

Michigan Journal of International Law

Volume 11 | Issue 2

1990

The Impact of U.S. Trade Law Actions on Government Policy Decisions in Korea

Jong-Kap Kim

Ministry of Trade and Industry, Republic of Korea

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [International Trade Law Commons](#)

Recommended Citation

Jong-Kap Kim, *The Impact of U.S. Trade Law Actions on Government Policy Decisions in Korea*, 11 MICH. J. INT'L L. 410 (1990).

Available at: <https://repository.law.umich.edu/mjil/vol11/iss2/9>

This Symposium is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

THE IMPACT OF U.S. TRADE LAW ACTIONS ON GOVERNMENT POLICY DECISIONS IN KOREA

*Jong-Kap Kim**

INTRODUCTION

It is my great pleasure to be present at the "Symposium on U.S.-Korea and U.S.-Taiwan Trade Law Issues in Comparative Perspective" hosted by the University of Michigan. I believe that this symposium will contribute to further understanding of Korean-U.S. trade relations and thereby help consolidate economic partnership between the two countries.

I would, first of all, like to briefly review the recent trends in bilateral trade and U.S. trade policies from the perspective of the United States' trading partners. I would then like to make a presentation on the impact of U.S. trade law actions on government policy decisions in Korea — a major topic at this symposium. In conclusion, I would like to suggest ways to help strengthen trade relations between Korea and the United States over the long run.

RECENT TRENDS IN BILATERAL TRADE

The trade and economic relationship between Korea and the United States has matured and contributed to the prosperity of both countries. The United States has continued to be Korea's largest trading partner, and Korea is now the United States' seventh largest trading partner, surpassing both France and Italy.

Although Korea generally recorded large annual trade deficits with the U.S. until 1982, the recent trend of bilateral trade surpluses beginning in 1982 has been of particular concern to Korea. However, Korea's bilateral trade surplus with the U.S. has fallen drastically since the end of 1988.

For the first nine months of 1989, U.S. exports to Korea increased by 25.7 percent, notably higher than our overall import growth rate of 18.7 percent. Over the same period, our exports to the United States actually declined by 1.6 percent. The ongoing slowdown in Korean exports to the U.S. is mainly attributable to the 32.8 percent apprecia-

* Director, United States Division, Ministry of Trade and Industry, Republic of Korea.

tion of the won against the U.S. dollar from September, 1985, through October, 1989. Currency value is likewise a major factor in the growth of U.S. exports to Korea, along with expanded market access for American goods. For 1989 as a whole, we project that Korea's trade surplus with the U.S. will fall to \$5 billion from \$8.6 billion in 1988 and \$9.6 billion in 1987.

Although this rapid progress toward greater balance is due in part to the freer play of market forces, it also reflects specific actions undertaken by the U.S. and Korean governments. For our part, we have tried to act consistently within a liberal policy framework, implementing market-opening measures at home and working to promote such policies in multilateral forums. We have adopted this position because we believe it is the best way to strengthen the Korean economy, so as to compete internationally and, ultimately, to enhance the living standards of our people. We also seek to continue our strong bilateral relationship with the United States and other trading partners because we believe that the continued cooperation of the two countries will contribute not only to our own economic development, but also to world economic prosperity.

U.S. TRADE POLICIES FROM THE PERSPECTIVE OF U.S. TRADING PARTNERS

With this background information in mind, I would now like to turn to U.S. trade policies. In my view, the United States is still one of the most open markets in the world. It is also arguable, however, that the U.S. has been shifting its trade policies in a protectionist direction, a direction that is often termed "managed trade."

U.S. trade policies could be characterized as a mixture of both bilateral and multilateral approaches. The U.S. Administration's "top trade liberalization priority" is to successfully conclude the Uruguay Round ("UR") of multilateral trade negotiations in order to develop rules to cover agricultural trade and new areas such as services, investment, and intellectual property rights. The U.S. government, however, frequently pursues a bilateral approach in an effort to remove or reduce so-called "trade barriers" under U.S. domestic trade acts.

On the side of imports, the U.S. takes various measures to justify protection for U.S. industries "injured or likely to be injured" by import surges or other foreign "unfair trade practices" under U.S. domestic trade regulations. Although the U.S. government announced a "Fair Trade Policy" in September, 1985, under the Reagan Administration, it has continued to resort to safeguard measures as a major tool to protect declining domestic industries.

These trade regulations have been further intensified by the Omnibus Trade and Competitiveness Act of 1988. This Act introduced the so-called "Super 301" provisions with a view to bilaterally addressing trade problems with U.S. trading partners. The Act also strengthened such provisions as section 201, section 337, and the antidumping and countervailing duty laws in order to effectively provide protection for domestic industries.

The Omnibus Trade Act and the measures taken under the Act have been criticized by U.S. trading partners in GATT consultations and other bilateral and multilateral trade forums. These countries have argued that unilateral and protectionist measures taken by the United States are inconsistent with GATT and may thereby jeopardize the ongoing Uruguay Round of multilateral trade talks.

U.S. trading partners have contended that the Super 301 provisions are unilateral in nature, in that the measures taken under them are based on unilateral criteria of "unfairness." The U.S. Trade Representative stated that "the United States would use Super 301 negotiations to support and complement the U.S. government's Uruguay Round efforts." In the view of U.S. trade partners, however, this approach will expand bilateralism, which is hardly consistent with the ongoing multilateral approach.

U.S. trading partners also argue that U.S. import restrictions may discourage multilateral efforts, especially with regard to the "standstill and rollback commitment." The U.S. government recently extended the existing voluntary restraint arrangements (VRAs) on steel imports, and it also decided to extend the current textile agreements with textile exporting countries.

In the opinion of its trading partners, U.S. trade policies are contradictory: making threats to compel those partners to eliminate "unfair practices" on the one hand, while intensifying import restrictions on the other. These restrictions serve as barriers to trade and are inconsistent with the U.S. government's own efforts to open U.S. trading partners' markets. They also contradict the spirit of GATT.

IMPACT OF U.S. TRADE LAW ACTIONS ON GOVERNMENT POLICY DECISIONS IN KOREA

I would now like to proceed to the major issue of today's symposium: the impact of U.S. trade law actions on government policy decisions in Korea. In general, Korea has been forthcoming in addressing trade issues of concern to the United States, in order to solve trade problems before they become explosive political issues in both countries. Trade problems, if politicized, work against the interests of the

two countries. This is especially true given the fact that anti-American elements in Korea have been growing in recent years, partly due to mounting U.S. pressures on Korea with respect to market liberalization. The two governments, however, have effectively handled bilateral trade issues and are optimistic that they will be able to resolve pending issues in a mutually satisfactory manner.

I will explain in detail the procedures involved in resolving trade cases that have been filed recently under U.S. trade laws.

Super 301 Actions

Under the Super 301 provision of the Omnibus Trade and Competitiveness Act of 1988 (hereinafter referred to as "1988 Trade Act") the U.S. government was mandated to identify "Priority Foreign Countries" ("PFC") and "Priority Practices" ("PP") by the end of May, 1989. Such identification was then to trigger an investigation and negotiations with U.S. trading partners over the succeeding twelve to eighteen months, a period during which the offending trade barriers were to be removed.

The Korean government began to contact the U.S. government informally in December, 1988, to determine whether Korea could be omitted from the PFC list if it agreed to seek a negotiated settlement. Officials of the two governments met three times in Washington. As a result, a decision was made to negotiate on three major issues of concern to the United States — namely, agriculture, localization, and investment policies in Korea.

Three major reasons for Korea's decision to seek negotiations with the U.S. included the following: first, it would be in the interests of both countries if they could resolve their trade problems in advance, before these issues ignited domestic political controversy; second, the two governments felt that they could resolve these problems even though Korea might make fewer concessions than would have become necessary at a later stage if Korea were designated a PFC; third, Korea, as long as it was not designated a PFC or "unfair trader," would be perceived as a responsible trading partner, not only in the United States but also in the world trading community.

As is well known, the two governments reached agreements on these three trade issues through three rounds of formal consultations in Washington. The series of formal and informal consultations lasted for about six months.

Agriculture

On April 8, 1989, before the two governments began formal consultations, the Korean government unilaterally announced a three-year agricultural liberalization plan covering 243 items, seventy of which were of interest to the U.S. The Korean government's view was that agricultural liberalization measures should take into account Korea's domestic agricultural structure and, because of the sensitivity of the issue in Korea, should not be considered a matter for negotiation. Although at the formal consultations the U.S. government strongly requested that further liberalization measures be taken before Korea could be omitted from the agricultural PP list, Korea was not in a position to change the three-year liberalization plan that it had already announced to the public. Any change in the plan would have damaged the credibility of the Korean government. Moreover, it would certainly have provoked intense domestic political controversy.

The U.S. government seemed to take the view that all agricultural issues involving Korea should be dealt with in a multilateral rather than bilateral forum to minimize friction between the two countries. Furthermore, it seemed to believe that the GATT balance of payment ("BOP") consultations would conclude that Korea would not be justified in invoking article 18B on the basis of developing country status. In fact, in the October BOP consultations, Korea was graduated from article 18B, and was thereby required to take liberalization measures within the next eight years.

In the agricultural agreement under Super 301, Korea reconfirmed its earlier liberalization plan, agreed to reduce tariffs on seven items of interest to the U.S., and committed itself to removing technical barriers involving agricultural products. The agricultural sector in Korea will pose difficult social and economic problems as import controls are generally phased out. About one in five Koreans still depend on agriculture for their livelihood, and the plight of the farmers is an important public concern. However, virtually all manufactured goods (99.5 percent) are importable into Korea under automatic import licensing, and the overall liberalization ratio is 95.5 percent, comparable to that of many developed countries. Overall tariffs were slashed nearly in half, from 23.7 percent in 1983, to 12.7 percent in 1989, and will drop to 7.9 percent by 1993. From 1983 to 1989, tariffs for manufactured goods were cut by more than half, from 22.6 percent to 11.2 percent, with a further drop to 6.2 percent scheduled by 1993.

Localization

The second issue of concern to the U.S. in the Super 301 negotiations was Korea's localization policies. For the purpose of negotiation, localization policies were defined as measures taken by the Korean government to promote domestic industry. These included import restrictions and standard-setting procedures. Some types of import restrictions were termed "border closure measures," defined as measures taken by the Korean government, inconsistent with GATT safeguard provisions, to promote localization in response to petitions filed by Korean industries.

Regarding this issue, the Korean government agreed to terminate all remaining border closure measures and to do its utmost to ensure that the application of the safeguard provisions of Korea's Foreign Trade Law would be consistent with article 19 of the GATT. Korea also agreed to simplify import procedures and abide by the GATT Standards Code with respect to standards, technical regulations, quality controls, testing and certification.

In its own interest, the Korean government had already begun, in early 1989, to streamline regulations governing imports. A special task force was formed within the government to review forty individual laws, with a view to bringing import procedures more into line with international rules. The localization part of the Super 301 agreements, therefore, reflected the Korean government's plan to reduce or remove import-distortive regulations. The two governments easily compromised their differences and reached an agreement in the early part of formal consultations.

Foreign Direct Investment

The third area of Super 301 consultations involved the foreign direct investment ("FDI") policies of the Korean government. FDI in the manufacturing sector is allowed with virtually no government controls, except for regulations with respect to national security, environmental controls, and other purposes generally permitted internationally.

In the FDI agreement, Korea committed itself to terminating performance requirements that had been imposed on foreign investors as a term or condition of investment or receipt of incentives. For the purpose of the agreement, performance requirements were defined as requirements to export goods or services, to use local content, to transfer or license technology, to restrict remittances related to investment, and so forth. Korea in recent years had, except in a small number of

situations, seldom enforced such requirements. One such instance was where foreign-invested firms were not allowed to import a raw material (milk, for example), but instead were required to source it locally.

Korea also agreed to move on a gradual basis from the current "case-by-case approval system" to an "automatic approval" or "notification" system by January, 1993. Since there were restrictions on FDI in the areas of agriculture and services, Korea agreed to develop and implement further progressive foreign investment liberalization steps.

This part of the Super 301 agreements highlights the way Korean government policy has been increasingly directed toward liberalization and internationalization of the Korean economy. In my view, the agreements provide a reasonable timetable for Korean liberalization of foreign direct investment, since Korea also plans to begin liberalizing capital markets and foreign indirect investment beginning in 1992.

At present the Korean government considers the Super 301 negotiations to have marked a milestone in resolving trade problems through dialogue. The Korean government did its best to respond to U.S. requests despite intense opposition within Korea. Korea sees this outcome as very significant for our bilateral cooperation in the future, and we believe that full implementation of the agreement is of critical importance. Thus, we are paying special attention to the follow-up measures for implementing the agreement.

I would, however, like to call your attention to the fact that after we reached the "Super 301" agreement last May, most Koreans expected bilateral trade frictions to end and our bilateral trade relationship to move onto a smoother plane. Contrary to that expectation, a series of new trade requests has been made by the United States. Many Koreans are frustrated by the fact that frictions continue despite Korea's having made such substantial concessions to the U.S. in the Super 301 negotiations.

Two of the countries designated as PFCs in May have thus far refused to enter into negotiations. Yet the U.S. has not responded. Thus, in comparative terms, most Koreans do not see how the May agreement contributed to resolving bilateral trade friction. This kind of criticism is very evident in our National Assembly and in the media.

Telecommunications

The U.S. Trade Representative identified Korea and the EC as priority countries under section 1374(a) of the 1988 Trade Act on January 19, 1989. In addition, the U.S. government decided to review existing telecommunications agreements with Japan and other countries. The USTR reportedly reviewed thirteen foreign trading part-

ners. As guidelines in the investigation process, the Trade Policy Staff Committee (TPSC) took into account, among other factors, those listed in section 1374(b):

- (1) the nature and significance of the act, policies, and practices that deny mutually advantageous market opportunities to telecommunications products and services of United States firms;
- (2) the economic benefits (actual and potential) accruing to foreign firms from open access to the United States market;
- (3) the potential size of the market of a foreign country for telecommunications products and services of United States firms;
- (4) the potential to increase United States exports of telecommunications products and services, either directly or through the establishment of a beneficial precedent; and
- (5) measurable progress being made to eliminate the objectionable acts, policies, or practices.

The Korean government's view, however, is that the U.S. decision was based primarily on the third factor, namely, the potential size of the foreign country's market. In fact, Korea has progressively liberalized the telecommunications market in recent years, and its market is generally considered more open than that of any other developing country. Moreover, it is well known that there are many developing countries that have virtually closed telecommunications markets whose governments do not plan to open them to foreign competition. It would hardly be justified for the U.S. to penalize a country that is moving in the right direction, even if the potential size of Korea's market is attractive to U.S. industry. Another important aspect of the issue is that Uruguay Round services consultations have been proceeding and that telecommunications services are under discussion in those talks. In this regard, the bilateral approach that the U.S. has taken may not necessarily be consistent with the Uruguay Round's multilateral approach.

The Korean government, however, has met with the U.S. government in an effort to address U.S. concerns within the framework of Korea's plan to liberalize the telecommunications market. Although the two governments were not able to reach an agreement in the past two rounds of consultations, the Korean government will be making a concerted effort to reach a mutually satisfactory understanding before February 18, 1990, the due date for telecommunications consultations under the 1988 Trade Act.

Intellectual Property Rights

In 1985, the U.S. government initiated a section 301 investigation

of Korean government policies designed to protect intellectual property rights (IPRs).

As a result of consultations between the two governments, a comprehensive legal framework for the protection of intellectual property rights in Korea was put in place on July 1, 1987. This included revision of the patent and copyright laws and implementation of a new law regarding computer programs.

Apart from protection available under the Korean legal system, the Korean government reached an understanding with the United States on July 21, 1986, to provide some measure of retroactive protection (by means of "administrative guidance") for the following American IPRs:

— Pipeline products patented in the United States between January 1, 1980, and June 30, 1989, but not marketed in the United States or Korea, with guidance extended for ten years;

— Copyrights registered between July 1, 1977, and June 30, 1987, with guidance extended for the duration of the copyright;

— Computer programs copyrighted between July 1, 1982, and June 30, 1987, with guidance extended for the duration of the copyright.

Korea also acceded to U.S. requests to convert "process" patent applications to "product" patent applications (some 1,370 products at the time of the negotiation) when the amended patent law went into effect in July, 1987.

Such special and deferential treatment was accorded to U.S. IPRs in response to American requests and in recognition of the singular importance of the bilateral trade relationship to Korea.

Despite these legal and administrative measures, problems remain in the area of enforcement. Such circumstances are attributable to a traditional lack of awareness in Korea that IPR protection is an economic desideratum and essential to the healthy development of domestic industries. To address these problem areas and to demonstrate the government's unequivocal commitment to effective IPR protection, the cabinet established a permanent inter-agency Task Force in December 1988.

At the recommendation of the Task Force, the Prosecutor General's Office designated special enforcement teams in forty-nine prosecutors' offices nationwide to implement IPR protection. The teams will target large-scale manufacturers. Currently, a total of 120 investigators, 340 police officers, and 440 related specialists dealing solely

with IPR protection matters work under the prosecutors in these offices.

In May, 1989, as Korea continued to make efforts to provide effective IPR protection, the U.S. government placed Korea on a "Priority Watch List" ("PWL") together with seven other countries, although it did not designate any country by itself as a priority country. The U.S. government announced that it was not identifying a priority country under Special 301 because significant progress had been made in a number of negotiations. However, the U.S. singled out twenty-five countries whose practices deserved special attention. Seventeen of those countries were placed on a "Watch List" ("WL"), while the remaining eight countries were placed on a PWL.

On November 1, the USTR announced changes in its earlier decision. Korea was moved from the PWL to the WL. Korea's efforts over the previous several months in deploying the IPR Task Force had drawn some measure of recognition from the U.S. government.

The Korean government will continue to take relevant actions, not only to avoid trade friction with Korea's trading partners but also to promote R&D by domestic industries, encourage a fair domestic trading environment, and protect Korea's own IPRs abroad.

The number of IPR trade conflicts is increasing, and Korea fully recognizes the need to establish a set of rules in the Uruguay Round to address this issue. In this regard, Korea supports efforts to formulate standards for IPR protection and to strengthen the GATT dispute settlement mechanism. Additionally, Korea has been playing a constructive mediating role between developed and developing countries in this area.

Antidumping, Countervailing, and Safeguard Measures

U.S. firms and/or labor unions frequently file antidumping or countervailing duty petitions against imports from abroad. As Korea has virtually eliminated export subsidies, countervailing duty investigations since 1984 have resulted in "de minimis" decisions or marginal duty levels. Recognizing the shift in Korea's trade policies, the U.S. government did not raise this issue with reference to Korea in the U.S. "National Trade Estimate" report on foreign trade barriers published in April, 1989. Antidumping petitions, however, have had a substantial impact on Korean exports to the U.S. Some seventy percent of the cases were finally decided as either "no injury" cases or "no dumping" cases. Although Korean exporters in these cases were exonerated from any wrongdoing, in almost all cases they had lost market share in the U.S. American importers had switched sources from the Korean

firms subject to investigation to firms in other countries. Such harassment tactics more than responses to actual dumping practices have adversely affected Korean exports to the U.S.

In the face of the hardship endured by Korean traders and American importers, the Korean government in May, 1989, submitted a detailed proposal to the MTN Negotiating Group regarding the GATT Anti-Dumping Code. The proposal, based on a careful study of the Anti-Dumping Code as well as national legislation and practices, covers fifteen topics and deals with both substantive and procedural issues.

The U.S. imposes certain restrictions on Korean imports, restrictions that tend to contradict its proclaimed free trade policy, while continuing to make requests that Korea open its markets. The steel VRA expired in September, 1989, but was extended to March, 1992, even though steel imports into the U.S. have steadily declined, domestic employment has substantially increased, and the capacity utilization rate is well above average. The U.S. textile industry has been protected since 1961 and, although the ongoing Uruguay Round is trying to integrate textiles into the GATT, the U.S. is currently seeking to strengthen textile import restrictions as well.

Although Korea has been officially recognized as a fair trader in steel, the Korean government was forced to negotiate a steel VRA. U.S. steel producers were threatening to file anti-dumping and countervailing duty petitions. Some Korean firms preferred not to accept a VRA, confident that they could successfully defend themselves against any trade cases, while others preferred to avoid further trade harassment if a substantial quota could be secured. The two governments reached an agreement in October, 1989.

The two governments are currently negotiating the terms and conditions of a textile agreement. The past four rounds of negotiations have not yet been successful in reaching a final agreement. The Korean textile industry has recently been experiencing great difficulties due to wage increases, and another extension of the textile agreement will affect textile exports further in the years ahead.

SUGGESTIONS FOR STRENGTHENING TRADE RELATIONS BETWEEN KOREA AND THE U.S.

I would like to suggest that the United States take certain actions to strengthen both U.S.-Korean trade relations and the world trading system. My suggestions will focus on three areas: multilateral issues, bilateral issues, and regional issues.

First, the United States and Korea have been actively participating in the Uruguay Round from the outset of the MTN in 1986. The U.S. government, however, seems to be concentrating mainly on issues of concern to the United States. The outcome of the Uruguay Round should reflect the interests of both developed and developing countries in order to produce a real "multilateral trade regime." We are concerned that the U.S. approach may lead to a "minilateral trade regime," in which only a handful of "like-minded" nations will join and the rest will be left out. Korea, as one of the NICs, will continue to play a mediating role in seeking to reconcile the interests of both developed and developing countries. The U.S. and Korea should work together closely during the remainder of the round to help it reach a successful conclusion. The hope would be to strengthen the world trading regime and benefit all trading nations, both developed and developing.

Second, the U.S. and Korea so far have handled bilateral trade problems fairly well. But the differences in perception that exist, along with excessive U.S. pressures on Korea, generate political controversies *within* as well as between the two countries. The U.S. perceives Korea as a "second Japan." The policy that there should "never again be a second Japan" propels its search for a "level playing field" in its trade with Korea. Korea, for its part, sees itself as one of the few countries, developed or developing, that is moving consistently and rapidly to open its domestic market to the free flow of imports. Hence, Korea views many of the U.S. requests as unjustified.

It is also my personal view that Korea has been moving in the right direction and has been forthcoming in addressing the concerns of all its trading partners, including the U.S. The Super 301 agreement reached in May, 1989, is one example of the efforts Korea has made. Korea is currently in the midst of a tumultuous democratization process, and strong domestic opposition to further market liberalization exists. Excessive pressure by the U.S. would put the Korean government in a more difficult situation vis-à-vis its own trade policies and would play into the hands of minority anti-American elements in the country.

Third, the U.S. government is now becoming increasingly interested in Asian-Pacific Rim cooperation as the European Single Market approaches in 1992. The countries of this region, as we all know, differ from one another in their history, culture, and degree of economic development — to a much greater degree than in Europe. Nevertheless, there is considerable room for closer regional economic coopera-

tion. Toward this end, the United States and Korea are in a position to play major facilitative roles.

CLOSING

Korea provides a good example of a U.S. foreign policy success. Korea has experienced impressive economic and political development in recent years. The success that the United States and Korea have together achieved deserves to be encouraged rather than penalized.