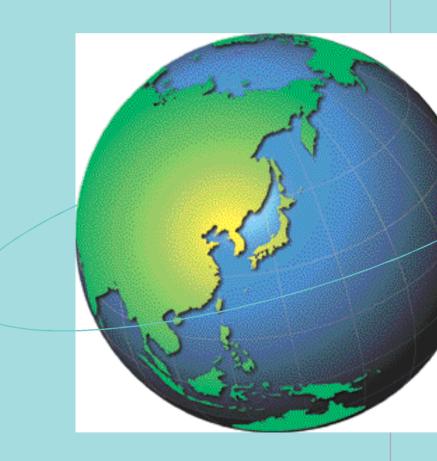
ľ

李奎億 · 尹美京



KIEP 對外經濟政策研究院

政策研究 1990 1 17 1992 1 地域研究 가 30 40 70 APEC 國際巨視金融室, 貿易投資政策室, (東北亞 , 東西南亞 , 美洲 ,), APEC , 東北亞 , 北京事務所 (KEI) FTA 研究報告書. [®]KIEP KIEP (http://www.kiep.go.kr) 가 가

院長安忠榮

對外經濟政策研究院

ekcera institute hor international economiec poescy

137-747 300-4

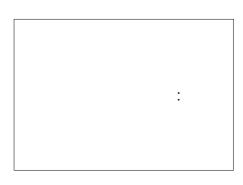
TEL: 02) 3460-1001,1114 / FAX: 02) 3460-1122,1199

URL: http://www.kiep.go.kr

調査分析02-04

•

李奎億・尹美京



가 가 가 가 가 , 가 가 가 2002 12

가

院長 安忠榮

,

()

가

.

가

가

(TRIPS)

가

71

·

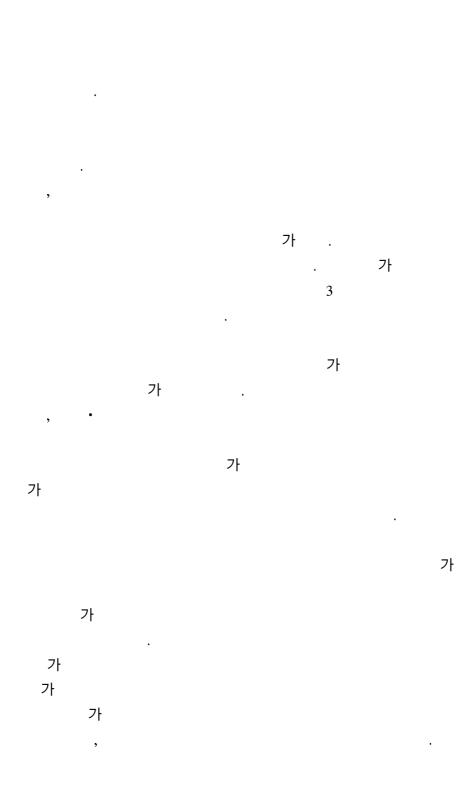
가

WTO

가

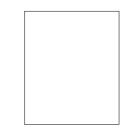
, 가 가

가 가 가 가 가 가 가 가 가 가 가 가 가



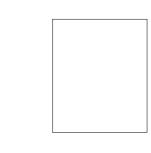
가 가 가 . 가) 가 가 가





	•••••	5
		6
1		
2		
	1.	19
	2.	26
	3.	
	4.	35
	가	. 41
		. 42
3		46
	1.	46
	가.	46
		:50
		52

		가	: 56
	2.		58
	3.		66
	가.		66
			67
			68
4		•••	
	1.		70
	가.	•••	
		•••	
			74
		•••	
	2.		77
	가.		77
			79
			80
	3.		81
	가.		84
	. ()	86
5			• 88
	••••••	•••••	95
Execu	ıtive Sumr	nary ··	98



<	2-1> 對	: 1995~2000	25
---	--------	-------------	----



• • • • • • • • • • • • • • • • • • • •	2-1>	<
• • • • • • • • • • • • • • • • • • • •	4-1>	<

```
가
                           가
 (
                           (
                                  1995a).
                                      . 1999
       가
                                      가
                                    1999. 3. 16).
           1995
가
                           가
WTO
                   (TRIPS)
            2001).
(
                                                가
                   가
     가
                                        가
                              가
```

가?
가?
WTO 가?
가?
가?

. 기; 가;

,

•

•

가

가

가 가

가

가

가

(Herendi) (1997) EU (Silhouette) ((1998) 2001: 54-55).

OECD

.1)

가 1994 BBS

: 53).

가

24 1)

:

가, 가 가 .

(1998:30-32; 1998).

· , 가

. 가,

·

•

가 .

, . . 3

. 5

1.

, (2-1). " " 가

.

,

•

(genuine products) , (graymarket) .2)

가 가 . 가가 ,가

. 가 가 . 가

2) "graymarket goods" ,

"parallel import" .

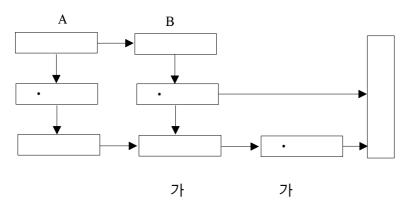
20 :

 カ
 , カ
 カ

 カ
 カ
 カ

 カ
 カ
 (arbitrage)

<그림 2-1> 병행수입의 경로



가

,

, ()

,

. 가

가

. 가

가

.3) 가 가 4) (1) 가 A (:) 가 A (:) 가 가 3 A (: 가 가 가) 가 3 В (; 가) (2) (license) (' 가 가 가 (1) 3

3) 4

4)

가

:

(1) フト · フト . (1) 3 フト . (1) (1)

(2) 3

가 .

가 가 가 , 가 .

가 . 가

가

가 .

가 가 가 가 .

· 가

•

가 가 가 가 가 가 가 가 . (license)

가 . 가 가 . 가

가 가 .

가 .

,

. 1988 70~100 1985 24 :

(Gallini and Hollis, 1999). 60,000 **OECD** 가 가 EU (OECD 2001). CD 가 25~30% . EU 가 . EU (NERA: National Economic Research Associate) (1999) 가 EU 5%, 10~20% . NERA EU 가 가 Ganslandt & Maskus(2001) 가 1995~1998 3/4 가 1/4 가 가 가 OECD 가

1996 2000

< 2-1> , , ,

, , , , .

<표 2-1> 對한국 상표품의 병행수입 추이: 1995~2000

		(US \$)			
1995(11-12)	34	1,513,922	,	,	
1996	474	11,594,716	,	,	,
1997	1,260	62,847,399	,	,	,
1998	569	24,295,516	,	,	,
1999	860	31,069,133	,	,	
2000	1,130	42,563,885	,	, 가	

: .

, 가

. , 가

					(1	996)
				,		,
						가
	가		가			가
					가	
				가		
가				•		
			•			
1995		20		가		
		170%				3.6
		(1996	5).			
				,		
				가		가
		(,	.com, 1	997. 8. 14)	. ,
, TV						
		7	' }			

2.

.

 $\mbox{(international exhaustion of rights)} \label{eq:continuous} \mbox{(national exhaustion of rights)} \mbox{.}$

·

, 가 . 가

가

.

가 .

. (,) 가 가

,

28	:		
•			
			•
가 .		가 ,	
. 가			
	가	•	
가	, ,	,	
WTO		(Trade R	elated Intellectual
Property Rights: TRIPS)			
			가
,		가	
가			,
	66	"	
			가
			,
	가		

가

1998: 312. Abbott 1998: 623).

가

,

.

WTO

WTO 가 . WTO

GATT . ()

GATT 가 . GATT (20 d) GATT

.

. 20 d

가

GATT 3 4 (' ') WTO

. GATS 가

•

WTO GATT 3 4

GATT

•						
. GATT 20	d	•	•			
GATT					20	
GATT "				,,	20 "	
				,,	••	
"					•	
WTO						
	WTO					
GATT						
가			•	,		
71						
	가		GATT			
			(Ku	ilwijk	1999:296~29) 7;
Abbott et al. 1999: 1798	3~1800).					
WTO		TRIPS	6	,		
. TRIPS 6	"				3	
4						
			"			.5)
TRIPS					가	•
IKIFS		71			71	
		가			•	
EUナ						
		•	TRIPS			
			WTO			
. WTO						
. TRIPS					GATT	3
5) 3 4						
•						

:

```
4 (
                                            TRIPS
               )
                                           WTO
                                   WTO
                                                WTO
           (ILA)
                                                       WTO
                                       1
                                                (1998:
                                                           "Abbot
                                                            가
     ")
                                TRIPS
                        WTO
      wto가
                                                        WTO
                           (
                                   2001).
      2001
             11
                                              WTO
                                                     \lceil TRIPS
       (public health)
                             J
                              WTO
                                                               가
                 (WTO
                                     2001).
                       4
                       TRIPS
                                     6
가
                                              (I.L.A)
                               TRIPS
                                                 가
```

```
가
                                                           가
                   가
                    1980
                                                            1999).
                                           가
                                                                       (
            2000: 359).
             (material difference
                                        Herendi
      Original Appalachian
                                                                   . EU
                              (1987)
                                                     (1997)
   Silhouette
                  (1998)
                                                                       EU
                                                          .6)
   EU
                       (European Economic Area: EEA)
6)
                          EU
                                      (Trade Mark Directive, 1989)
         EU
                          EC
                                            7
                                                    EU
                                           EU
                                      Dyed Jeans
                                                   (1996)
                       Silhouette
  (Abbott et al. 1999: 1354). Kuilwijk(1999)
                                           Silhouette
                                                               EU
        가
                                                    EU
```

```
(European Free Trade Area: EFTA)
                                                 EU
         Maglite
                   (1997)
                                                    (Kuilwijk, 1999).
    , Silhouette
                                                  Davidoff
                                                             (1999)
                                                    : 53-55).
                             (
                        (1997, 1998)
                                                             1984
Scorpio社가
         1989
                Taito ,
                                        BMG Music
                                 1992
                     . 가
                                                   Quality King
(1998)
                                  가
                                             가
                                                             가
                                    가
                                                   가
                                  가
             (consent)
                                                            (Rothnie
1993).
                                                           BBS
                        (
                                         4
                                                   ).
```

3.

가 가 가 가 가 가 가

가 가

가

가

가 가 가

(Commonwealth) 가 가

Winter

Betts 對 Willmott (1871) Tilghman (1883)(Rothnie 1993: 106~185). , 19 가 4. 가 가 가 () 가 가 가 가 가 .7) 가 가 가 (joint profit) A가 가

7)

(1993)

:

		В				A가			가
Ъ			가	В				71	A
В	A	В					•	가	
							가		
В	A A						В		
A	Л								
								가	
							•	,	·
負									
	•		(가)	
				7	' }	,	,		(
),		,		,			フ	ŀ
	7	' }							
			가				.8))	
						. Chard	and Mell	or(1989)	
8)		(franchising)		-				
		7	가 (fixed	fee)		기	가 -		
								(Tirole 199	0: 176).

가 가 () 가 (interbrand competition) 가 .10) 11) 가 9) 가 가 10) (Chard & Mellor 1989: 81).

11)

```
가
                                  . Rey and Stiglitz(1995)
                      가
                                      가
         가
                                                       가
                            가
                  가
                              .12)
                                        가
                                                   가
                                         가
                                                       가
              가
                      가
                                                 가
        가
            가
                              가
           가
                       가 (
                                가
12)
                   1
                                      ), 2
                                           가
                                                        3
                         가
가
     가
         가
                                                가
                                             가
      (deadweight loss)
         가
               . 2
                    가
                            가
                                                (
                           가
         ),
                           가
                          . 3
                                           가
                              가
                         가
                                      가
```

```
가
      가
                                가 .
                                                  ( , 가
 Malueg and Schwartz(1994)
           가
                           가
                                                  가
     )
         가
                               가
                                                  가
          가
                       가
                                        가
                                                      가가
가
                                                   . Malueg
                                     가
and Schwartz(1994)
                           EU
             가
                       ( ,
                                                        )
                                      가
                                                       가
                                       )
                 ( ,
                                          가
                    가
                                                 가
  가
                                                 . 가
            가
 가
             가
                                                    Malueg
                                             가
and Schwartz(1994)
        EU
                      가
     가,
                                     가
                    가
              가
                           가
                                       가
```

가 . 가 . EU 가 가 . Abbott(1998) WTO 가 . Yang, Ahmadi and Monroe(1998) 가 가 가 가 가 3 가 가

・ (segmentation) 가 가

,

가 · ,

가. 병행수입 반대론

3

가 • • • 가

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가 가 가 . 가

가 가 가 가 • • 가 .

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가 ()

나. 병행수입 지지론

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가 가 . 가

. WTO .

EU

•

, 가

7 1

가 가 가 가 가 가 가 가 .13) 3 3 가 가 '(rule of reason) . EU

3 (shrink wrap)' "

•

가

)

44 ()" 가 가 CD-ROM (1996 Pro-CD 對 Zeidenberg) 가 가 가 CD-ROM

가

, 가 (

1.

가. 상표권

14) 通達

關稅定率法 21 1 5 '

() 가 . 가 가 가

.15) 가 , 가

가, (NMC) 가

. .16) 가

15) 7\

16) 1970 2 27 (大阪) .

```
(
                                )
                                                가
                                가
                 가
       , NMC
                     가
                                     가
        가
                                          가
                    )가
                    )
           (Lacoste)
       가
                  가
               三共生興
(Izod) 가
              .17)
         (Lacoste Alligator) 가
                                           가
```

17) 1984 12 7 (東京)

, 가 가 , 가 3

, 25 , 37 1 , 2 3 2

. X가

Y () X가

, Y가

가 . 가

, X Y

가

나. 저작권: 반포권에 의한 병행수입의 제한

(113 1 1).

21

3 ___51 __

) 1984 () (26 2).

) (26 2). 26 1

가

. 1994 7 1 '101

. ()

가 ()

CD

CD

· 가 .

BBS

다. 특허권

, 가

가

· (Brunswick) 18)

가

18) 1969 6 9 (大阪)

```
(BBS)
.19)
                          (BBS Kraftfahrzeugtechnik) 가
                                                         가
      (1994
                      東京
                                                         (1995
                 22
    23 )
3
                  BBS가
                              . BBS
                           가
    가
                                        가
             가
    가
                            가
                                                    가
                       ,
가
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19) 1997

. 가

가 가 , 가

3 가

가

3

가

가

```
55
                                        3
                                                 (
           )
                                          가
                                                   가
  가
  Γ
                                                  J
  通達
      1992
            1994
(藏關 1192 )
                           1998
                                3
                                   26
             .20)
 (1)
     ')가
 20)
```

<u>56</u> :

가 3 가 3

(2) 가 가

(3) (1) " 가

가 , 가 .

라. 하자가 있는 상품의 병행수입: 기술실시 계약

가 가 . 가 가

2 1 1 ,

. "

" . , " 2 1

21) 1999 1 28 (東京) .

58 1 2 가 가 'Fred Perry' 4 가 가 가 3 (가 가 가 2. 1970 가

가 가 가 가 가 가 가 가 가 22) Γ (1972 11 21) 23) 가 6 22)) () () 가 23) 가 가

```
1
     1985
                                 가가 가
            円高
            가
                  가
             가
                                   가
                 1987 4 17 <sup>[</sup>
                  J
         가
            6가
                                      Γ
      가
                      가 1991 7 11
                        J( : •
                                      가
   ) 3 (
                              ) 3
                              가
              가
                           6
                 가
          가
                       가
                     가
   가
                              가
                       가
   가
'가
                       가
                          가 가
```

가 가

. 가 .

1) 가

•

.

가 가

•

2) 가

가 () .

가

.24)

24)

가 ()

. (1) (1) 가 '가 ' . 가 가

가

3)

가 .

가 ,

,

.25)

4)

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5)

O)

가 . 가

가 가

. 가

25) ,

64 가 가 가 가 가 가 (買占) 6) 가 가 가 가 가 가 가 가 7) 가 가

. , 가 가

. 가 가

가 가

8)

. 가

가

,

가 .

3.

가

가 가

가. 호비 재팬 사건(1997년 11월 28일 심결)

(Wizard of the Cost) " ()"

· 가 가 . ,

, , ,

가

가 가 가

가 가 가

· 가

.

나. 미츠와 자동차 사건(1998년 5월 29일 심결)

(Porsche)

가 . ,

1995 6 가 가

35% 가

가 가 가

가 가 가

가 가 .

. 가

가 .

다. 그랜드 듀크 사건(1998년 7월 24일 심결)

(General Ecology) 가 Seagull IV 가

가 . ,

, 1994 가 가

가

3 가 가 가 가 가 가 가 Γ . 가 J 가 가

4

),

```
71
                                        4
                                             가
            27)
                                    가
                    가
                   가
   가
                                                   가
                       1998
                             10
                                                  (
                              1999
14
  1 , )
                                     Γ
       (1999)」
               • 2001: 70).
          (
               가
 27)
                         가
                 가
           ( ,
                               가
                                  가
                         )
                 가
            HS 6
                                           가
```

. 2001 2 가

. 2002 6 Г _{Д29)} ,

28) • (2001) . 29) 4 ()

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•

(, 가

. 가 .

(1)(2)

(3)

(4)

(5) (goodwill)

プト 2001 1 2002

, ,

가 .

. 가 가

가 . 가 가

PC

•

.

:

나. 상표법

. ,

(50, 55, 2 1

). , 가

(, 1995b). ,

가 가

다. 저작권법

.

235 ()³⁰⁾
30) 235 ().

. 2

•

4 75

.

(distribution)

,

, 1995b). , 92 가

가 가

. 3 4 가 . , 가

2 , , ,

31) 43 2

31) 43 2 16 2 76 :

.

라. 특허법

•

가 ,

(2 127)

(2 , 127). 가

가 가

가

.³²⁾ 가

,

,

1 1~2 . , 1982

가 . . .

_77

4

가 가

. 가, . 가 가

WTO TRIPS

. 가

가 .

가

2.

가. 병행수입에 대한 공정거래위원회 고시

:

·

.

0 (,)

(,) o

()

o

가 , ,

(7t) o

가

() o 가 ()

, ,)

33) 1998-18. 23 () 2 36 (

1 2 .

4 79

32 () 2 Γ (1995 1997)」 가 3 (7 가 8 () (가) 가

나. 국제계약상의 불공정거래행위등의 유형 및 기준

가 . , (3)

가

가

.

80 :

· , 가

. ,

가

가 .

다. 부정경쟁방지법

, 가 .

· (譲受)가 가

(, 1998).

34) 1961 7h

가 (1997: 561~564). ,

*

4

가

• 2001: 53).

3.

フト 1997 2002 6 (< 4-1>). フト フト

(, ,).

가 • 가

가 가

가 ()

· ·

<그림 4-1> 병행수입 관련 사건에 대한 공정거래위원회 의결 사례

1.		()		(1007)	
1.		()		(1997)	
		()	가		가
	가			,	
				.	
2.		()		(1997)	
	•				
			•	가 , 가	
		가		, 7	
			•		
3.		()		(1998)	
			(Mercedes	s Benz)	
	()	40	()	가 1995	
		()			
			가	3%	
			가	가	
				가	
	•	가	3%		
		가	,		
			•	가	
				•	
4.		()		(2000-2001)	
		()			
		` /	•		

4 83

<그림 4-1> 계속

```
가 가
                                 가
                             Γ
                                                           3
                                                                1
                                                 ( )가
                           가
                              가
             가
5. ( )
                                           (2001)
( )
     가
                                                          가
           가
                                                가
                                                               가
                                  (2002)
6.
( )
                                             ( )
Univision USA Inc.
```

; , . .

84 :

가. 한성자동차의 부당한 병행수입 저지에 관한 건

가 1998 .35) (Mercedes Benz) () 가 1995 () (Three Point Motors) 40 () 가 3% 가 가 가 가 3% 가 23 1 5 (가 35) 98-110 . 1353. " 9609

. 77

4 85

·

,

3

.³⁶⁾ 가 가

, 가 가

가

. 가

가

·

 71
 .37)

 36)
 98-49
 9807
 1100. " ()

37) 7t 27 " " 2002 3 8 7t

(2002-047 , 2002

86 :

.38)

, 가 (가

나. (주)엘알에스랩의 부당한 병행수입 저지에 관한 건³⁹⁾

()

() 가

2002 1 16 (Univision USA Inc.)

. 가

38) 가

. 가 . 44~45 .

39) 2002. () 2002-099 . 2002 0452. ()

Г

가

·

가 가

· ,

가 . , 가 가

, . 가 가 2002 30%

가 가

가

•

5

가

가

가 가 가

가 가

• 89 5

가 가

가

가

가

가 , 가 . 3

90

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Executive Summary

Application of Competition Policy to Parallel Imports: A Comparative Study of Korean and Japanese Cases

Kyu Uck Lee and Mikyung Yun

Parallel imports refers to genuine products which are protected by intellectual property rights but are imported without express authorization from the owners of the intellectual property rights. Exhaustion of rights on first sale is usually recognised within national borders but there is no consensus on this matter for goods that cross borders, so it is possible for parallel imports to infringe on rights in the importing country, depending on the local legal framework.

This study looks at the parallel import issue from the perspective of competition policy. While it is important to balance incentives for innovation by protecting intellectual property rights against the adverse effects on competition arising from such protection, authors believe that insufficient attention has been given to competition aspects. This study argues that exhaustion should be recognised internationally and that in principle, parallel import should be allowed to facilitate intra-brand competition, as long as the parallel importer clearly mark their products and meet minimum safety standards. Parallel imports should only be prohibited where there are externalities that seriously impair market efficiencies. Whether attempts to prohibit parallel imports are based on anti-competitive motives or on the need

to eliminate externalities should be determined solely by analysing the reasons behind the price differences in the exporting and the importing markets.

Rather than treating these issues theoretically, the main focus of this study is to conduct a comparative analysis of how competition law has been applied to parallel imports in Japan and Korea by examining particular cases handled by the competition authorities in each country. Both countries have allowed parallel imports, partly to combat high prices of branded products and inefficiencies in their distribution systems. However, while this is a recent phenomena in Korea, Japan has a greater history of parallel imports. Japan has therefore accumulated a greater body of case law than Korea, and its experience may provide useful insights for policy making in Korea.

Furthermore, traditionally Japan has been more favourably inclined towards parallel imports than in the West, where the emphasis has been on protecting intellectual property rights. Only very recently have some OECD economies such as Australia and Sweden shown an interest in the competition enhancing effects of parallel import. Therefore, Japan may be a more appropriate case to study from a competition perspective.

The comparative study finds three main differences between Korea and Japan. First, while both Korea and Japan have similar criteria for allowing parallel imports, their views on the relationship between the two criteria differ. Both Korea and Japan similarly requires two criteria for allowing parallel imports: that the rights holders must be the same in both exporting and importing countries, and that the original good and the parallel imported product must be identical in quality and product specification. However, while Korea views the two criteria as independent of each other, Japan regards them as being closely related. For example, in Japan, that the rights holders are the same in both countries is taken to mean that the original seller is in

a position to monitor and control the quality of the goods being sold abroad. Therefore, the interpretation is that if the right holders are the same, any difference in quality between the original good and the parallel imported good must be within the tolerance limit of the original seller. In Korea, a recent case has established that regardless of whether the right holder is the same or not, and whether therefore the original rights has the power to control quality of its goods internationally, the quality of the original good and parallel imported good must be strictly identical. The Japanese approach seems to be more reasonable, since otherwise the 'same person' criteria would be rendered meaningless, and the right holders would not be responsible for controlling the quality of products on which the goodwill and brand loyalty of their consumers are based.

The second difference is related to the use of private contracts that restrict purchasers from reselling in certain geographical areas. According to Japanese case law, such contracts are binding only for the parties explicitly giving their consent, but cannot be binding on third parties. Contractual conditions forced unilaterally through the labeling of products (eg. shrinkwrap contracts), cannot have legal effects against the consumers at large. There have not been any cases setting such a precedent in Korea yet, and therefore it is difficult to predict how the court will decide on this issue in the future. To enhance predictability, the appropriate government authority should provide some legal standards on this issue, based on lessons learned from the Japanese experience.

Third, in Japan, the main criteria used by the competition authority to regulate attempts to restrict parallel imports is whether the motive of such attempts is to maintain prices and effectively prevent competition. Thus, the focus is mainly on the real effects of limiting parallel imports on competition.

On the other hand, in Korea, the relevant guideline is less explicit on anti-competitive motives of attempts to restrict parallel competition or on the real impact on prices. The focus is more on whether the conduct fits with conducts legally defined as anti-competitive. Nevertheless, this study shows that the Korean competition authority has increasingly emphasized analysing the actual impact of the conduct on competition or on prices, which is a welcome development.

$(1997 \sim 2002. 12)$

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97-01			/ 成克濟
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97-02	韓國 海外直接投資 現況 成果	98-07	1
	/ 王允鍾 編著		柳在元・李弘求
97-03	外國人直接投資 障碍要因 促進方案	98-08	
	/ 金準東		/ 李昌在 外
97-04		98-09	外國人投資誘致政策: 國際的 成功事例 示唆點:
97-05	OECD 賂物防止協定 國內立法現況 示		/ 李晟鳳・李炯根
	唆點 / 金鍾範	98-10	外國人投資誘致政策: 國際的 成功事例 示唆點:
97-06	電子商去來 國際的 論議動向 對應課題		投資自由地域 / 李晟鳳 外
	/ 李鍾華・李晟鳳	98-11	統一對備 : 國際金融機構
97-07	韓・美 通商摩擦 推移 對應方案		/ 張亨壽・李昌在・朴映坤
	/ 王允鍾・羅秀燁	98-12	臺灣企業 國際化 戰略 / 崔秀雄
	中國經濟 浮上 韓國 對應 / 李昌在 外	98-13	中國 國有企業 改革 現況, 問題點 展開方
97-09	東 貿易・投資 構造變化 向後 課題		向 / 徐錫興
	/ 金南斗 外	98-14	Technology Cooperation in the APEC: Case of
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	/ 金元鎬 外		/ 張亨壽・元容杰
	WTO 主要論議 動向 對應課題 / 金寬澔 外	98-16	FTA / 鄭仁教
97-14	中國內 外資企業 勞務管理 實態 改善方案	98-17	國際投資 紛爭事例 研究 / 金寬澔・李性美
	/ 趙顯埈	98-18	通商關聯 電子商去來 論議動向 示唆點
98-01	MF體制下 韓國經濟(1997.12 1998.6): 綜合深		/ 尹昌仁
	層報告① / 張亨壽・王允鍾	98-19	中・東歐 CIS 經濟統合
	中國 金融改革 / 李章揆 外		/ 鄭余泉・崔秉煕・韓貞澈
98-03		98-20	
	/王允鍾・金琮根		/ 趙明哲・洪翼杓

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98-21			果 政策的 示唆點 / 鄭仁教・李景姫
	/ 全載旭・崔義炫	00-08	WTO 論議動向 對應方案
99-01	1999 2000 :		/ 金準東・蔡 旭・梁俊晳
	/ 曺琮和 編	00-09	體制轉換國 經濟開發費用 / 趙明哲・權
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	/ 金博洙・王允鍾・申東和・李炯根		楊斗鏞・王允鍾・黃祥仁
99-04			WTO 新通商議題 / 尹昌仁 外
	/ 王允鍾・鄭在完・金琮根・李鴻培	00-12	中國・ 初期 改革・開放政策 北韓
99-05	2000 / 曺琮和 編		改革方向 / 趙明哲・洪翼杓
99-06	APEC 1998	00-13	WTO 協商 韓國 協商力
	(IAPs) 가 / 安炯徒 編著		/ 蔡 旭・崔洛均
99-07	1 :	00-14	環境裝置가 韓國 輸出競爭力
	/ 李昌在		影響 對應方案
99-08	2 :		/ 尹昌仁・韓宅換・庾相喜
			3 ASEM 頂上會議: 經濟協力分野
99-09			/ 李鍾華
	/ 金益洙	00-16	農産物 保護費用 政策示唆點 / 宋有哲・朴芝賢
99-10	東華人經濟華人資本	01-01	/ 南相烈
	/ 崔秀雄	01-02	WTO 가
99-11			
	綜合深層報告[2] / 黃祥仁・王允鍾・李晟鳳	01-03	/ 鄭仁教
99-12			/ 黃祥仁・金寅培・辛仁錫
	/ 李晟鳳 外	01-04	韓・日 FTA
99-13			/ 鄭仁教
00 .0	/ 王允鍾 外		APEC / 金尚謙・朴仁元
00-01	WTO 規範分野 韓國	01-06	
00 01	協商戰略 / 崔洛均・蔡 旭・金準東・宋有哲・	01 00	· 自琮和・金于珍
	尹美京・徐暢培	01-07	
00-02			WTO / 梁俊哲・金鴻律
00-02	/ 金準東・姜仁洙	01-08	
00 03	東歐 經濟體制轉換 アンス ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・ ・	01-00	/ 尹德龍・朴淳讃
00-03	/鄭余泉	04 00	/ 产版展・作序環 EU : CGE
00 04	WTO 工産品協商 實證分	01-09	/ 李鍾華・朴淳讃
00-04		01 10	
00.05	析 韓國 協商戰略/崔洛均・李明憲・朱文培		
00-05	WTO 影響分析 對應戰略 / 金準		/ 宋有哲 外
	東・李長榮・李漢煐・金龍奎・崔重熹・許 琮・	U1-11	
00.00	李障源		: • •
00-06	WTO 農業協商 影響分析 對應戰略		/ 金準東 外

: WTO

/ 宋有哲・朴芝賢・李載玉・魚明根・任廷彬 01-12

00-07 韓・ 自由貿易協定 推進背景, 經濟的 效

	/ 崔洛均 外		對 / 金興鍾
01-13	WTO	02-20	
	/ 尹昌仁 外		/
01-14	WTO		李昌在
	· 가 / 蔡 旭・徐暢培	02-21	韓·中·日 IT 戰略的 提携
02-01			: 知識連繫 / 洪裕洙
02-02	: DDA	02-22	
02 02	/ 宋有哲・朴芝賢・李載玉・林頌洙		/ 金鴻律
02-03		02-23	/
02 00	: • • /		白權鎬 外
	金準東・高俊誠・具文謨・朴淳讚	02-24	, 117412
02-04			楊斗鏞・吳奎澤・金恩京
02-04	/ 崔洛均・鄭在皓	02-25	3
02-05		00.00	/ 李鴻培
02-03	姜文盛・魯在峯・李鍾華	02-26	/ 趙明哲 外
02.06	DDA TRIPS		
02-00	/ 尹美京·崔允僖	_	
02-07			
02-01	南相烈・權・栗	07.04	共同人类 對市 机次 奉送 复数式用 八七
02-08			韓國企業 對中 投資 實態 經營成果 分析
02-00	崔洛均・朴淳讃	07.00	/ 朴相守 經濟改革 推進現況 經濟展望
02-09		97-02	經濟以早 推進現坑 經濟展呈 / 鄭在完
02 00	姜三模・王允鍾	07 02	, ^{與在元} 韓國 對 投資 ODA 推進方向
02-10	가	97-03	
02 10	/ 姜文盛·羅秀燁	07 04	/ 製造元 西方 中央 石油・가 部門 進出現況
02-11		91-04	/ 李哲元
02	尹徳龍・鄭在植・曺琮和	07_05	ファイス イン
02-12			江流域 開發現況 韓國 參與方案
0 <u>L</u> 1 <u>L</u>	野中 對韓 가	97-00	/ 鄭在完・權耿德
	/ 李彰洙	07 07	CIS 經濟統合 推進現況 展望
02-13	FTA / 金良姫・趙炳澤	97-07	
02-14	/ 32000 /		7 字主沃·崔米熙 金融産業: 危機 背景 展望
02 14	池晚洙	97-00	本
02-15	ASEAN • /	07 00	, 並だけ 中國 産業 現況 韓國 示唆點
02 .0	權・栗・金玧慶		/ 崔義炫
02-16	/ 趙顯埈		/ E 我 A WTO 紛爭解決事例 研究: 日本 酒稅
	1990 韓・美 /	31-10	研究 / 蔡 旭
0 <u>-</u> 11	梁俊哲・金鴻律	07 11	WTO紛爭解決事例 研究: 美國 「
02-18	NAM WIST	31-11	WIO新学科/大学的 (竹九) 夫國 基準 紛爭 / 李鎬生
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02-19		97-13	中國 石油化學産業 現況 展望 / 洪翼杓

07 14	中國 株式市場 現況 展望 / 金琮根	遵守現況 / 朴映坤・金干珍・羅秀燁
	中國 經濟改革 中央・地方關係 / 朴月羅	
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	/ 李炯根	00-03 NAFTA 經濟的 效果分析: 展望 實
	80 日本 通商政策 基調	行效果 比較 / 金元鎬・姜文盛・羅
	/ 羅成燮	秀燁・金眞梧
	・	00-05 國際協力體 北韓開發
	→ 競児 機 ・ 対し 関 ・ 対し 関 ・ 対し	/ 張亨壽・朴映坤
		01-01 가 知識基盤經濟
98-03		/ 鄭在完
00.04	/ 趙潤濟・金鍾燮	01-02 市場特性 分析 韓國 輸出擴大
	運用實態 國別 換投機 事例分析	方案 / 朴英鎬
	/ 李永雨	01-03 WTO : e-Trade
	APEC	/ 孫讃鉉・尹眞那
	/鄭聖哲・李明振	01-04 WTO
98-06	APEC WTO	:
	/ 朴成勳	/ 宋有哲・朴芝賢
98-07	APEC 가 對APEC	01-05 韓・日
	/ 李載裕・李載榮	/ 金良姫・金鍾杰
98-08	APEC	01-06 南北韓- 3
	/ 朴泰鎬・文宇植・白珍鉉	/ 鄭余泉
98-09	APEC / 孫正植・韓弘烈	01-07 對 / 權奇洙
98-10	APEC	/ 惟可/木 01-08 가 가 /權 栗
	/ 朴氣弘	01-00 / / 作 未 01-09 / 金眞梧
98-11	貨 對EU	01-09 / 並兵16 01-10 ・ フナ
	/ 李鍾華 外	/ 李哲元
98-12		01-11 WTO TRIPS :
	1	/ 尹美京・李性美
98-13	WTO :	01-12
		/ 趙明哲
	/ 蔡 旭	02-01
	WTO :	/ 姜文盛・羅秀燁
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	/ 蔡 旭・徐暢培	/ 朴英鎬
	OECD	02-03 WTO 2
00 10	/ 金裕燦・李晟鳳	/ 宋有哲
99-01		02-04 :
33-01	OLOD Z OLOD	/ 尹美京・李奎億
	/ 李晟鳳・李炯根	
99-02	/ チルジョル M&A	■ Policy Analyses
JJ-0Z	/ 金琮根	Policy Analyses
00-01	透明性 提高 國際基準 規範 開發	
00-01	延引工 返回 四次坐十 水彩 開放	00-01 Regional Arrangements to Borrow: A Scheme for

	Preventing Future Asian Liquidity Crisis		Korean Perspectives
	/ Tae-Joon Kim • Jai-Won Ryou • Yunjong Wang		/ Tae-jun Kim • Doo Yong Yang
00-02	Foreign Exchange Market Liberalization: The Case	01-01	(FTA)
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공정거래위원회(비상임)위원, 한국개발연구원 부원장, 산업연구원 원장 역임. 현재 법무법인 세종 부설 시장경제연구원 원장 겸 아주대학교 경영학과 교수.

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