

International Spread of Anti-dumping Measures and Diversification of Investigation Methodologies

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I. Introduction

As global economic growth has lost momentum due to the COVID-19 pandemic and the tension between U.S. and China, among other developments, concerns about the spread of protectionism are growing. In particular, anti-dumping (AD) measures are more likely to expand in the future in that they are relatively easy to take and have a direct effect on international trade compared to other protectionist trade policies. Accordingly, this study reviews the spread of AD measures and the effects of AD measures on trade. We also pay attention to the fact that AD investigation methodologies are being diversified. Focusing on particular market situation (PMS) and adverse facts available (AFA) provisions, which have been applied in many recent AD investigations on Korean export goods, we analyze the logic of investigation authorities. Finally, we provide

policy implications for companies and the government to take note of in preparing for AD measures and investigations.

II. International Spread of AD

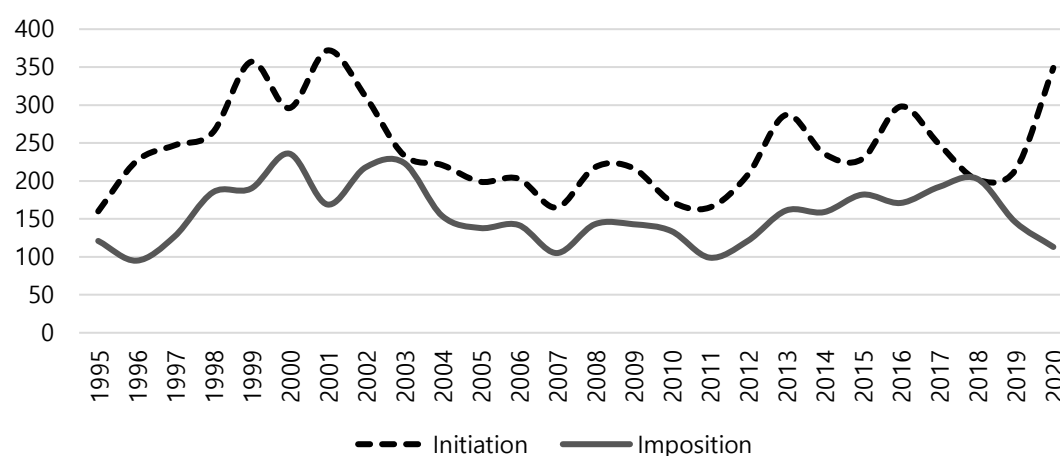
AD measures decreased in the 2000s, but have been on the rise since the global financial crisis in 2009. The products subject to AD measures have also been increasing in terms of trade value. The number of countries that initiated AD investigations increased from 29 countries (2010-2014) to 35 countries (2015-2020) on an annual average. Looking at the subsets of products subject to AD investigation by production stage, intermediate goods account for more than 70% in terms of imports, followed by consumer goods with about 20%. AD measures are mainly taken in the metal, chemical, plastic and rubber industries. In

most cases, developed countries have taken AD measures against developing countries. Yet the number of AD measures between developed countries and those between developing countries are increasing in recent years as well.

AD measures against Korea are also mainly taken in the metal, chemical, plastic and rubber industries. Looking at the country rankings

for AD investigations against Korea, out of a total of 471 cases, India accounts for about 17% with 80 cases, followed by the United States (14%), China (9%), Australia (9%), and the European Union (7%). For reference, Korea accounts for 2.6% of global imports as of 2019, but the proportion of total AD investigations was 1.7%, which is relatively low compared to its imports.

Figure 1. Trends in Global Anti-dumping Measures (1995-2020)



Source: WTO

Table 1. Status of AD Investigation Initiation by Industry (2014-2020)

	2014/7~2015/6	2015/7~2016/6	2016/7~2017/6	2017/7~2018/6	2018/7~2019/6	2019/7~2020/6
1	Metals (36%)	Metals (37%)	Metals (41%)	Metals (28%)	Metals (46%)	Metals (45%)
2	Chemicals (24%)	Other (20%)	Chemicals (27%)	Plastics (21%)	Chemicals (13%)	Chemicals (17%)
3	Other (17%)	Chemicals (13%)	Plastics (11%)	Chemicals (18%)	Plastics (10%)	Plastics (12%)
4	Plastics (16%)	Textiles (7%)	Other (10%)	Other (10%)	Other (10%)	Other (10%)
5	Machinery (4%)	Plastics (7%)	Textiles (7%)	Textiles (8%)	Machinery (7%)	Textiles (8%)

Source: WTO

In an empirical analysis using data from 2010 to 2019 for 120 countries around the world, we find that AD measures have a negative effect on trade. Further empirical analyses conducted by splitting all product datasets by industry or production stage also indicated that AD measures have a negative effect on trade. Next, it is found that AD measures taken against Korea have a negative effect on Korean exports for the chemical, rubber, plastics industry as well as metal industry. Finally, we also analyze whether the trade diversion and trade refraction effects of AD measures occurred in the above two industries, focusing on cases where the United States conducted investigations against Korea. The results of our empirical analysis indicate that the trade diversion effect does not occur in the chemical, rubber, and plastic industries, but is found to occur in the metal industry. The trade refraction effect occurs in the chemical, rubber, and plastic industries, but not in the metal industry.

III. Diversification of AD Investigation Methodologies

We find that major AD users such as the United States, the European Union, Australia, India, and China have recently granted their investigating authorities expansive authority and discretionary powers in conducting AD investigations and calculating dumping margins, thereby resulting in further diversification and technical complexities to existing AD methodologies. For instance, such tendencies

can be seen in the application of PMS and AFA provisions under the United States' AD investigations. Since the enactment of the Trade Preferences Extension Act of 2015, and more noticeably under the Trump administration, the United States Department of Commerce (DOC) has repeatedly invoked PMS and AFA against imports from Korea. Following the United States' practice, other major AD users including the European Union, Australia, and China are preparing or have adopted similar measures in their AD laws.

A PMS is deemed to exist where the domestic price of an exporting country is distorted such that it cannot be accepted to constitute normal value in dumping determination. Where a PMS is found, the investigating authorities can use a third country price or construct normal value. An AFA is applied where a respondent subject to an AD investigation is non-cooperative to the investigating authorities' request for information, or where it submits information in an incomplete or inaccurate manner. In this case the investigating authority can take into consideration any information available to itself, usually leading to adverse inference against the respondent.

As have been witnessed in AD investigations on various steel products from Korea, where PMS and AFA were repeatedly applied in the original investigation and subsequent administrative reviews, such methodologies can significantly affect dumping margins to alter

Table 2. Examples of PMS, AFA, or Similar Measures by Major AD Users

U.S.	- Sec. 771(15) & Sec. 773(e) of the Tariff Act of 1930 (19 USC §§1677(15), 1677b(e)) as amended by Sec. 504 TPEA - Sec. 776 of the Tariff Act of 1930 (19 U.S.C. §1677e) as amended by Sec. 502 TPEA
EU	- Art. 2, para. 6a of EU Basic Regulation ¹ as amended by Regulation (EU) 2017/2321 ² and a number of AD determinations made on products ³ imported from China after the amendment
Australia	- Sec. 269TAC of Customs Act 1901
China	- MOFCOM's AD determination on n-propanol imported from the U.S., partly on account of alleged non-market conditions in some U.S. energy sectors

Source: Cho et al. (2021)

market competitive conditions in the U.S. market. Despite criticism on the part of its trade partners, the possibility seems rather low that the U.S. Congress will amend the relevant laws to reduce the administration's powers in AD investigations. There have been several instances, however, where the Court of International Trade (CIT) reversed the DOC's AD determination based on PMS and/or AFA and remanded them for reasons of lack of evidence, the DOC's failure to meet the burden of proof, or a violation of due process.⁴

Exporting companies mainly or frequently subject to PMS and AFA could strategically use against the DOC the reasoning made by the CIT in future AD investigations. Further, given the recent WTO panel rulings in DS539,⁵ where most of the U.S. applications of AFA were held inconsistent with the WTO AD Agreement, it can still be deemed important and relevant to argue legal inconsistencies of such methodologies against the United States under the WTO dispute settlement system.

¹ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L 176/21.

² Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not Members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2017] OJ L 338/1.

³ Imports of certain aluminum foil in rolls (OJ L 146, 5. 6. 2019); threaded tube or pipe cast fittings, of malleable cast iron and spheroidal graphite cast iron (OJ L 197, 25. 7. 2019); certain organic coated steel products (OJ L 116, 3. 5. 2019); ceramic tableware and kitchenware (OJ L 189, 15. 7. 2019); tungsten electrodes (OJ L 200, 29. 7. 2019); bicycles (OJ L 225, 29. 8. 2019); ironing boards (OJ L 252, 2. 10. 2019); peroxosulphates (persulphates) (OJ L 13, 17. 1. 2020).

⁴ For instance, with respect to the CIT's remand order on the DOC's PMS determination on Oil Country Tubular Goods or "OCTG" from Korea, see CIT, *Nexteel Co. v. United States*, Consolidated Court No. 17-00091, Slip Op. 19-01 (January 2, 2019); CIT, *Nexteel Co. v. United States*, Consolidated Court No. 18-00083, Slip Op. 19-73 (June 17, 2019); CIT, *Nexteel Co. v. United States*, Consolidated Court No. 18-00083, Slip Op. 20-69 (May 18, 2020); CIT, *SeAH Steel Corp. et al. v. United States*, Consol. Court No. 19-00086, Slip Op. 21-43 (April 14, 2021); CIT, *SeAH Steel Corporation v. United States*, Court No. 20-00150, Op. 21-146 (October 19, 2021).

⁵ WTO Panel Report, *United States - Anti-Dumping and Countervailing Duties on Certain Products and the Use of Facts Available*, WT/DS539/R, 21/01/2021.

IV. Policy Implications

If the global economic growth rate slows down, it is likely that AD measures will be used more actively by using various AD investigation methodologies such as PMS and AFA. In cases where neighboring exporting countries are under AD investigation during economic downturn and Korea is also a major exporter of the products in question or its exports are rapidly increasing, Korean companies are highly likely to be subject to AD investigations. It is necessary to prepare in advance. Also, it is important for companies in AD proceedings to prepare and submit the materials requested by the investigation authorities in a timely manner, as completely and accurately as possible.

Since it takes a long time from the initiation of an AD investigation to a definitive determination, it is essential for companies that are likely to be subject to AD measures to secure

professional manpower such as accountants and lawyers in the field. At the same time, industry associations and government agencies need to cooperate to build an AD investigation pre-recognition system, a task that is difficult for individual companies to coordinate. Moreover, since SMEs lack the human capital and financial means to actively respond to anti-dumping investigations, it is necessary for the government or relevant associations to focus on supporting SMEs.

Korea has already signed FTAs with many countries such as the United States, the European Union and China, among others, which include trade remedies chapters. In the case of provisions not clearly specified in the WTO agreements (for example, procedure requirements to notify initiation of AD investigations in advance), it is necessary to minimize damage to our companies by including WTO plus provisions in the FTA trade remedies chapters. **KIEP**