

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

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I. Introduction

The recent proliferation of free trade agreements (FTAs) is ironically the phenomenon after the establishment of the World Trade Organization (WTO) that was created by the commitment of more than 120 Members “to develop an integrated, more viable and durable multilateral trading system” and “to preserve the basic principles and to further the objectives underlying this multilateral trading system”.¹ For this FTA development or “FTA-fever”, the North American Free Trade Agreement (NAFTA) has played a crucial role in setting up the structure and the scope of subsequent FTA texts. A vast majority of FTAs particularly until the mid-2000s had significantly drawn from NAFTA that worked as the model template for minor customization. In fact, drafting the WTO Agreements was also benefited from the experience of NAFTA that entered into force one year earlier.²

More recent FTAs concluded after the mid-2000s, however, have shown increasingly new – so-called “WTO plus” – elements which address issues currently not under the auspice of the WTO, such as investment, competition, and cultural cooperation as well as issues in ways beyond the current scope of implementing the WTO system such as changing the trade remedy rules and amending protection levels of intellectual property rights. In that regard, the recent FTAs concluded by Korea provide important insights about how the post-NAFTA FTAs have evolved in terms of not only the contents and scope of market liberalization but also trade disciplines. In addition, the Korea-EU FTA is the first major FTA that the EU concluded after announcing new trade policy strategies in 2006.³ Therefore, the Korea-EU FTA will become an important predecessor for subsequent FTA negotiations involving the EU.⁴

Abandoning the conventional position as ardent opponent to discriminatory trading arrangements including FTAs in the late 1990s⁵, Korea has become one of the most aggressive

¹ Preamble of “Agreement Establishing the World Trade Organization”.

² NAFTA accepts French and Spanish as well as English for its official language. See Article 2206 of NAFTA. The only other international trade agreement that use those three languages as the official language is the WTO.

³ A new trade policy by the European Commission is explained in “Global Europe: Competing in the World – A Contribution to the EU’s Growth and Job Strategy”, <<http://trade.ec.europa.eu/doclib/html>>. For a detailed analysis on this policy shift, see Dukgeun Ahn, “EU’s Recent Trade Policy to North America and Implications for the Korean Economy” (KIEP, 2007; *in Korean*).

⁴ The EU is currently undertaking FTA negotiations with many trading partners including ASEAN, Canada, Columbia, India, MERCOSUR, Peru, and Singapore. See < http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf>.

⁵ Korea had been a traditional member of “MFN Friends Group” that opposed preferential trading

FTA negotiators in the WTO systems. For example, Korea is one of the very few countries that establish FTA relation with both United States and European Union.⁶ Moreover, Korea is expected to formally initiate FTA negotiations with China in the early 2011 at the latest and resume the currently pending FTA negotiation with Japan shortly – at least not to be delayed much after the Korea-China FTA negotiation. This paper will review key features of the recent FTAs – especially, Korea-EU FTA – and pertinent trade policy measures undertaken by Korea and draw some implication for future FTAs.

Section II summarizes the state-of-the-play of Korea's FTA negotiations and discusses main characteristics. Section III analyzes the main features of Korea's recent FTAs involving US and EU. Section IV discusses trade adjustment assistance programs recently implemented by Korea and problems in legislative procedures typically experienced by many developing countries. Section V concludes with future agenda to be addressed in FTA negotiations.

II. Overview of Korea's FTA Policies

2.1 Development of Korea's FTA Policy and Negotiation

Korea, whose economy relies considerably upon foreign export markets, had traditionally been antipathetic about regional trade arrangements (RTAs)⁷ that intrinsically cause discriminatory treatment for products from non-party economies. Such policy tendency has been based on the premise that, as an economy with a global trading exposure, RTAs are not helpful to promote Korea's trading interests and that these arrangements may lead to mutually exclusive trading blocs which undermine the multilateral trading system. Korea therefore participated in regional economic cooperation arrangements such as APEC and took part in a limited number of preferential tariff arrangements such as the Global System of Trade Preferences (GSTP), Trade Negotiations among Developing Countries (TNDC), the Bangkok Agreement Among Developing Member Countries of the Economic and Social Commission for Asia and the Pacific, and since 2000, unilateral tariff concessions to least developed countries. However, Korea did not become a party to any RTAs such as the free trade area or customs union until recently. Korea indeed remained as a very few WTO Members that did not establish

arrangements such as FTAs. It is interesting to note that other "MFN Friends" such as Australia, Japan, New Zealand and Singapore have all actively pursued FTAs in recent years.

⁶ The countries that have FTAs both with the US and the EU include, other than Korea, Chile, Israel, Jordan, and Mexico.

⁷ RTA is a broad concept to embrace FTA, customs union, common market and economic union.

any FTA relationship with other countries until 2004.⁸

This policy toward RTAs was dramatically changed in the late 1990s when the Korean government recognized that it became isolated from most economic integration initiatives and suffered from trade diversion due to tariff disadvantages in most exporting markets. RTAs are increasingly seen as an effective way of maintaining export markets and for inducing foreign direct investment into Korea. On 5 November 1998, the Committee for Internal Economic Policy Coordination chaired by the Prime Minister determined that the Korean government launched the first FTA negotiation with Chile.⁹ It was the first time for the Korean government to formally decide on the FTA policy matters. The Government Report submitted to the Trade Policy Review of Korea in September 2000 clearly denotes the change in policy:

As an economy that has benefited greatly from the openness in global trade, Korea has traditionally valued the multilateral trading system and has not supported bilateral or regional free trade agreements. Though its commitment to multilateralism is still firm, Korea has recently begun to be more flexible with regard to the FTAs in the world trading system. Korea is now of the view that FTAs, if properly concluded and managed in accordance with relevant rules, can supplement the multilateral trading system and contribute to market opening in the world through bilateral and regional acceleration of trade liberalization.¹⁰

For the first FTA negotiation, the Korean government established “Korea-Chile FTA Committee” and five working parties on market access, quarantine and standards, investment and service, trade rules, and dispute settlement. On the APEC Summit meeting in September 1999, presidents of both countries agreed to begin the FTA negotiation. Four formal meetings for the FTA negotiation in December 1999, February, May, and December 2000 were held before the FTA negotiation was stalled mainly due to the strong opposition from Korean agricultural sectors. The negotiation appeared a failure after the fifth formal meeting in March 2001 could not be held despite the original schedule.¹¹ But, at the APEC Summit Meeting in Shanghai in October 2001, two countries agreed to continue the FTA negotiation. Finally, on 24 October 2004, both countries announced the conclusion of a bilateral FTA after the full one week negotiation at Geneva.¹² The FTA was signed on 15 February 2003.

But, the last and the most difficult hurdle for the first FTA came from the National Assembly of Korea. When the FTA text was moved to the National Assembly for ratification in

⁸ As of September 2010, Mongolia is the only WTO Member without any FTA arrangement on the basis of the formal notification to the WTO.

⁹ KREI and KIEP, White Paper on the Korea-Chile FTA, 83 (2004, in Korean, hereinafter “White Paper”).

¹⁰ WTO, WT/TPR/G/73 (dated 28 August 2000), para.67.

¹¹ For more detailed history of the Korea-Chile FTA negotiation, see *supra* note 7, “White Paper”. See also Appendix 1.

¹² It is noted that the first FTA for Korea was signed at Geneva, not Seoul nor Santiago. This incident actually shows how controversial the conclusion of the first FTA was to the Korea government.

October 2003, there was vehement opposition especially from congressmen representing farming sectors. After long desperate battles in the legislative body – especially, after three consecutive failures at the floor voting, the first FTA for Korea was ratified on 16 February 2004 only with an enormous subsidy package for farming sectors.¹³ This first FTA for Korea with Chile finally entered into force on 1 April 2004.

There are several reasons why the Korean government chose Chile as the first FTA partner. Firstly, the opposite seasonal environment and the long geographical distance were considered favorable conditions to alleviate agricultural trade and thus problems for domestic agricultural sectors. Secondly, it wanted to have an access to the Chilean market that already established many FTA relationships.¹⁴ Particularly, they thought that the extensive FTA network of Chile in the western hemisphere might work as an important gateway for Korea to get an access to increasingly integrated American markets. In addition, the Korean government thought that the supplementary industry structure of two economies based on traditional comparative advantages would maximize gains from trade incurred by the FTA. Other than those, learning effects from the Chilean FTA experience, sharing similar policy principles for open economies are also noted as relevant factors to choose Chile. Lastly and maybe most importantly, Chile was one of the very few countries that actually showed the willingness to engage in a FTA negotiation with Korea, because most other countries did not take Korea's offer for FTA negotiation seriously.¹⁵ The long history of Korea as the strong opponent to RTAs probably made other countries suspicious about the change of the Korean government's trade policy.

As summarized in <Table 1>, after initial “experimental” or “pioneering” FTAs with relatively small trading partners, the Korean government aggressively pursued FTA policies. With these strategically well-dispersed three FTAs, one with Latin American country, another with Asian economy and the last with European countries, the Korean government basically finished a “warm-up” stage of FTA policies. It had accumulated reasonably divergent experience to deal with not only geographically different countries, but also economically different stages of countries – i.e., developed (Singapore), developing (Chile) and a mixture of countries (EFTA).

Unlike most other countries in FTA races, the Korean government then moved directly to major trading partners for FTA negotiation. The FTA negotiations followed right after those

¹³ The Korean government announced a comprehensive farming support program in an amount of more than \$100 billion (equal to 119 trillion Korean won). Although the whole amount of \$100 billion would not be provided as lump sum payment to farming sectors, it still included massive subsidy programs. On the other hand, the farming support program in an amount of 119 trillion won was reportedly prepared to take the image of “emergency” from the emergency call number in Korea that is “119”.

¹⁴ Before dealing with Korea for FTA, Chile had the FTA relationship with EC, US, Mexico, Canada, Costa Rica and El Salvador.

¹⁵ The countries that showed early interest in a FTA with Korea included Israel, Jordan and South Africa.

warm-up FTAs include Japan, ASEAN, the United States, European Union, India and Canada. As of September 2010, Korea is examining the feasibility of FTAs with MERCOSUR, Russia and China.

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

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

2.2 Special Features of Korea's FTA Policy¹⁶

A. Comprehensive "WTO plus" approach

The Korean government has maintained comprehensive "WTO plus" approach for market liberalization undertaken by FTA negotiations. Since trade barriers at borders of major trading partners are typically very low or scarce, Korea endeavors to work on non-tariff issues such as trade remedy system, investment, trade in services, intellectual property protection, cooperation in science and technology. In this regard, it is noted that the Korean government has pursued *sui generis* FTA trade remedy systems by modifying the WTO rules.

For example, the Korea-Chile FTA included special safeguard mechanism for agricultural products.¹⁷ The Korea-Chile FTA generally resorts to the WTO Agreements for its

¹⁶ This part is mostly drawn from Dukgeun Ahn. "Korea's FTA Policy" in *The New International Architecture in Trade and Investment: Current Status and Implications* (APEC, March 2007).

¹⁷ For more general discussion on FTA trade remedy systems, see Dukgeun Ahn, "Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules", *Journal of International Economic Law*, Vol. 11, No.1,

safeguard mechanism. Chapter 6 stipulates that both parties maintain WTO rights and obligations concerning safeguard matters. Notwithstanding Chapter 6, Article 3.12 sets forth a special safeguard system for agricultural goods in case an import increase causes or threatens to cause serious injury or “market disturbance”.¹⁸ This special agricultural safeguard provision substantially differs from the special safeguard mechanism under the WTO Agriculture Agreement that employs an automatic triggering system. Moreover, although ‘material injury’ and ‘threat of material injury’ are defined in line with the WTO Safeguard Agreement, the concept of ‘market disturbance’ is not specifically stipulated and completely unprecedented in both countries’ jurisprudence. The lack of clear definition on the latter element for safeguard actions in the Korean statutory system may lead to serious controversy in actual application of the provisions, unless it is elaborated with more specific guidelines or criteria.¹⁹

The Korea-Singapore FTA adopted additional commitments for the anti-dumping mechanism: prohibition of zeroing and the “lesser duty” rule. Article 6.2 of the Korea-Singapore FTA stipulates that:

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.

The above provisions are noteworthy in that they are the first kind of a modified FTA trade remedy system adopted in the East Asia.

While the Korea-EFTA FTA retains basically all the rights and obligations under the WTO Anti-dumping Agreement, it also adopted the above mentioned a “lesser duty” rule. In addition, the Korea-EFTA FTA stipulates that parties “shall endeavor to refrain from initiating anti-dumping procedures against each other” and consult “with the other with a view to finding mutually acceptable solution”, although it does not mandate any specific additional legal requirements. Interestingly, the parties under the Korea-EFTA FTA shall review whether there is

107-133 (2008).

¹⁸ Laws on Investigation of Unfair Trade and Safeguard, Article 22.3 (Public Law 7093, promulgated on Jan. 20, 2004).

¹⁹ Article 22.3 of the Law on Investigation of Unfair Trade and Safeguard was elaborated by Article 22.3 of the Implementing Regulation (Presidential Order 18565, promulgated and entered into force on Oct. 21, 2004). But, the Implementing Regulation did not clarify the concept of “market disturbance” either.

need to maintain anti-dumping systems after five years of FTA implementation and subsequently every two years. Moreover, the Korea-EFTA FTA requires at least a 30 day period for mutual consultation before parties initiate countervailing investigations.

In relation to customizing the trade remedy rules, future FTA negotiations of Korea with Japan and China may bring about potentially significant precedents for the WTO system. Currently, these East Asian countries are most like-minded WTO Members in terms of trade remedy negotiations in the WTO Doha Round. Given that three countries are among major players in terms of WTO trade remedy actions, how much or what they can agree among or between themselves to modify the current WTO trade remedy rules will have crucial implications for future development of the WTO trade remedy system.

Moreover, the Korean government accepted higher protections for intellectual property rights in FTAs than those protected under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).²⁰ It is noted that WTO plus elements for intellectual property rights are actually subject to the most-favored nation treatment (MFN) principle under the TRIPS Agreement that does not permit FTA exceptions such as Article XXIV of GATT or Article V of GATS. In other words, the intellectual property protection has been gradually strengthened through FTAs in Korea.

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

Currently, (South) Korea is treating products from North Korea essentially as domestic products and does not impose any tariff or other trade measures applicable to importation. In fact, Korea enacted a special implementation law for WTO Agreements in 1995 and declared that it would treat North Korean products as domestic goods. Article 5 of the “Special Law on Implementation of World Trade Organization Agreement”, subtitled “Intra-Nation Transaction”, provides that “the trade between South and North Korea constitutes an internal trading within an economy and as such shall not be regarded as that between countries”.²¹ Notwithstanding this domestic regulation, the exemption of tariffs and other trade measures may invoke MFN treatment problems under the WTO system since North Korea appears to satisfy all the legal requirements to be treated as “country” in the United Nations (UN) system that is the basis for MFN treatment.²² For example, on 17 September 1991, Korean and North Korea secured

²⁰ A more detailed account is in Section 3.3.

²¹ Public Law No. 4858. See also Moon-soo Chung, “Implementation of the Results of the Uruguay Round Agreements: Korea” in *Implementing the Uruguay Round* (eds. by John Jackson & Alan Sykes) 375 (1997).

²² The MFN provision of GATT is as follows:

“1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to

simultaneously the membership of the UN that requires sovereign state status.

As transaction between South and North Korea continues to grow especially using Gaesung Industrial Complex – special North Korean district where South Korean companies manufacture products using North Korean workers for exportation, consumption or further processing in South Korea – counterpart for Korea’s FTA negotiation have raised controversial issues on whether those products should be benefited under the FTA arrangements. The Korea-Singapore FTA first made a formal recognition of “internal” trade between South and North Korea. But, transaction between South and North Korea was not categorically recognized as “internal” trade. Instead, the following “outward processing” provision articulates the specific conditions carefully designed to embrace products from Gaesung Industrial Complex to render preferential treatment:

ARTICLE 4.4 : OUTWARD PROCESSING

1. Notwithstanding the relevant provisions of Article 4.2 and the product-specific requirements set out in Annex 4A, a good listed in Annex 4C shall be considered as originating even if it has undergone processes of production or operation outside the territory of a Party on a material exported from the Party and subsequently re-imported to the Party, provided that:

- (a) the total value of non-originating inputs as set out in paragraph 2 does not exceed forty (40) per cent of the customs value of the final good for which originating status is claimed;
- (b) the value of originating materials is not less than forty-five (45) per cent of the customs value of the final good for which originating status is claimed;
- (c) the materials exported from a Party shall have been wholly obtained or produced in the Party or have undergone there processes of production or operation going beyond the non-qualifying operations in Article 4.16, prior to being exported outside the territory of the Party;
- (d) the producer of the exported material and the producer of the final good for which originating status is claimed are the same;
- (e) the re-imported good has been obtained through the processes of production or operation of the exported material; and
- (f) the last process of production or operation⁴⁻¹ takes place in the territory of the Party.

2. For the purposes of paragraph 1(a), the total value of non-originating

all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III,* 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.”

See also Dukgeun Ahn, “Legal Issues for Korea’s ‘Internal Trade’ in the WTO System”, in *Multilateral and Regional Frameworks for Globalization: WTO and Free Trade Agreements* (eds. by Lim and Torrens, Korea Development Institute, 2005).

inputs shall be the value of any non-originating materials added in a Party as well as the value of any materials added and all other costs accumulated outside the territory of the Party, including transportation cost.

⁴¹ The last process of production or operation does not exclude the non-qualifying operations stipulated in Article 4.16.

Goods listed in Annex 4C include plastics and articles thereof (HS Code Chapter 39), nuclear reactors, boilers, machinery and mechanical appliances; parts thereof (Chapter 84), electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles (Chapter 85), ships, boats and floating structures (Chapter 89), optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof (Chapter 90).

This provision was similarly adopted in the Korea-EFTA FTA. Annex I of the Korea-EFTA FTA has the provision regarding the exemption for territoriality principle as follows:

APPENDIX 4 TO ANNEX I EXEMPTIONS FROM THE PRINCIPLE OF TERRITORIALITY

1. In accordance with Article 13 of Annex I, the acquisition of originating status shall not be affected by working or processing carried out outside the territory of a Party on materials exported from the Party concerned and subsequently re-imported to that Party, provided that:

(a) the total added value as set out in paragraph 5(a) does not exceed 10 percent of the ex-works price of the final product for which originating status is claimed; and

(b) the materials exported from the Party concerned shall be wholly obtained in that Party or having undergone working or processing going beyond the insufficient operations listed in Article 6 prior to being exported outside the territory of that Party.

2. Notwithstanding paragraph 1, for products listed in the Table set out at the end of this Appendix, the acquisition of originating status shall not be affected by working or processing carried out in an area, for instance an industrial zone, outside the territory of a Party, on materials exported from the Party concerned and subsequently re-imported to that Party, provided that:

(a) the total value of non-originating input as set out in paragraph 5(b) does not exceed 40 per cent of the ex-works price of the final product for which originating status is claimed; and

(b) the value of originating materials exported from the Party concerned is not less than 60 per cent of the total value of materials used in manufacturing the re-imported material or product.

The product coverage under the above provision was expanded from that of the Korea-Singapore FTA by including, *inter alia*, rubber products, articles of leather; apparel and clothing accessories, footwear, glass and glassware, precious metals, articles of iron or steel, vehicles

other than railway or tramway rolling-stock, miscellaneous manufactured articles.

Although the above approach to treat products from North Korean territories was accepted by Singapore and EFTA, other FTA negotiation partners such as Japan and the United States have vehemently opposed to the adoption of similar provisions. In fact, the Korea-US FTA came up with the different approach to leave the important decision in the future, widening the potential to cover the whole peninsula but with much more difficult conditionality. Annex 22-B of the Korea-US FTA stipulates “Committee on Outward Processing Zones on the Korean Peninsula” to address the issues for products manufactured from North Korean territories as follows:

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.
4. The Committee shall determine whether any such outward processing zone has met the criteria established by the Committee. The Committee shall also establish a maximum threshold for the value of the total input of the originating final good that may be added within the geographic area of the outward processing zone.
5. Decisions reached by the unified consent of the Committee shall be recommended to the Parties, which shall be responsible for seeking legislative approval for any amendments to the Agreement with respect to outward processing zones.

Although the above provision enlarges the scope of the outward processing zones to broader areas than Gaesung Industrial Complex, it substantially strengthens the criteria to apply for the provision by including various non-economical and even diplomatic as well as military issues. The Korea-EU FTA was a crucial opportunity for Korea to reverse the above compromise with the US back to the original approach to more broadly embrace products from Gaesung Industrial Complex. However, the above provision, *albeit* with much weaker conditions, was adopted similarly in the Korea-EU FTA.²³ Whether this approach would be employed in the

²³ Annex IV of Protocol Concerning the Definition of ‘Originating Products’ and Methods of Administrative Co-operation. The Korean government anticipated a more favorable position by the EU towards the Gaesung Industrial Complex since most EU Members maintain diplomatic relationship with North Korea. In fact, the European Parliament permitted products from Gaesung Industrial Complex to be included as negotiating agenda in the FTA negotiation. But, conflicts in the course of negotiation, particularly on textile imports, raised serious controversy to the already difficult negotiation situations involving automobile and duty drawback system. Finally, instead of eliminating textile products, which accounts for more than 60% of imports from Gaesung Industrial Complex, from the coverage of the outward processing zone, the issue was put to the committee.

same way or substantially modified in future FTAs – for example, by the Korea-China FTA – is a very important issue for the Korean government.

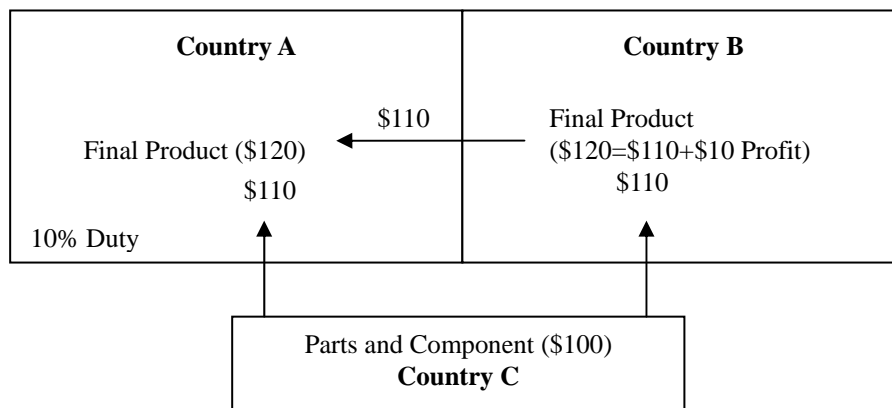
III. Legal Issues of Korea-US and Korea-EU FTAs

3.1 Market Access

A. Duty Drawback

Most countries have maintained duty drawback systems to promote export competitiveness by refunding or waiving customs duties on a good that is used as input material for a product subsequently exported to other countries. Nevertheless, duty drawback system has been considered controversial in the context of FTAs. While duty drawback system typically facilitates more trade between parties, it may also aggravate free ride problems by parts and components imported from third countries and ultimately industry injury by imports from FTA parties obtaining cost advantages. Therefore, early FTAs such as Canada-US FTA and many FTAs by the EU prohibit the duty drawback system between FTA parties.

<Figure 1. Structure of Duty Drawback System>



However, the complete prohibition of duty drawback system has been gradually compromised with certain qualification. For example, NAFTA Article 303 stipulated the 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”. Although the US and Canada prohibited duty drawback in the Canada-US FTA, NAFTA embracing Mexico that had

particular economic interests with assembly processing for its exportation permits duty drawback at least up to the lesser level of parties' duties on materials. Later, the US government tried to strengthen the duty drawback limitation in subsequent FTA negotiations, especially with countries that have some manufacturing capacities. For example, Article 3.8 of the US-Chile FTA categorically prohibits the duty drawback system.

On the other hand, the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) permits remission or drawback of import duty up to those levied on imported inputs that are consumed in the production of the exported product. This provision made other FTA partners more reluctant to accept the US position that prohibits or restricts the duty drawback system. Accordingly, the Korea-US FTA fully permits duty drawback within the boundary of the WTO SCM Agreement.

This issue was, however, much more controversial – in fact, almost a deal breaker – with the European Union. The EU's conventional concern on free riding problems through duty drawback seriously collided with Korea's trade interests that demand embracing a broader scope of supply chain. In fact, the EU has rarely permitted duty drawback system in its trade agreements. This issue remained as the last single agenda to be resolved for concluding the Korea-EU FTA. Finally, the Korea-EU FTA stipulates 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.”²⁴ A negative effect on competition may be shown if i) the rate of import increase of materials from non-parties is significantly greater than the rate of export increase of the product incorporating such materials to the other party, and ii) imports of the product incorporating such materials significantly increase in absolute terms or relative to domestic production. This arrangement with relatively specific criteria could substantially alleviate the EU manufacturers' concern. At the same time, Korea could also accept this provision because duty drawback would be no longer an issue if most major trading partners were embraced by FTAs during the transition period.

B. Agriculture

While the Doha Development Agenda has been unexpectedly stalled, significant agricultural market liberalization – at least the framework for freer trade of agricultural products – has been accomplished through FTA negotiations. It should be noted that after tariffication of agricultural trade barriers was implemented in the WTO system, the real market liberalization

²⁴ Protocol concerning the definition of 'originating products' and methods of administrative co-operation, Article 14.

based on tariff reduction for agricultural trade has taken place in the context of FTAs. In this regard, the arrangement of the Korea-EU FTA deserves much attention because the structure and scope of agricultural market liberalization appear to establish significant template models for subsequent trade negotiations.

As summarized in Table 2, Korea, one of the most defensive countries in terms of agricultural market liberalization, agreed on essentially the full scale free trade of agricultural products only with minor exemptions. In value terms, Korea exempted 0.9% of agricultural trade from the coverage of the Korea-US FTA. It was further reduced to 0.2% in the Korea-EU FTA. It is also noted that the EU committed to 99.5% market liberalization within 5 years. This arrangement under the Korea-EU FTA represents the dramatic paradigm shift in agricultural trade policies that has a strong implication for the future WTO negotiation.

<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

Source: Korea-EU FTA (MOFAT, 2009, *in Korean*).

Unlike NAFTA that struggled with domestic support for agricultural sectors, post-NAFTA FTAs simply rely on WTO commitments in terms of domestic support or export subsidy matters that have multilateral implications for agricultural trade. Like all other FTAs concluded after the WTO inception, the Korea-US FTA and Korea-EU FTA do not even mention domestic support or export subsidy issues in the text, implying that those matters are completely deferred to the WTO.²⁵

NAFTA was the first international agreement to articulate SPS disciplines for agricultural trade with dispute settlement procedures. After that part of the NAFTA Agreement

²⁵ However, the lack of disciplines on agricultural subsidies in FTAs often leads to the increase of agricultural subsidies after the conclusion of FTAs in order to compensate full scale market liberalization, despite the fact that they should be substantially decreased on the basis of commitments in the Doha negotiation. The delay in the Doha negotiation has contributed to proliferation of such short-term solutions.

was incorporated as the independent SPS Agreement in the WTO, the subsequent FTAs typically “affirm their existing rights and obligations with respect to each other under the SPS Agreement”. Moreover, as in Korea-US and Korea-EU FTAs, FTA parties do not generally allow recourse to dispute settlement procedures of FTAs.

C. MFN clause for trade in services

Given that a FTA is a major exception from the MFN requirement of the WTO, the MFN provision in a FTA appears to be contradictory to its founding objective. No FTA has required the MFN treatment for trade in goods. However, Article 1203 of NAFTA stipulated the MFN requirement when it first embraced cross-border trade in services. This has been the template model for the most of subsequent FTAs. Article 12.3 of the Korea-US FTA also incorporates this MFN provision by providing that “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.” The only qualification is that this provision shall not be interpreted as extending the “scope and coverage” of the Korea-US FTA.

This provision was similarly adopted in Article 7.8 of the Korea-EU FTA but with the notable differences. The Korea-EU FTA allows 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.²⁶ It is noted that the arrangements under the Korea-US FTA are not subject to the MFN obligation in Article 7.8 of the Korea-EU FTA that applies only to “economic integration agreement signed after the entry into force of this Agreement.”²⁷ In addition, the MFN provision for trade in services does not cover measures related to recognition of qualifications, licenses or prudential measures, and treatment under international tax agreements.

This MFN provision for trade in services has become another key provision for modern FTAs, particularly involving developed countries. Under the current situation that the services market liberalization through the WTO Doha negotiation has been stalled, this mechanism to require MFN treatment for trade in services in FTAs may work as an important alternative channel to gradually improve market access for services.

3.2 Trade Rules and Dispute Settlement

²⁶ For example, the arrangements under the European Economic Area between EU members and EFTA are excluded from the MFN coverage.

²⁷ This MFN system is often referred to as “future MFN”. In contrast, the MFN treatment under the Korea-US FTA is stronger in the sense that all treatments for trade in services are subject to it regardless of timing of signing or entry into force of pertinent agreements.

A. Trade Remedy Rules

NAFTA has the unique trade remedy system in Chapter 19, mandating the FTA dispute settlement panel to use national trade remedy rules to determine whether parties wrongfully implement their own domestic regulations, instead of agreeing and applying international trade remedy rules. After the WTO establishment, most FTAs have simply adopted the trade remedy rules under the WTO and even excluded dispute settlement process for trade remedy issues in the FTAs. This trend has been changed in recent years. As explained in Section 2.2, an increasing number of FTAs have changed and modified the WTO trade remedy rules, typically in an effort to strengthen the trade remedy disciplines between parties.²⁸ In fact, Korea has been actively pursuing modification of WTO trade remedy rules through FTA negotiations.

However, the legal constraint of the US government under the trade promotion authority and political reluctance of the US Congress to weaken the existing trade remedy system defied the bargaining pressure from the Korean government to amend the current WTO rules.²⁹ Accordingly, Chapter 10 of the Korea-US FTA includes only minor additional commitment in terms of trade remedy rules. For example, notification and consultation requirement was inserted before the initiation of the investigation. Also, the Korea-US FTA tries to promote price undertakings that have been rarely employed by the US government.

Compare to the Korea-US FTA, the Korea-EU FTA has made more significant FTA commitments in light of trade remedy systems. In addition to procedural clarification such as pre-investigation notification and consultation requirement, Chapter 3 of the Korea-EU FTA emphasizes public interest consideration. Also, pre-initiation examination must be undertaken “with special care” for antidumping investigations on a good from the other party on which antidumping measures have been terminated in the previous 12 months as a result of review.³⁰ Similarly, special care was mandated for cumulative assessment of conditions of competition. Moreover, *de minimis* margin rule was explicitly extended to a sunset review procedure. Probably most importantly for trade remedy issues, the Korea-EU FTA codified the lesser duty rule that recommend WTO members to impose a lesser duty between dumping margins and

²⁸ Despite its innocuous intent, this new phenomenon of “rule diversity” may cause economic as well as legal problems by aggravating arbitrary discrimination against non-parties. Dukgeun Ahn, “Foe or Friend of GATT Article XXIV: Diversity in Trade Remedy Rules”, *Journal of International Economic Law*, Vol.11, 107-133 (2008).

²⁹ Under the Trade Act of 2002 that granted the trade promotion authority to the USTR for the last time, “[t]he principal negotiating objectives of the United States with respect to trade remedy laws are ... to *preserve the ability* of the United States to enforce rigorously its trade laws, including the antidumping, countervailing duty, and safeguard laws, and *avoid agreements that lessen the effectiveness* of domestic and international disciplines on unfair trade, especially dumping and subsidies, or that lessen the effectiveness of domestic and international safeguard provisions, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions.” Section 2102(b)(14) of Trade Act of 2002.

³⁰ The FTA text does not clarify the level and duty in relation to “special care”.

injury margins.

In terms of safeguard measures, the most notable feature of NAFTA is the selective application of global safeguard actions. Article 802 provides that 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”. This provision had been the basis of excluding imports from Canada and Mexico when the US government imposed the WTO safeguard measures and become one of the most contentious issues in the WTO dispute settlement process.³¹ Later, this selective safeguard system based on FTAs has become one of the major preferences for FTA parties of the US.³²

Article 10.5 of the Korea-US FTA also incorporates such selective safeguard system with a legal modification. Unlike NAFTA requiring the selective safeguard application under certain circumstances, the Korea-US FTA provides that 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.” In other words, the exemption of the other party’s imports from a WTO safeguard measure is the right or under discretionary authority of an importing country, not the legal duty. However, in practice, the US government has always exempted the FTA parties from the WTO safeguard measures despite the legal discrepancy in the FTA texts.

Although the EU had supported the selective safeguard application until the Uruguay Round negotiation, it did not incorporate such system in FTAs. Like other FTAs involving the EU, the Korea-EU FTA does not embrace the selective safeguard mechanism.

B. Dispute Settlement System

NAFTA established the most articulated dispute settlement procedures among FTA parties and became one of the very few FTAs that actually utilized the procedure to settle the trade disputes.³³ Many subsequent FTAs have followed the NAFTA model for their dispute settlement procedure, only with minor customization such as the number of panelists.

Although the Korea-US FTA also adopted the NAFTA model in most of the major structures for dispute settlement procedures, there are a few notable differences. Firstly, the Korea-US FTA allows non-violation complaints for broader issues than NAFTA does, including

³¹ Dukgeun Ahn, “Restructuring the WTO Safeguard System”, in *The WTO Trade Remedy System: East Asian Perspective*, 11-31 (eds., M. Matsushita, D. Ahn & T. Chen, Cameron May, 2006).

³² In fact, Korea was one of the most ardent opponents for this selective safeguard mechanism and disputed this issue against the US in the WTO litigation. WTO, *US – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* (WT/DS202/R).

³³ See for example, William Davey, *Pine and Swine: Canada-US Trade Dispute Settlement – The FTA Experience and NAFTA Prospects* (Center for Strategic and International Studies, 1996).

the whole market access areas, rules of origin, and government procurement, in addition to NAFTA coverage of trade in goods except for automotive sector and energy investment matters, TBT, cross-border trade in services and intellectual property. But, the Korea-US FTA does not allow non-violation complaints for cross-border trade in services or intellectual property rights if the measure is subject to an exception under Article 23.1 (General Exceptions). Moreover, non-violation complaints for intellectual property rights are not permitted during a period for which WTO Members have agreed not to initiate such complaints.³⁴

Secondly, Annex 22-A of the Korea-US FTA provides alternative procedures for disputes concerning motor vehicles. This so-called “snap-back” system allows a party to increase tariffs on automobiles back to MFN applied rates if “the non-conformity or the nullification or impairment that the panel has found has materially affected the sale, offering for sale, purchase, transportation, distribution, or use of originating goods of the complaining Party”. The procedures shall terminate ten years after the FTA’s entry into force, provided that no panel during that period determines that a Party has failed to conform with FTA obligations or that a party’s measure has caused nullification or impairment in the sense of non-violation complaints.

The Korea-EU FTA stipulates a similar dispute settlement system with the following distinguishable features. Firstly, unlike NAFTA or the Korea-US FTA, the Korea-EU FTA does not allow non-violation complaints. Article 14.4 provides that the panel procedure is initiated with the submission to identify the specific measure at issue and to explain the breach of pertinent provisions of the FTA, implying no possibility of non-violation complaints.

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

	NAFTA	Korea-US FTA	Korea-EU FTA
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 of 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

³⁴ Article 64 of the TRIPS Agreement suspended the non-violation complaints for 5 years from the WTO establishment. This suspension was formally extended to 2007 and still in effect.

Alternative Procedure		Snap-back for auto disputes	NTB Mediation
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Secondly, the Korea-EU FTA appears to have a narrower scope of forum exclusivity compared to the Korea-US FTA or NAFTA. The latter FTAs provide that once a panel establishment for any matter is requested in either the FTA or the WTO, that selected forum “shall be used to the exclusion of other fora.” Thus, depending on how broadly interpret a “matter” in the context of the dispute settlement, this forum exclusivity may significantly limit the duplicative litigation. Article 14.19 of the Korea-EU FTA, however, sets forth the general principle for forum exclusivity by clarifying that recourse to the FTA dispute settlement provisions shall be “without prejudice to any action in the WTO framework, including dispute settlement action.” However, when a party initiates a dispute settlement proceeding regarding a particular “measure” either under a FTA or the WTO Agreement, it may not institute another proceeding in the other forum until the first proceeding ends. It implies that the Korea-EU FTA permits repetitive dispute settlement process for the same ‘measure’. Instead, parties are not allowed to seek redress of an obligation which is identical under the FTA and the WTO. Thus, the Korea-EU FTA permits duplicative, *albeit* sequential, litigation for the same measure unless the exactly identical legal obligations under both the FTA and the WTO are addressed.

Forum exclusivity issue has been routinely addressed in recent FTAs not to cause potential jurisdictional conflict. But the structural problem of FTA forum exclusivity provisions is the lack of the WTO Agreement to accommodate such legal system. Insofar as a WTO member brings complaints pursuant to the DSU rules, WTO DSB has no authority to repeal the panel request on the basis of such FTA provision on forum exclusivity. In that regard, the approach under the Korea-EU FTA to exclude the identical legal obligations from the alternative and subsequent proceeding may reduce unnecessary confusion on jurisdictional conflicts.

Annex 14-A of the Korea-EU FTA stipulates mediation mechanism for non-tariff measures that adversely affect market access in goods. The whole purpose of this mediation mechanism is to facilitate mutually agreed solutions between parties, instead of finding rigorous legal violation. The mediation mechanism is without prejudice to a formal panel procedure. Moreover, parties are prohibited to use evidence related to mediation such as positions taken by parties and proposals by a mediator in the dispute settlement procedures. Both parties agreed to adopt the WTO procedure in case the current proposal for NTB mediation is accepted by WTO Members.³⁵

3.3 Intellectual Property Protection

³⁵ WTO, TN/MA/W/88 (2007). The EU is one of the submitting countries of that proposal.

Unlike the FTA market access commitments for goods and services which are subject to MFN exception under GATT Article XXIV and GATS Article VI, the TRIPS Agreement does not incorporate such a FTA exception for MFN obligation. In other words, all advantages, favors, privileges and immunities granted to other FTA parties in light of intellectual property protection must be granted to all WTO members. Despite this MFN requirement, more FTAs especially involving the US and the EU enhance intellectual property protection compared to the WTO TRIPS regime. For example, the Korea-US FTA extended the protection period for copyrights from 50 years to 70 years after the author's death. In addition, Article 18.8 of the Korea-US FTA obligates parties to adjust the term of a patent to compensate for unreasonable delays that occur in granting the patent. Moreover, with respect to pharmaceutical patents, each party shall make available an adjustment of the patent term or the term of the patent rights of a patent covering a new pharmaceutical product for unreasonable curtailment of the effective patent term as a result of the marketing approval process related to the first commercial use of that pharmaceutical product in the territory of that Party.

These additional commitments in terms of intellectual property protection are to be applicable for the EU. On the other hand, the Korea-EU FTA also added more commitments. For example, regarding the border measures, most of the international trade agreements including NAFTA, Korea-US FTA and even WTO TRIPS provide the authority to suspend release of counterfeit trademark or pirated copyright goods. But, Article 10.67 of the Korea-EU FTA allows border measures for goods infringing patent, plant variety rights, registered design, and geographical indication as well.³⁶ This is in fact a huge progress in terms of intellectual property protection since this issue has not been settled in the WTO TRIPS negotiation.

The Korea-EU FTA protects "registered design" and "unregistered appearance" that is not yet covered by the WTO TRIPS Agreement or other FTAs. The duration of protection for the former is at least 15 years while that for the latter is at least 3 years. In addition, the Korea-EU FTA also expanded the legal protection for geographical indication³⁷ and deepened the legal obligations by applying the rules reserved for wines in the TRIPS to all agricultural products.

Following the Korea-US FTA, Article 10.35 of the Korea-EU FTA also stipulates the extension of the patent protection period to compensate the patent holder for reduced patent

³⁶ Korea has two year transition period to fully implement this obligation.

³⁷ The number of geographical indications for both parties are as follows:

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

See, Brief of the Korea-EU FTA, ministry of Foreign Affairs and Trade, 2009 (*In Korean*).

period due to the first authorization to sell the products. Despite the WTO panel's ruling that such regulatory review is consistent with the TRIPS obligations in *Canada – Patent case*, the US and the EU basically reverse the WTO jurisprudence by the textual languages of a FTA.³⁸

3.4 WTO-Plus Elements

It becomes routine practices for FTA parties to improve existing bilateral investment treaties through incorporating them into FTA texts. In this regard, many FTAs adopt investment dispute settlement systems of NAFTA, in particular investor-state dispute settlement system that allows private investors to bring a claim against the other party's government in case a breach of investment agreements incur loss or damages. These investment disputes are typically subject to either ICSID Convention or UNCITRAL Arbitration rules. The Korea-US FTA also adopted this system despite huge political controversy in Korea based on various NAFTA cases. However, the Korea-EU FTA does not include such provision because investment protection measures are normally under the purview of individual EU countries' legal authorities.

The Korea-US FTA includes additional agreements on labor and environment, following NAFTA. Chapter 13 of the Korea-EU FTA, entitled "Trade and Sustainable Development", encompasses a broader agenda such as not only labor standards and environment agreement but also civil society dialogue mechanism and corporate social responsibility. Annex 13 provides the indicative list of areas for cooperation that includes, inter alia, cooperation on trade-related aspects of the international climate change regime and biodiversity, and cooperation on trade-related measures to promote sustainable fishing practices.³⁹

Moreover, the Korea-US FTA confirms the free trade principle and non-discrimination obligations for electronic commerce except for subsidies and services supplied in the exercise of governmental authorities. Chapter 16 of the Korea-US FTA addresses competition related matters and stipulates various rules to improve cooperation for competition policy enforcement, including national treatment, designated monopoly, state enterprise and cross-border consumer protection. In particular, Korea introduced for the first time the system to resolve competition law cases based on mutual agreement between competition authorities and the subject of enforcement action.

Chapter 11 of the Korea-EU FTA also regulates competition policies addressing anti-

³⁸ WTO, *Canada – Patent Protection of Pharmaceutical Products*, paras. 7.39-7.84 (WT/DS114/R).

³⁹ Despite the seemingly innocuous statements for cooperative initiatives, the actual implementation may be much more controversial. For example, the EU and Korea have been disagreeing on several issues in relation to the WTO fishery subsidy negotiation. How such negotiation will be facilitated after the FTA enters into force is an interesting question to be observed.

competitive practices, public enterprises entrusted with exclusive rights or state monopolies. Interestingly, the Korea-EU FTA provides the additional commitments in terms of subsidy policies included in Chapter 11. Article 11.11 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.

The above provision is very unique in that subsidy disciplines with inherently multilateral natures and implication are established in the context of a bilateral FTA. From the legal perspective, the above provision is also distinguishable from the prohibited subsidy rules of the WTO SCM Agreement. Firstly, unlike the prohibited subsidy rules under the WTO SCM Agreement, the above provision requires the injury condition, i.e., “adverse effect” to trade of the other party that is the legal element for actionable subsidies in the SCM Agreement. Secondly, specific subsidies to an enterprise, especially in financial distress, are explicitly highlighted as prohibited subsidies. In other words, the subsidies are disciplined based on the nature of recipients. This is contrasted with the SCM Agreement that prohibits the subsidies based on use of subsidies – contingency in export performance or import substitution. On the other hand, this provision is not serious modification of the SCM Agreement. In fact, it is tantamount to the clarification of the SCM Agreement because FTA parties would be able to rely on the WTO rules to prohibit those subsidies essentially under the same legal conditions. Nevertheless, it is noteworthy that Korea and the EU – two among most frequent targets of the SCM Agreement – have tried to agree on more stringent subsidy disciplines.⁴⁰

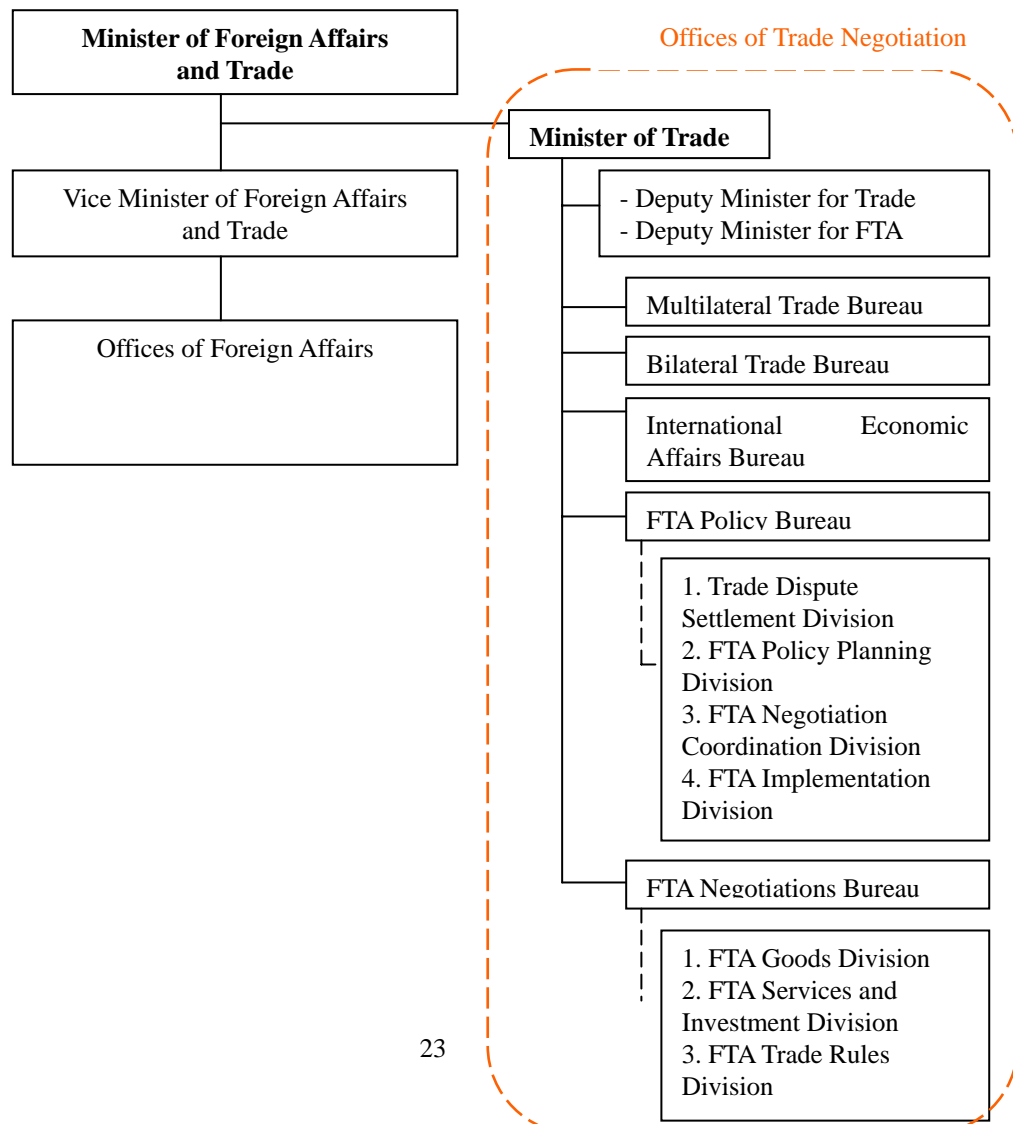
⁴⁰ This provision appears to target the government subsidies on a Korean semiconductor company, Hynix that were contested between Korea and the EU in the WTO. See WTO, *EC – Countervailing Measures on Dynamic Random Access Memory Chips from Korea* (WT/DS299/R). The recent fiscal stimulus policies by the EU for automobile companies might also have been subject to the above provision if the Korea-EU FTA had entered into force earlier.

The Korea-EU FTA includes the “Protocol on Cultural Cooperation” that stipulates a variety of cooperative measures such as information exchanges, freer movement of artists or cultural professionals, and supports for co-production of audio-visual products. It is noted that the protocol provides its own dispute settlement system although cross-retaliation is not permitted. Mostly importantly, this protocol is contingent upon the ratification of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

In addition, the Korea-EU FTA is one of the first FTAs from the perspective of the EU that stipulate transparency rules in a separate chapter of the FTA texts. The codification of transparency standards in the Korea-EU FTA may have significant implications for EU’s future FTAs, particularly involving developing countries.

IV. Institutional Development of Korea for FTA

<Figure 2. Organizational Structure of Ministry of Foreign Affairs and Trade (MOFAT)>



4.1 Reform of Government Organization

The Ministry of Foreign Affairs and Trade (MOFAT), the main government ministry in charge of trade negotiation, basically consists of offices of foreign affairs and offices of trade negotiation. In February 1998, the former Ministry of Foreign Affairs was augmented to expand trade negotiation functions that were handled often by the Ministry of Commerce, Industry and Energy (now Ministry of Knowledge Economy, ‘MKE’).

On the other hand, Chapter 2 of the Foreign Trade Act explicitly provides that the promotion of trade is within the jurisdiction of the MKE. Thus, under the current trading system in Korea, trade negotiation function is rendered to the MOFAT whereas trade promotion function is still maintained by the MKE. The distinction of these two jurisdictions is often obscure and confusing even for officials at the ministries.

In fact, the confusion on the jurisdiction of relevant government ministries becomes more acute when one considers the fact that the Ministry of Strategy and Finance (MOSF) has the authority for general conciliation of foreign economic policies including trade policies. On September 12, 2001, the Korean government promulgated the regulation on “Ministerial Meeting on International Economy” for which the Minister of Strategy and Finance Strategy and Finance becomes the chairman.⁴¹

As one of the most ardent supporters of the multilateral trading system, the trade negotiation related division of the Korean government was structured to focus on the WTO matters. But, the MOFAT reformed the governmental organization in order to deal with increasing FTA negotiations. As of September 2010, the ministry of trade in the MOFAT has five Divisions, among which two divisions were newly added to specialize in FTA negotiations.

Also, as indicated in Figure 1, the Ministry of Trade has now two deputy ministers – one for trade in general and the other specifically for FTA. Seven divisions in total were established under two FTA related bureaus, specializing in specific issues such as sectoral negotiations for FTAs as well as FTA policy coordination and implementation.

Whereas the external negotiation function was substantially improved by beefing up the Ministry of Trade, the internal policy coordination and implementation issues were assigned to the FTA Promotion & Policy Adjustment Authority (FTA PPAA) established under the MOSF. The FTA PPAA consists of six divisions – Policy Division, Education & Promotion Division,

⁴¹ President Order No. 17354.

Analysis Division, Assistance Policy Division, Industry Assistance Division, and External Cooperation Division.

The FTA PPAA is advised by the FTA Promotion & Policy Adjustment Council, which is composed of 13 private members representing industry, media, civil society and academics as well as 13 government officials who are mostly ministers or minister-level officers from government departments or agencies related to FTA works. The FTA PPAA's main role is, however, to promote FTAs rather than to coordinate policy conflicts among different ministries. As a result, the role of the FTA PPAA in relation to policy coordination has not been very effective.

4.2 Trade Adjustment Assistance Program

The Korean government introduced the Trade Adjustment Assistance (TAA) program in 2007 to provide assistance to the parties adversely affected by trade liberalization. The “Act on Trade Adjustment Assistance for Manufacturing and Other Industries (TAA Act)” that provides legal frameworks for TAA programs entered into force on April 29, 2007.⁴² Specifically, 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. In 2008, 32 billion won was budgeted for TAA compensation although most of the budget was not actually spent due to the lack of applications.⁴³

Whereas the Korean TAA benchmarked the US TAA system, it differs considerably from the US system. First of all, the Korean TAA is primarily focused on supporting small and medium size firms facing structural adjustment. Less emphasis is placed on providing social protection and assuaging workers within the liberalized trading order. This dissimilarity in objectives is manifest in the distribution of TAA funds, as about 90% of \$1 billion annual allotment under the US TAA program is received by displaced employees. Only 9% is allocated to farmers and 1% is extended to firms. Meanwhile, according to a 10-year government plan issued in 2007 by the Korean government, 92% of 2,845 billion won budget under the Korean TAA program will go to firms while employees will be given less than 8%. This disproportionate spreading of funds is troubling since firm-oriented support systems may be more vulnerable under the WTO SCM Agreement.

Secondly, 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. Article 6.2 of TAA Act stipulates that the KTC should make a positive

⁴² Public Law No. 8852.

⁴³ WTO, Trade Policy Review: Republic of Korea 2008.

determination on (i) “serious injury” that is defined to mean 25% or more reduction in total sales or production⁴⁴ and (ii) causation requirement – imports of same kinds or directly competitive goods or services to be a primary cause of serious injury.

As of October 2010, three TAA measures were implemented based on positive determination by the KTC. The brief summary information is given in <Table 4>.⁴⁵

It is noted that the very first application under the TAA system was actually declined by the KTC on the basis of negative determination on injury. The KTC determined that the main cause of alleged injury was not the import increase from the FTA partner country but the substantial reduction of exportation by the applicant. The first actual TAA measure was rendered to a local alcoholic beverage producer that produced products allegedly competitive to wine imported from Chile. Pursuant to the positive determination of the KTC, the loan of the total 200 million won was granted to this company. In addition, 16 million won was offered to assist consulting arrangement for marketing strategy development. Since then, two additional TAA measures were implemented to assist pork producing companies that claimed serious injury due to the FTA with Chile. There are two more cases in which the KTC concluded positively on serious injury in relation to the FTA with EFTA. But, concrete TAA measures were not yet finalized and implemented.

<Table 4. Summary Information of TAA Implementation as of October 2010>

Product	Faucet	Wine	Pork	Watch	Pork	Mackerel
Reason for Application	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%)
Importing Country	Switzerland (EFTA)	Chile	Chile	Switzerland (EFTA)	Chile	Norway (EFTA)
KTC Determination	Negative	Positive	Positive	Positive	Positive	Positive
Loan		KRW200 million (08.12. 1)	KRW100 million (09. 2. 3)		KRW100 million (09. 7. 14)	
Consulting Support		KRW16 million ('09.1.22~4.30)	KRW16 million ('09.3.2~12.12)			
		For marketing strategy development	B2B business strategy development			

Source: Trade Adjustment Assistance Center, 2010, *in Korean*

⁴⁴ The TAA Act also permits kind of “threat” of serious injury to be a basis for injury requirement. But, it provides that serious injury is certainly to occur, if not already occurred. The difference in terms of legal criteria to distinguish these elements for injury determination is not clearly elaborated in the Act.

⁴⁵ There are two additional TAA investigations on golf wear and raspberry wine currently in progress.

Although the KTC, the main trade remedy agency in Korea, is involved in injury determination, the procedure and standards used for TAA system are not rigorous as much as those for normal trade remedy procedures. In fact, all decisions for TAA related injury were made through documentary review instead of having actual deliberation meeting for trade commissioners. So far, the TAA implementation in Korea is still at an inchoate stage. It will take much more real cases to articulate criteria for injury determination and TAA measure development.

4.3 Regulatory Frameworks for Trade Negotiation and Legislation Procedure

A. General Procedure under the FTA Directive

The FTA negotiation with Chile raised numerous issues for the Korean government regarding its authority for negotiation and policy coordination, procedural legitimacy, and legislative process subsequent to the conclusion of FTA negotiation. Based on the experience of the Korea-Chile FTA the Korean government tried to make up some institutional and regulatory framework for FTA negotiation procedure.

The Korean government must follow the procedures and requirements stipulated in the “Presidential Directive on Procedures for the Conclusion of Free Trade Agreements (FTA Directive)” when it handles FTA negotiations.⁴⁶ The FTA Directive governs the entire process of negotiations, including the pre- and post-negotiation stages, of an FTA the Korean Government undertakes.

Pursuant to the FTA Directive, the Ministers’ Meeting for External Economic Affairs (MMEEA) has the authority to make decisions on major policy issues concerning FTA negotiations such as the selection of FTA partners, the timing and the method of such negotiations, and other relevant mandates for the negotiations. The FTA Directive has required to establish three committees: the FTA Committee, the working-level subcommittee, and the FTA Advisory Committee. These three committees are expected to undertake the key decision making for FTA negotiations and implementation.

The FTA Committee, which is chaired by the Minister for Trade and consists of Deputy Ministers of relevant ministries, is primarily responsible for making Korea’s FTA policy, overseeing FTA negotiations, and undertaking any follow-up measures. The FTA Committee is to be supported by the working-level subcommittee which consists of Director-General level government officials from relevant ministries.

The FTA Advisory Committee, which is chaired by the Minister for Trade, and

⁴⁶ Presidential Directive, No. 224 (Aug. 28, 2008).

consists of experts from academia and businesses, supports the Government in relation to various issues covering basic strategy, position decision for individual negotiation agenda, and other matters of FTA negotiations.

The Korean government often carries out a joint study with a candidate FTA partner to examine the feasibility of an FTA before it starts negotiations.⁴⁷ However, a joint study is not mandatory under the FTA Directive. For example, the Korean government launched negotiations with Chile merely after two preliminary consultations. Also, the Korea-US FTA and the Korea-EU FTA were initiated without a formal procedure to adopt the joint study report. When the joint study report is prepared with potential partners, such issues as the economic effect of the FTA, the scope and coverage of the FTA, and negotiating modalities are normally discussed. When a joint study or any other form of preliminary consultation ends with the conclusion that the proposed FTA is expected to bring sufficient benefits to Korea compensating potential injury to certain economic sectors, the FTA Committee recommends to the MMEEA the launching of FTA negotiations.

Sometimes, seemingly mere procedural steps can provoke quite controversial disputes. For example, Article 12 of the FTA Directive requires that a public hearing must be held prior to the MMEEA's decision and the result of the public hearing should be presented to the MMEEA at its deliberation. Considering the result from the public hearing along with many other data and information, the MMEEA decides whether or not to launch the negotiations. As in many other administrative processes, public hearing steps ensure that various interested parties and relevant sectors have a chance to be heard by the Government before the Government makes any formal decision on the launching of negotiations.

However, what should be done or achieved with public hearing procedures are not articulated. For example, the public hearing meeting on February 2, 2006 for the Korea-US FTA required under the FTA Directive could not be properly processed due to the physical interference of the session by angry farmers and opponent groups. But several hours later, the Minister of Trade announced that pursuant to the FTA Directive, the FTA negotiation with the United States would formally begin. The opponent group claimed that the failure to conduct the public hearing session as planned constituted the violation of Article 12 of the FTA Directive, while the Korean government explained that the opening of the public hearing session technically complied with the requirement under the FTA Directive.

B. Law on FTA Negotiation Procedure

As demonstrated in Appendix, the legislative procedure in the National Assembly after

⁴⁷ Cheong, I and J. Cho, "The Impact of Free Trade Agreements on Business in the Republic of Korea", ADBI Working Paper Series, No.156 (Oct. 2009).

the conclusion of the Korea-Chile FTA raised huge concern for legislative hurdle for trade negotiation. After the voting by the National Assembly turned down the Korea-Chile FTA three consecutive times, the Korean government needed to come up with the massive “Comprehensive Assistance Plan for Agricultural and Rural Sector” that amounted to 119 trillion won basically to address the concern of congressmen from rural sectors. This experience led the Korean government to consider the formalized procedure under which the legislative authority of the National Assembly vulnerable to unlimited political abuse may be constrained in a similar manner to the trade promotion authority procedure of the US Congress.⁴⁸

On the other hand, the opposing party also raised the need to establish the institutionalized procedure for initiating and concluding a trade agreement, including FTA, which inevitably causes huge economic harms to a specific sector and too often is rubberstamped by the National Assembly allegedly for the sake of national interest. This request was particularly strong after the Korea-US FTA was initiated despite the lack of social consensus and procedural drawbacks. When the Korean government decided to cut the existing screen quota down to the half – from 146 to 73 days and resume the importation of the US beef before the formal FTA negotiation with the United States began, the demand from the National Assembly to limit overly ambitious trade negotiation undertaken by the administrative body increased.

So, multiple proposals were prepared to establish a formal procedure by which the FTA negotiations could be guided. As of September 2010, the National Assembly did not push forward any particular proposal, although they still agreed on the need to have a more formalized process.

The proposals in this regard share some of the key concerns highlighted from the recent experience of the FTA negotiations. Firstly, there are issues on what should be satisfied to initiate the FTA negotiation. How to ensure that a trade negotiation is supported by certain level of social consensus remains a difficult question. Although the National Assembly does not seem to have a constitutional authority to interfere with the decision to initiate a FTA negotiation by the administrative body, many politicians support the idea that there must be something more than a mere record of public hearing and so-called economic analysis reports issued by government funded institutes. In other words, legal requirements for due process especially at the stage of initiating a FTA negotiation are raised as one of the core issues.

Secondly, it becomes very controversial how to meet transparency requirement in the

⁴⁸ There is a fundamental discrepancy between the constitutional system of the US and most other countries including Korea. While it is the Congress that has the ultimate authority for foreign commerce in the US, most other countries' governments or executive bodies have typically the constitutional authorities for trade policies. It requires for the US Congress to establish regulatory as well as political processes to delegate its trade policy authorities to the executive bodies. See more generally Destler, I. M., *American Trade Politics* (4th ed. 2005).

course of a negotiation. Transparency often contradicts with confidentiality that is also very important element of trade negotiation. In January 2007 at which the Korea-US FTA negotiation was still at a critical phase, the confidential document briefing the Korean government's negotiation strategy prepared only for confidential discussion between the Special FTA Committee of the National Assembly and the administrative body was leaked to the press and published in a newspaper. The next day, the chief negotiator of the US delegation, Ms. Curtler made comments on the Korean government's negotiation strategy when she faced the Korean chief negotiator, Mr. Jonghoon Kim. This incident highlights the importance of maintaining the right balance between transparency and confidentiality. In fact, a significant portion of the criticism towards the government regarding the Korea-US FTA negotiation was about non-transparency. In response, the Korean government tried to improve communication with relevant parties from a wide variety of sectors, particularly opposing sectors. Inevitably, the contents of such communication were leaked to the public forum, not rarely but actually quite routinely. This problem becomes particularly acute because the politically opposing party often tries to and is able to abuse transparency requirement. Although transparency is a critical element of any democratic legislative process, it takes very rigorous scrutiny to decide what to share with whom, when and how often.

Thirdly, there is a controversy as to how the economic analysis report should be prepared. Normally, a government funded research institute issues a report assessing the economic impact of an FTA, typically relying on a computational general equilibrium (CGE) model. In Korea, this report is generally prepared by the Korea Institute for International Economic Policy (KIEP). However, a CGE result is very contingent on the assumptions the model imposes and thereby can vary a lot depending on what kinds of economic assumptions are taken. This nature of econometric analysis routinely adopted for FTA negotiations can provoke huge controversy when an FTA at issue is politically sensitive. Because the result of economic analysis can vary considerably depending on the assumptions for a model, who is doing how can be not just an economic issue but also a political problem.

The US Congress also demands the economic analysis report for any proposed FTA in the course of negotiation and ratification procedures. The economic analysis should be done by the US International Trade Commission (ITC). Unlike other trade remedy related agencies, the USITC has its own research capacity with significant numbers of economists. A relatively strong credibility of the USITC report has been supported by long experience of trade remedy works which have been protected from direct political influence. In Korea, however, a report by the KIEP often becomes a target of criticism on the basis of neutrality, objectivity, and econometric sufficiency. After the conclusion of the Korea-US FTA negotiation, the economic assessment report was prepared collectively embracing all government funded research

institutes. This report, however, did not assuage the concern of opposing groups when they found that none of “their” economists were not included in the analysis works. So, a seemingly neutral economic issue of how to analyze impact of an FTA still remains to be a very political problem that relates to a fundamental issue whether or how much an FTA at issue is beneficial to a country.

Fourthly, what should be a precondition for ratification is also a difficult issue the National Assembly has struggled. It is already a widely accepted notion in the National Assembly that some kind of government measures to address marginalized or injured sectors must be prepared before the ratification. But, how much or what kind of assistance or compensation measures should be prepared is now the core issue of a legislative process in Korea. In this regard, the Korean government prefers the approach taken in the TPA. What to be done for injured sectors by trade negotiations is addressed during the negotiation through the consultation with the US Congress. After the negotiation is concluded, how much a particular sector should be compensated is not a major issue. Instead, they focus more on how the negotiation result should be arranged to accommodate the difficult situations of sensitive industries. Close consultation requirement under the TPA procedure contributes to reduce the burden for the USTR or the President to come up with compensation programs to address injured sectors after the conclusion of an FTA.

Unlike the US Congress that follows the TPA procedure, the Korean National Assembly has to bargain with the administrative body in relation to FTA ratification. Having seen the controversy of the National Assembly related to the Korea-Chile FTA, the Korean government now faces considerably bigger problems to deal with massive market liberalization under the Korea-US FTA.

Lastly, what should be the time schedule for ratification procedure has become very important especially due to the Korea-US FTA. In principle, the US Congress must make a decision whether to ratify an FTA or not within 90 days from the date it is formally submitted to the US congressional ratification procedure if the FTA was concluded pursuant to the TPA process. However, they do not have any limit about when the FTA should be submitted to the congressional ratification procedure. In the case of the Korea-US FTA, it was signed on June 30, 2007 but not yet submitted to the US Congress. The prolonged delay in the US congressional ratification procedure led the National Assembly to stop ratification process for more than three years. This made another bad example for the politicians in Korea, implying that political reasons can be the basis to sacrifice “national economic interest” almost unlimitedly. The National Assembly of Korea still discusses what should be the procedure for concluded FTAs to facilitate timely ratification and prevent political maneuvering. The actual possibility for the National Assembly to agree on the established time schedule for ratification process is, however,

still very slim.

V. Unfinished Works

Korea has transformed from one of the most ardent opponents for FTAs into the most aggressive FTA using country. Korea now becomes one of the very few countries that establish FTAs with both the United States and the European Union and aim to conclude FTAs with China and Japan. As discussed in the paper, some of the Korea's recent FTAs may deserve some more serious attention in light of the future FTA negotiations. Although the Korea-US FTA and the Korea-EU FTA provide new models for various FTA agenda, there are still several crucial issues to be resolved in the future FTAs, some with even urgency.

Firstly, subsequent FTAs should more directly deal with coherence problems between the WTO and FTA jurisprudence. Conflicts between NAFTA and WTO or MERCOSUR and WTO are no longer theoretical. A more reasonable and clear demarcation of FTA jurisdiction is necessary to avoid serious contradiction between regional and multilateral trading system.

Secondly, the rule diversification problem needs to be addressed. Recent FTAs typically cause trade diversion not just based on preferences in market access but also based on modified or customized trade rules.

Thirdly, "backdoor" market liberalization through MFN obligations in services trade and intellectual property protection should draw more attention from experts as well as policy makers to properly deal with potential impacts to domestic industries. While it can be seen as second-best alternative to the hopeless multilateral trade negotiation, the current way in which developed countries tend to impose such requirements to developing country partners may raise unnecessary controversy in the future in terms of legitimacy and sustainability.

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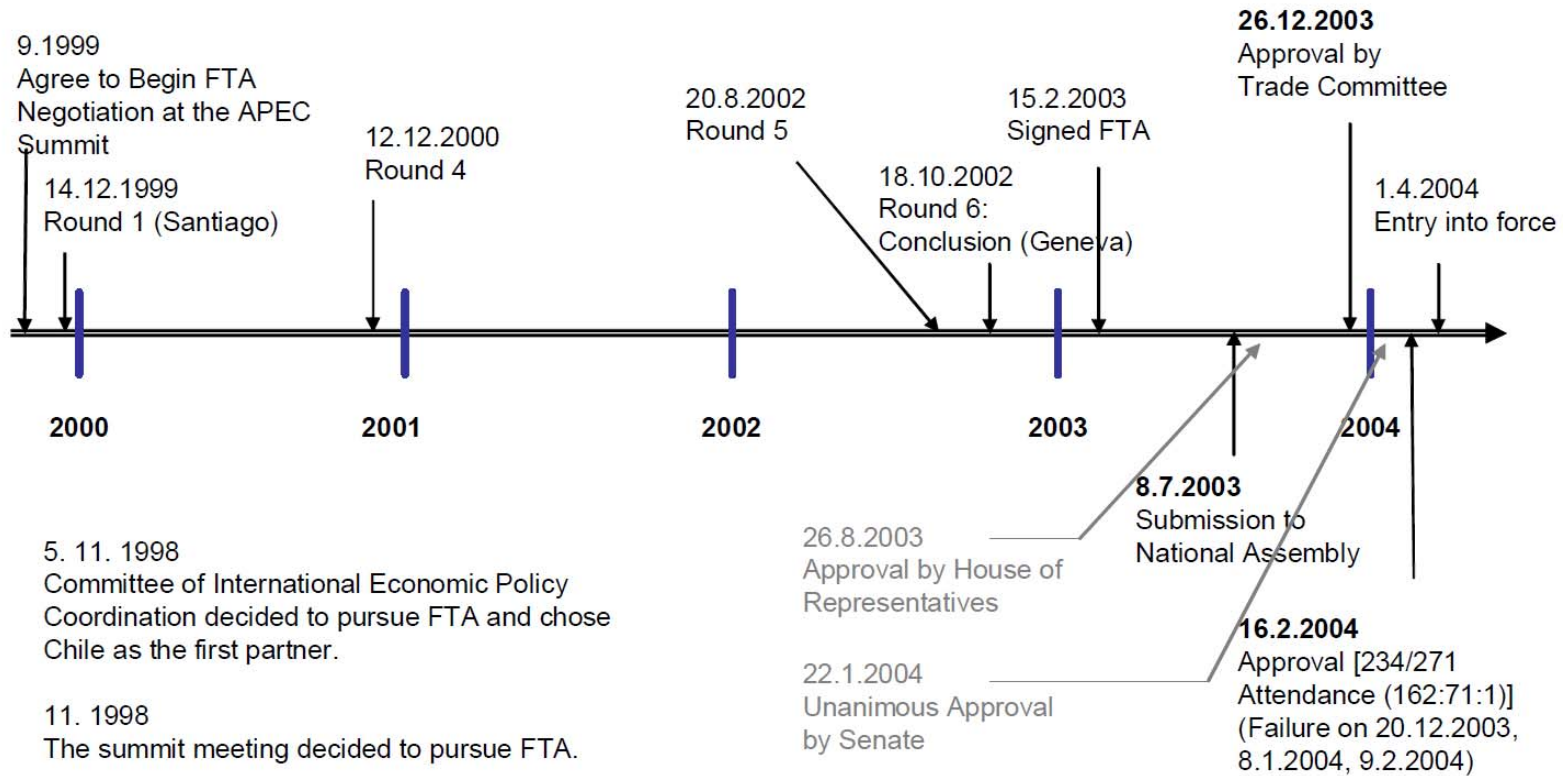
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Appendix 1. Procedural History of Korea-Chile FTA Negotiation



Appendix 2. US Trade Promotion Authority (TPA) Procedure

Timing	Action
Prior to Notification	Consult Trade Committees, Congressional Oversight Group (COG) and other Committees as deemed appropriate.
At least 90 days before initiating negotiations	Transmit written notification of negotiations to Congress, including specific negotiating objectives.
Before initiating negotiations on agriculture, fish and shellfish and textiles	Complete general agriculture tariff assessment & consult with Trade and Agriculture committees. Sensitive agriculture products: Identify products & consult Congressional committees; request ITC report; after receipt of ITC report notify Committees of products for which USTR will seek tariff cuts and reasons. Consult Trade, House Resources, & Senate Commerce Committees on fish & shellfish. Complete assessment on textile tariffs & consult Trade Committees.
Before making a tariff offer	Request and receive ITC probable economic effects report.
Before making a formal offer on tariffs, non-tariff barriers, service etc.	Hold TPSC hearing and receive summary of views. Take into account advice from ITC, private sector advisory committees, and TPSC.
During negotiation	Transmit meaningful labor rights report on negotiating partners to Congress. Conduct environmental impact review and employment impact review. Report to Trade Committees on environmental impact review and employment impact review.
180 days prior to entering into agreement	Report to Trade Committees on trade remedies proposals that could require amendments to U.S. laws and how these proposals relate to TPA objectives.
90 days prior to entering into agreement	Notify Congress of intent to enter agreement; publish notice in <i>Federal Register</i> . Provide ITC details & request report on agreement's likely impact on U.S. economy & specific industry sectors.
Before entering into agreement	Consult with Trade & other Committees with jurisdiction, COG on (1) nature of agreement, and (2) how and to what extent the agreement will achieve the applicable purposes, policies, priorities and objectives.
30 days after notification of intent to enter agreement	Private sector advisory committees provide reports to Administration and Congress on the agreement.
Just before initialing	Consult Trade & Agriculture Committees & Congressional Oversight Group.
After entry into agreement(signature)	Transmit copy of agreement to each House of Congress with statement of reasons for entering into agreement. Provide each Member of Congress with a summary of information submitted to each House.
60 days after signing	Submit to Congress a list of changes to existing laws necessary to comply with the agreement.
At time to be determined in consultation with	Submit to Congress: (1) copy of final legal text of agreement; (2) draft implementing bill; (3) statement of any administrative action; (4) explanation of how bill & administrative action affect existing

Congress	law; and (5) statement asserting that agreement makes progress in achieving applicable TPA objectives. Submit implementation plan.
House Ways and Means Committee	45 days
House Floor	15 days
Finance Committee	15 days
Senate Floor	15 days

Note: TPA also imposes continuing requirements to consult with and inform Congress, including the Congressional Oversight Group, as well as the private sector advisory committees.