pursuant to Article 9.1 of the WTO Agreement on Anti-dumping, the Party taking such a decision, should apply the 'lesser duty' rule, by imposing a duty which is less than the dumping margin where such lesser duty would be adequate to remove the injury to the domestic industry.



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## B. Special treatment for “internal trade” between South and North Korea

- ❖ MFN provision of GATT

“any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined *for any other country* shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties”

- ❖ Regardless of economic significance, used to be a politically priority issue

- Relatively less emphasis on this issue in recent years
- “Outward processing” approach
- “Committee on Outward Processing Zones on the Korean Peninsula”

### Annex 22-B of the Korea-US FTA

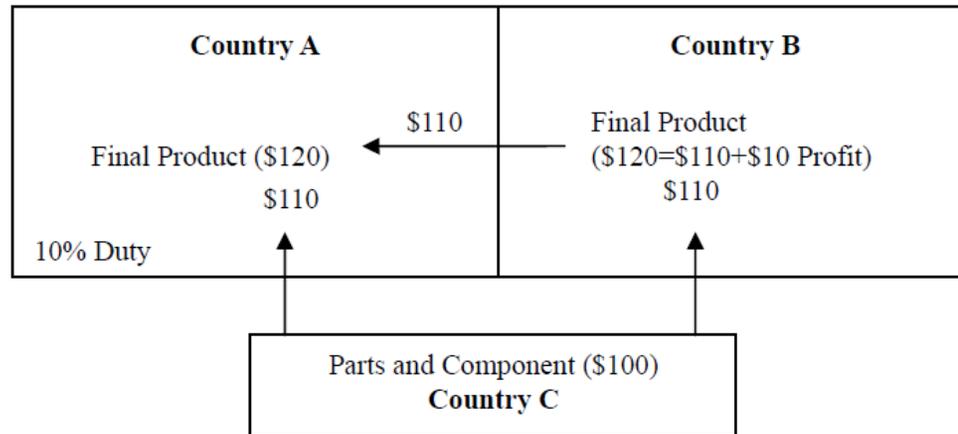
3. The Committee shall identify geographic areas that may be designated outward processing zones. The Committee shall establish criteria that must be met before goods from any outward processing zone may be considered originating goods for the purposes of this Agreement, including but not limited to: *progress toward the denuclearization of the Korean Peninsula; the impact of the outward processing zones on intra-Korean relations; and the environmental standards, labor standards and practices, wage practices and business and management practices prevailing in the outward processing zone, with due reference to the situation prevailing elsewhere in the local economy and the relevant international norms.*



### III. Legal Issues of Korea-US and Korea-EU FTAs

#### 3.1 Market Access

##### A. Duty Drawback



- Canada-US FTA: prohibit
- NAFTA (Article 303): restriction on the duty drawback by limiting the refund not to exceed “the lesser of the total amount of customs duties paid or owed on the good on importation into its territory and the total amount of customs duties paid to another Party on the good that has been subsequently exported to the territory of that other Party”
- Korea-US FTA: permit up to the actual duty amount
- Korea-EU FTA: the possibility to limit duty drawback schemes after five years of implementation “in case there is evidence of a change in sourcing patterns since the entry into force of this Agreement which may have a negative effect on competition for domestic producers of like or directly competitive products in the requesting Party.”



## B. Agriculture

- ❖ Actual market liberalization based on tariffication by the WTO system
- ❖ No arrangement on agricultural subsidy

**<Table 2. Agricultural Market Liberalization in Korea-EU FTA and Korea-US FTA>**

Concession Schedule	Korea-EU FTA				Korea-US FTA			
	Korea		EU		Korea		US	
	Item (%)	Value(%)	Item (%)	Value(%)	Item (%)	Value(%)	Item (%)	Value(%)
Immediate	42.1	19.5	91.8	88.3	38.1	55.2	58.7	81.5
2-3 year	1.2	17.9	0.5	0.9	0.4	0.2	0.6	0.1
Within 3 yr	43.3	37.4	92.3	89.2	38.5	55.4	59.3	81.6
5 year	19.2	27.9	5.8	10.3	20.7	11.6	22.1	2.1
Within 5 yr	62.5	65.3	98.1	99.5	59.2	67.0	81.4	83.7
6-7 year	3.3	4.1			4.3	4.4	5.1	14.2
10 year	19.9	21.9			23.3	4.7	9.9	2.1
Over 10 yr	11.5	8.5			12.1	23.0	3.6	
Exemption	2.8	0.2	1.9	0.5	1.1	0.9		
Total	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0



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### C. MFN clause for trade in services

- ❖ NAFTA & Korea-US FTA: “each party shall accord to service suppliers of the other Party treatment no less favorable than that it accords, in like circumstances, to service suppliers of a non-Party”
  
- ❖ Korea-EU FTA: MFN with exception
  - Applicable only to “economic integration agreement signed after the entry into force” of the Korea-EU FTA (Future MFN)
  - Exception for treatment arising from regional economic integration agreements that “stipulates a significantly higher level of obligations than those undertaken” in the Korea-EU FTA
  - Exception for measures related to recognition of qualifications, licenses or prudential measures, and treatment under international tax agreements



### III. Legal Issues of Korea-US and Korea-EU FTAs

#### 3.2 Trade Rules and Dispute Settlement

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##### A. Trade Remedy Rules

- ❖ NAFTA Article 802 (Selective Safeguard Application): NAFTA parties taking WTO safeguard measures shall exclude imports from other parties from the action unless that import, considered individually, accounts for a “substantial share of total imports” and “contributes importantly to the serious injury caused by imports”.
- ❖ Korea-US FTA, Article 10.5: a party taking a WTO safeguard measure “may exclude imports of an originating good of the other Party if such imports are not a substantial cause of serious injury or threat thereof.”
- ❖ Only procedural addition for antidumping/countervailing duty
  - notification and consultation requirement before the initiation of the investigation.
  - promote price undertakings



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❖ **Article 11.11, Korea-EU FTA:** prohibits the following subsidies if they “adversely affect” trade of the parties in domestic or export markets:

(a) subsidies granted under any legal arrangement whereby a government or any public body is responsible for covering debts or liabilities of certain enterprises within the meaning of Article 2.1 of the SCM Agreement without any limitation, in law or in fact, as to the amount of those debts and liabilities or the duration of such responsibilities

(b) subsidies (such as loans and guarantees, cash grants, capital injections, provision of assets below market prices or tax exemptions) to insolvent or ailing enterprises, without a credible restructuring plan based on realistic assumptions with a view to ensuring the return of the insolvent or ailing enterprises within a reasonable period of time to long-term viability and without the enterprise significantly contributing itself to the costs of restructuring. This does not prevent the parties from providing subsidies by way of temporary liquidity support in the form of loan guarantees or loans limited to the amount needed to merely keep an ailing enterprise in business for the time necessary to work out a restructuring or liquidation plan.

This subparagraph does not apply to subsidies granted as compensation for carrying out public service obligations and to the coal industry.



## B. Dispute Settlement

<Table 3. Comparison of Key Features of Dispute Settlement Systems>

	<b>NAFTA</b>	<b>Korea-US FTA</b>	<b>Korea-EU FTA</b>
Exception from coverage	AD, CVD	AD, CVD, SPS, competition, labor,	AD, CVD, SPS, competition
Choice of forum	If no agreement, normally under NAFTA. Exclusivity	Exclusivity	Exclusivity to the same obligation
panelist	5	3	3
Non-violation complaints	trade in goods except for automotive sector and energy investment matters, TBT, cross-border trade in services and intellectual property	the whole market access areas, rules or origin, and government procurement	Not allowed
Time	Last panelist to initial report 90 days	Chair to initial report 180 days	panel establishment to ruling 150 days
Alternative Procedure		Snap-back for auto disputes	NTB Mediation



### III. Legal Issues of Korea-US and Korea-EU FTAs

#### 3.3 Intellectual Property Protection

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- ❑ Korea-US FTA: extension of protection period
  - Copyright: from author's life + 50 years to author's life + 70 years
  - Patent: compensation for regulatory review or approval period
  
- ❑ Korea-EU FTA
  - More IP rights to protect: "registered design" for 15 years and "unregistered appearance" for at least 3 years
  - More geographical indications to protect

	Agricultural products	Wine	Spirit	TOTAL
Korea	63	0	1	64
EU	60	80	22	162

- Border measures: the authority to suspend release of "goods infringing patent, plant variety rights, registered design, and geographical indication", in addition to counterfeit trademark or pirated copyright goods



### III. Legal Issues of Korea-US and Korea-EU FTAs

#### 3.4 WTO-Plus Elements

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##### ❑ Korea-US FTA

- ❖ Investment: investor-state dispute settlement (ISD) system
- ❖ Labor
- ❖ Environment
- ❖ E-commerce: no tariff on e-commerce

##### ❑ Korea-EU FTA

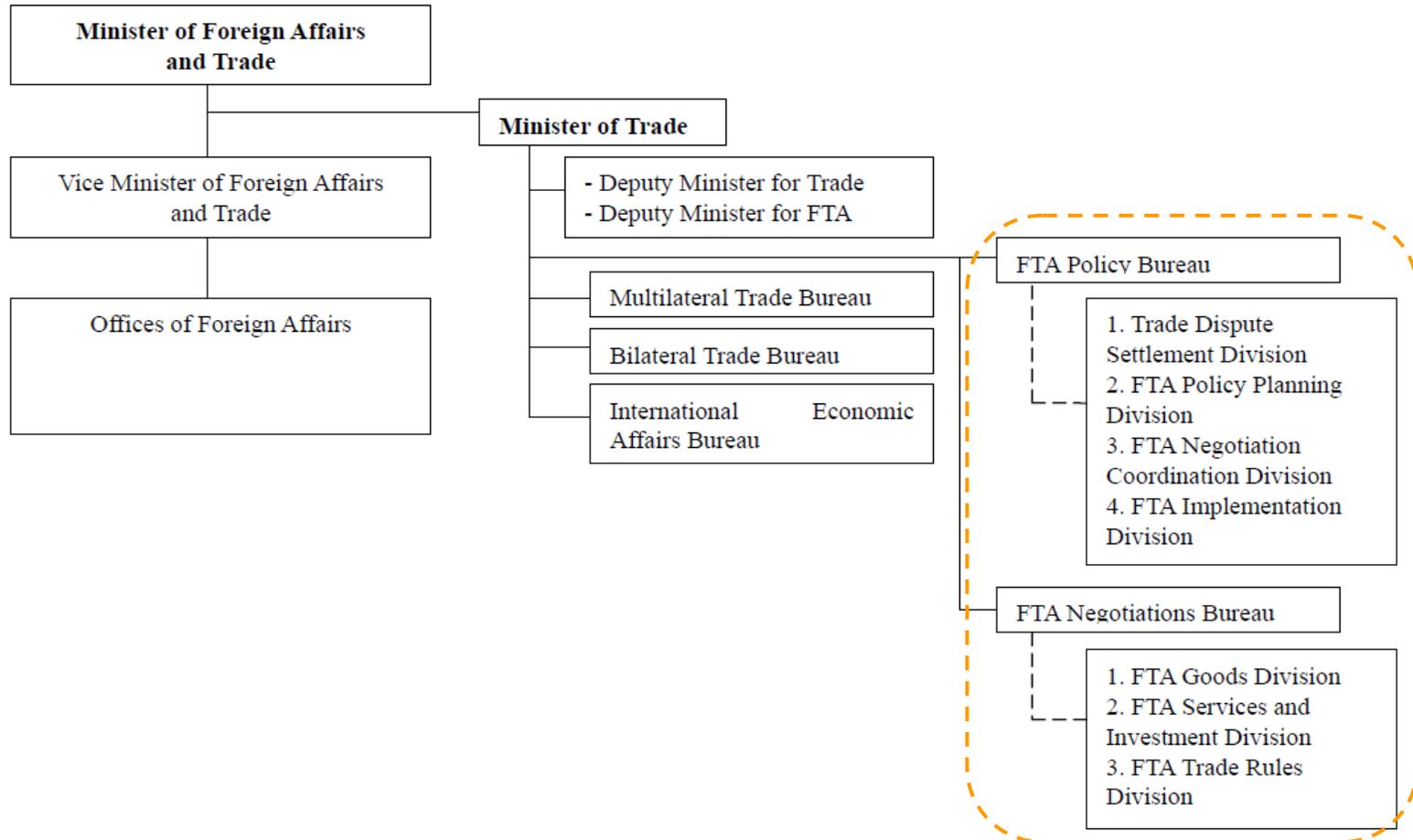
- ❖ Investment: no investor-state dispute settlement (ISD) system
- ❖ Trade and sustainable development: not only labor standards and environment agreement but also civil society dialogue mechanism and corporate social responsibility
- ❖ Cultural cooperation: contingent upon the ratification of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions
- ❖ Chapter on transparency



# IV. Institutional Development of Korea for FTA

## 4.1 Reform of Government Organization

<Figure 1. Organizational Structure of Ministry of Foreign Affairs and Trade (MOFAT)>



## IV. Institutional Development of Korea for FTA

### 4.2 Trade Adjustment Assistance Program

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- ❑ “Act on Trade Adjustment Assistance for Manufacturing and Other Industries (TAA Act)” entered into force on April 29, 2007
  - ❖ Loans, investments, and job placement support for labor can be requested by manufacturers when sales or production fall by over 25% due to import competition.
  
- ❑ The Korean TAA is primarily focused on supporting small and medium size firms facing structural adjustment
  - ❖ 92% of 2,845 billion won budget under the Korean TAA program will go to firms while employees will be given less than 8%.
  - ❖ Firm-oriented support systems may be more vulnerable under the WTO Agreement on Subsidy and Countervailing Measures.
  
- ❑ The Korean TAA system requires the determination of the Korea Trade Commission (KTC) on the injury caused by pertinent FTAs to become eligible for the TAA support programs.
  - ❖ The KTC should make a positive determination on (i) “serious injury” that is defined to mean 25% or more reduction in total sales or production and (ii) causation requirement – imports of same kinds or directly competitive goods or services to be a primary cause of serious injury.



<Table 3. Summary Information of TAA Implementation as of October 2010>

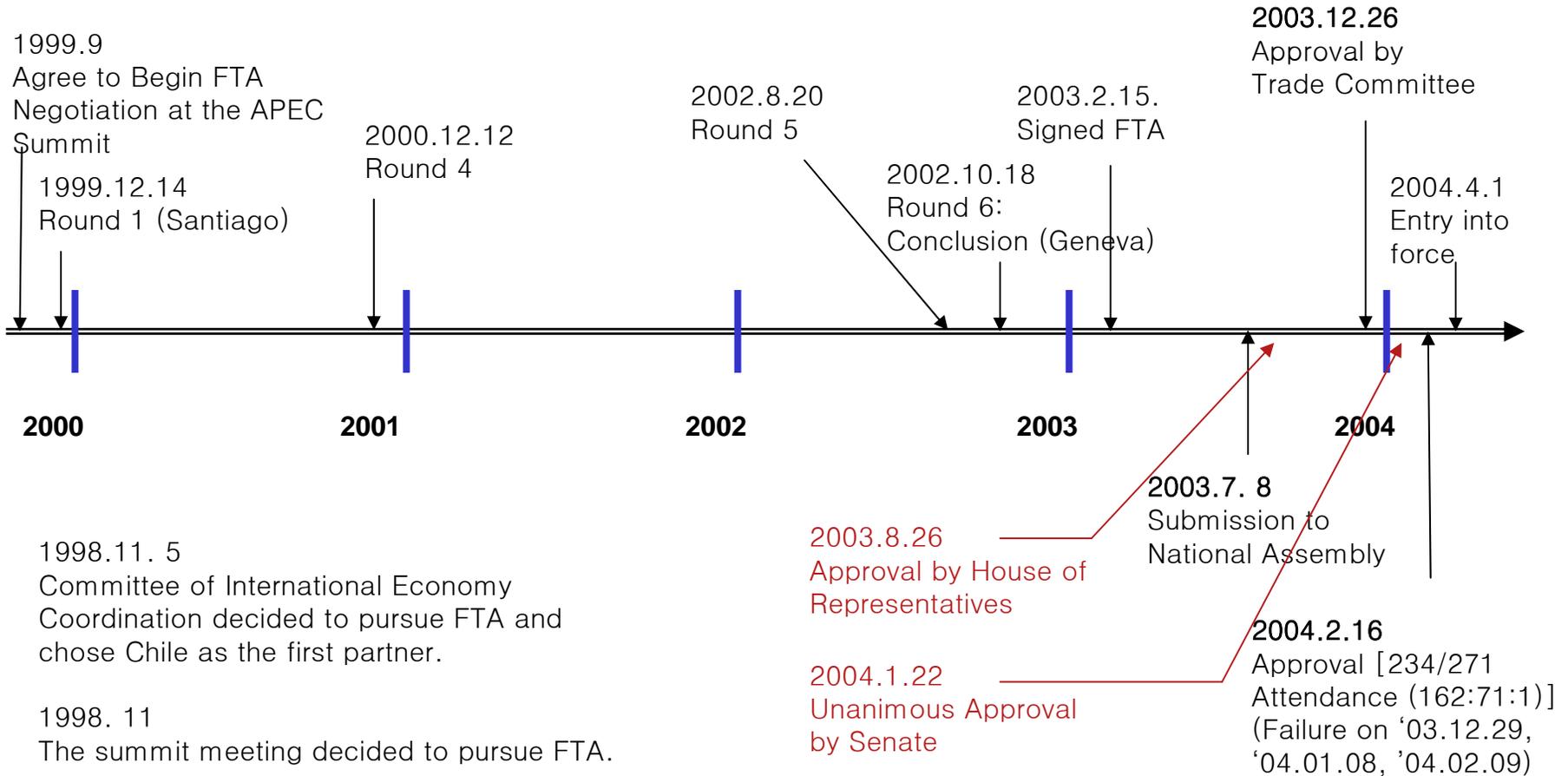
Product	Faucet	Wine	Pork	Watch	Pork	Mackerel
<b>Reason for Application</b>	Sales Reduction (Loss of 27%)	Sales Reduction (Loss of 45%)	Production Reduction (Loss of 28%)	Sales Reduction (Loss of 49.5%)	Sales Reduction (Loss of 31.6%)	Sales/Profit Reduction (Loss of 19.5%/51%)
<b>Importing Country</b>	Switzerland (EFTA)	Chile	Chile	Switzerland (EFTA)	Chile	Norway (EFTA)
<b>KTC Determination</b>	Negative	Positive	Positive	Positive	Positive	Positive
<b>Loan</b>		KRW200 million (08.12. 1)	KRW100 million (09. 2. 3)		KRW100 million (09. 7. 14)	
<b>Consulting Support</b>		KRW16 million ('09.1.22~ 4.30)	KRW16 million ('09.3.2~1 2.12)			
		For marketing strategy development	B2B business strategy development			



## IV. Institutional Development of Korea for FTA

### 4.3 Regulatory Frameworks for Trade Negotiation and Legislation Procedure

#### ❑ Problem of Cooperation with National Assembly: Korea-Chile FTA case



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❑ Issues on Institutionalized FTA Negotiation Procedure

- ❖ Requirements to initiate the FTA negotiation
  - Korea-US FTA: Can the President initiate a FTA negotiation when the ruling party opposes to it?
- ❖ Transparency requirement
  - How much at what stage to whom?
  - Incident of Korea-US FTA
- ❖ Analysis of economic impacts
- ❖ Procedure similar to that under the TPA



## V. Unfinished Works

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- ❖ Coherence with WTO Negotiations
  - Agricultural subsidy problems
  - Jurisdictional conflicts between FTA and WTO (NAFTA, MERCOSUR)
  
- ❖ Rule diversification
  
- ❖ MFN treatment for services trade and intellectual property protection in FTAs

