

Comparison & Analysis of Anti-dumping Provisions in the FTAs signed by Korea

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1. Background

As of November 11th 2014, Korea signed or effectuated 12 FTAs with its trading partners. Beginning with Korea-Chile FTA in 2004, Korea has effectuated nine FTAs by 2013 and has signed FTAs with Columbia, Australia and Canada respectively by November 7th 2014. In this light, comparing and analyzing the anti-dumping provisions in the free trade agreements that Korea entered or effectuated will be a good reference for Korea to prepare for mega free-trade deals such as the Regional Comprehensive Economic Partnership, the Trans-Pacific Partnership and the Free Trade Area of the Asia Pacific.

2. Overview of Anti-Dumping Provisions in the FTAs Signed by Korea

The FTAs that Korea signed contain 13 anti-dumping provisions – notification, consultation, english documentation, no zeroing, de minimis, cumulative assessment, undertaking, consideration of public interest, lesser duty rule, limited investigation after review completion, necessity test, exclusion of dispute settlement procedures, and committee on anti-dumping practices.

As shown in the following [Table 1.], these provisions are either recommendation or obligation provisions depending their legal nature. Consultation and exclusion of disputes on anti-dumping measures from FTA dispute

settlement procedures are defined as obligation provisions in the FTAs that Korea signed with other trading partners, whereas no zeroing and consideration of public interests are defined as recommendation provisions.

Table 1. Anti-dumping Provisions in the FTAs signed by Korea and Their Binding Force

	FTAs		Noti- fica- tion	Con- sulta- tion	Eng- lish Docu- men- tation	Zero- ing	De Min- imis	Cul- mina- tion	Under tak- ing	Pub- lic Inter- est	lesser duty rule	Investi- gation Limited After Review Comple- tion	Necessi- ty Test	Exclu- sion from Dispute Settle- ment Proce- dures	Commit- tee • Forum on Anti- dump- ing Practic- es
	Total	57	9	7	2	5	2	2	4	2	8	3	1	6	5
1	Kor-Chile FTA	1	.	.	.	.	.	.	.	.	.	.	.	○	.
2	Kor • Sin- gapore FTA	3	.	.	.	△	.	.	.	.	△	.	.	○	.
3	Kor • EFTA FTA	5	○	○	.	.	.	.	.	.	○	.	○	.	○
4	Kor • ASEA N FTA	0	.	.	.	.	.	.	.	.	.	.	.	.	.
5	Kor • India FTA	4	○	.	.	△	.	.	.	.	○	○	.	.	.
6	Kor • EU FTA	11	○	○	○	.	○	○	.	△	○	○	.	○	○
7	Kor • Peru FTA	5	○	○	○	.	.	.	.	.	△	.	.	.	△
8	Kor • US FTA	5	○	○	.	.	.	.	○	.	.	.	.	○	○
9	Kor • Tur- key FTA	7	○	.	.	△	○	○	.	.	△	○	.	○	.
10	Kor • Co- lumbia FTA	5	○	○	.	△	.	.	○	.	.	.	.	○	.
11	Kor • Aus- tralia FTA	5	○	○	.	△	.	.	○	.	○	.	.	.	.
12	Kor • Can- ada FTA	6	○	○	.	.	.	.	○	△	△	.	.	.	△

Note: ○(obligation clause), △(recommendation clause), .(Neither).

Source: Data collected from FTAs Signed by Korea.

As shown in [Table 2], some anti-dumping provisions in the FTAs signed by Korea in-

clude 'WTO Plus' commitments which are an advanced version of WTO antidumping provisions.

Table 2. WTO Plus Commitments Concerning Antidumping Provisions in the FTAs Signed by Korea

	FTAs Signed by Korea		Noti-fica-tion	Con-sulta-tion	Eng-lish Doc-umen-tation	Zero-ing	De Mini-mis	Cu-mula-tion	Under-tak-ing	Public Inter-est	lesser duty rule	Investigation Limited After Review Com-pletion	Neces-sity Test
	Total ¹⁾	33	9	1	2	5	1	2	3	2	4	3	1
1	Kor · Chile FTA	0	·	·	·	·	·	·	·	·	·	·	·
2	Kor · Singa-pore FTA	1	·	·	·	+	·	·	·	·	=	·	·
3	Kor · EFTA FTA	3	+ ²⁾	=	·	·	·	·	·	·	+	·	+
4	Kor · ASEAN FTA	0	·	·	·	·	·	·	·	·	·	·	·
5	Kor · India FTA	4	+ before 10 days	·	·	+	·	·	·	·	+	+ 12 months	·
6	Kor · EU FTA	8	+ before 15 days	+	+	·	+	+	·	+	+	+ 12 months	·
7	Kor · Peru FTA	2	+	=	+	·	·	·	·	·	=	·	·
8	Kor · US FTA	2	+	=	·	·	·	·	+	·	·	·	·
9	Kor · Turkey FTA	4	+ before 15 days	·	·	+	=	+	·	·	=	+ 12 months	·
10	Kor · Co-lumbia FTA	2	+	=	·	+	·	·	=	·	·	·	·
11	Kor · Aus-tralia FTA	4	+	=	·	+	·	·	+	·	+	·	·
12	Kor · Cana-da FTA	3	+	=	·	·	·	·	+	+	=	·	·

Note: 1) Only +(WTO Plus) were tallied.

2) +(WTO Plus), =(WTO equivalent), ·(no regulation).

3) Exclusion of anti-dumping disputes from dispute settlement procedures and committee on anti-dumping procedures in [Table 1] originate from FTA provisions, thus were excluded in [Table 2] as they are inappropriate to be compared with the WTO antidumping agreement.

Source: data collected from FTAs and WTO agreements.

3. Areas for Improvement for New or Revised FTAs Negotiations

India, US and China are the nations which initiate anti-dumping investigation against Korean exporters most frequently. (See Table 3)

However, de minimis rule in review proceedings or requirements of competition terms in cumulative assessment is not defined in Korea-US FTA. Therefore, Korea needs to make best endeavors to insert WTO Plus commitments in a new or revised FTAs with these countries.

Table 3. Nations Initiating Anti-dumping Investigation Against Korean Exporters

Ranking	Country	Cases	Ratio	Ranking	Country	Cases	Ratio
1	India	50	16.4%				
2	US	32	10.5%	14	Turkey	7	2.3%
	China	32	10.5%		New Zealand	7	2.3%
4	EU	28	9.2%		Taiwan	7	2.3%
5	Australia	27	8.9%		Columbia	7	2.3%
6	Brazil	15	4.9%	18	Egypt	4	1.3%
7	The Republic of South Africa	15	4.9%	19	China	3	1.0%
8	Indonesia	14	4.6%		Mexico	3	1.0%
9	Argentina	14	4.6%	21	the Philippines	1	0.3%
10	Canada	10	3.3%		Peru	1	0.3%
11	Malaysia	8	2.6%		Japan	1	0.3%
	Pakistan	8	2.6%		Israel	1	0.3%
	Thailand	8	2.6%		Ukraine	1	0.3%

Note: Based on the statistics from 1978 to 2013.

Source: WTO(2014), Statistics on anti-dumping, http://www.wto.org/english/tratop_e/adp_e.htm (on July 8).

De Minimis Rule Needs to be Applied in Reviews

In WTO anti-dumping agreement, the margin of dumping is considered to be de minimis if this margin is less than 2 percent, expressed as a percentage of the export price. Its application in review proceedings, however, is uncertain¹ because the clause on de minimis rule (Article 5.8) is included in the provisions that define original investigation (Article 5) and there is no such clause in those that define review proceedings (Article 11).²

¹ WTO Anti-dumping Agreement Article 5.8.

² WTO Anti-dumping Agreement Article 11.4 stipulates, "The provisions of Article 6 regarding evidence and procedure shall apply to any review carried out under this Article. Any such review shall be carried out expeditiously and shall nor-

WTO's dispute settlement panel ruled in the case of United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan³ that de minimis rule does not apply during review proceedings. In this case, Japan had argued that considering less than 0.5 percent of dumping margin as de minimis in the review proceeding violates Article 5.8 and Article 11.3 of the WTO anti-dumping agreement whose de

minally be concluded within 12 months of the date of initiation of the review." There is no clear mentioning of Article 5 (Investigation and subsequent investigation) which encompasses the clause on de minimis rule (Article 5.8).

³ United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan(2013), WT/DS244/AB/R. 15 December.

minimis criteria is 2 percent.⁴ However, the Panel did not agree with Japan's argument, stating that the Article 11.3 in WTO anti-dumping agreement does not explicitly nor implicitly incorporate the possibility of applying Article 5.8.⁵ Based on Article 32 of Vienna Convention on the Law of Treaties, Japan presented preparatory work of treaty and the circumstances of its conclusion, but this was rejected by the Panel on the ground that the Article 32 of the Vienna Convention cannot be applied in this case as the meaning of the agreement is neither ambiguous nor obscure.⁶

Nonetheless, Korea needs to increase the application of de minimis rule in review proceedings. The WTO dispute settlement panel's ruling that de minimis rule does not apply in review proceedings may be feasible in the interpretation of the present agreement, however, this is attributable to the judicial restraint which leads the Panel to interpret only what is expressly written. However, there is insufficient logical grounds or validity to exclude de minimis rule from review proceedings and thus legislative supplementation must be in order. The Korea-EU FTA stipulates legal obligation to apply de minimis rule in review proceedings and given that review proceedings are the biggest obstacle for Korean exporters, Korea needs to insert the clause of applying de minimis rule in review proceedings in its future FTAs.

Of the FTAs signed by Korea, only Korea-EU and Korea-Turkey FTAs incorporate the application of de minimis rule in review proceedings. In the Korea-EU FTA, de minimis rule is legally applied in review proceedings as well as in the original investigation.⁷ Given

that the Korea-EU FTA directly quotes the de minimis clause from the WTO anti-dumping agreement, the margin of dumping shall be considered to be de minimis if this margin is less than 2 percent of the export price. In the Korea-Turkey FTA, however, it only states that the parties shall comply with the de minimis rule defined in the WTO anti-dumping agreement.

The application of de minimis rule in review proceedings in the Korea-EU FTA is regarded as a WTO Plus commitment and a good example to leverage on in future FTA negotiations. Even though it lost in a WTO dispute settlement case, EU insisted on incorporating this clause as legal obligation in the Korea-EU FTA. This can be a clear precedence of including de minimis clause in future FTA negotiations.

Criteria for Terms of Competition in Cumulation Need to be Specified

When imports from more than one country are simultaneously subject to anti-dumping investigation, the WTO Anti-dumping Agreement allows a cumulative assessment of the effects of the dumped imports provided that certain requirements are met. For a cumulative assessment, two requirements need to be met. The first is that the dumping margin shall surpasses the de minimis level and the volume of dumped imports shall be more than negligible. Second, the investigation authority needs to determine that the cumulative assessment is appropriate given the conditions of competition between imported goods and between imported goods and the like domestic goods. The first requirement is quite clear as the numerical criteria for dumping margin and dumped volume are specified in the Article 5.8 of the WTO Anti-dumping Agreement. The article stipulates that, "The margin of dumping shall be considered to be de minimis if this margin

⁴ WTO Panel Report(2013), para. 7.58.

⁵ WTO Panel Report(2013), para. 7.67.

⁶ WTO Panel Report(2013), para. 7.84.

⁷ Korea · EU FTA Article 3.13 (De-Minimis Standard Applicable To Review).

is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.” The second requirement, however, is subject to an arbitrary interpretation by the investigating authority as there is no specific criteria for determining the conditions of competition in the WTO Anti-dumping Agreement.

Of the FTAs signed by Korea, the Korea-EU and the Korea-Turkey FTAs are the ones that make it a legal obligation to pay special care when determining the conditions for competition in a cumulative assessment. The fact that the Korea-EU and the Korea-Turkey FTAs legally obligate the examination of cumulative assessment in light of competition conditions whereas the WTO Anti-dumping Agreement leaves it to the discretion of the investigating authority makes it a WTO plus commitment. Furthermore, emphasizing the review of competition conditions by calling the investigating authority to examine, with special care, whether the cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition is also a WTO Plus commitment. However, the competition conditions need to be specified into provisions since the FTA merely calls for special care.

References

- Korea-Chile FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-Singapore FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-EFTA FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-ASEAN FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-India FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-EU FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-Peru FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-US FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-Turkey FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-Columbia FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-Australia FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Korea-Canada FTA. 2014. FTA Powerhouse KOREA. <http://www.fta.go.kr> (July 8).
- Agreement on Implementation of Article VII of GATT. 1994.
- WTO. 2014. Statistics on anti-dumping. http://www.wto.org/english/tratop_e/adp_e.htm (accessed on July 8).
- WTO Panel Report. 2013. “United States — Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan.” WT/DS244/AB/R. (15 December 2013).