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# GATT/WTO Dispute Settlement and Korea:

From Passivity to Aggression

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# GATT/WTO DISPUTE SETTLEMENT AND KOREA: FROM PASSIVITY TO AGGRESSION

***Dukgeun Ahn****

## ABSTRACT

Korea's economic development saga that amazed economists and policy makers has been filled with numerous trade disputes with its major trading partners. Despite the prevalence of such bilateral trade disputes, Korea had shown unequivocal resistance to resort to the multilateral dispute settlement forum under the GATT system. Since the inception of the WTO, however, Korea dramatically changed its attitude toward trade dispute settlement. The Korean experience of trade dispute settlement, therefore, seems a salient example of how the newly augmented system under the WTO is perceived and how it has been effectively utilized by average WTO Member countries in order to address international trade problems.

## INTRODUCTION

International trade is an indispensable element for explaining Korea's economic development during the past three decades[1], marking a remarkable accomplishment that has amazed many economists[2] and policy makers.[3] From a legal perspective, however, Korea's economic development saga has been filled with numerous trade disputes with its major trading partners.

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[1] See generally Il Sakong, *Korea in the World Economy* (Washington, D.C.: Institute for International Economics, 1993).

[2] Professor Robert Lucas, 1995 Nobel laureate in economics, wrote that "simply advising a society to 'follow the Korean model' is a little like advising an aspiring basketball player to 'follow the Michael Jordan model'". Robert E. Lucas, Jr., 'Making a Miracle', 61 *Econometrica* 251 (1993), at 252.

[3] For example, a report by the Korea International Trade Association (KITA) estimates that the contribution of merchandise export to total economic growth in 2001 amounted to 53.6%. However, this significant ratio was partly due to the substantial reduction of the total growth rate, that is estimated to have been 2.8% in 2001 while it was 8.8% in 2000. The economic growth attributed to the merchandise export is estimated to be 3.5% in 2000 and 1.5% in 2001. Korea International Trade Association, "Effect of Exports on the National Economy in 2001" (Feb. 2002; *in Korean*).

When export volumes and the diversity of products from Korea have grown, its primary exporting items have been routinely targeted by various trade remedy actions such as antidumping, countervailing and safeguard measures in the major markets, especially since the 1980s.[4]

Despite the prevalence of such bilateral trade disputes, however, Korea had not been eager to utilize the multilateral dispute settlement system established under the GATT. This general tendency of the Korean government to avoid legal confrontation in the multilateral forum and instead to resort to bilateral diplomatic settlements has dramatically changed with the development of the WTO dispute settlement system. Thus, the Korean experience of trade dispute settlement seems a salient example of how the newly augmented system under the WTO has been perceived and effectively utilized by many less visible WTO Member countries in order to address international trade problems.

This article briefly reviews the Korean experience of dispute settlements in the GATT/WTO system and also discusses non-legal implication of legal adjudication. But, rather than delving into the legal issues disputed in individual cases that are too diverse to be scrutinized in one paper, this article focuses on the overall progress of trade dispute resolution and implementation thereof. Sections I and II analyze the trade dispute settlement involving Korea under the GATT and WTO systems, respectively. Systemic issues regarding the current WTO dispute settlement system drawn from the Korean experience for the Doha Round negotiations are discussed in Section III. Finally, the last section concludes with some observations.

## I. DISPUTE SETTLEMENT DURING THE GATT PERIOD (1967 – 1994)

### A. Korea's Accession to the GATT

The Korean government first sought to join the GATT in 1950, when it eagerly tried to be recognized as an independent state in the international community after liberation from Japan. At that time, the Korean government delegation sent to Torquay, England finished the GATT accession negotiation and signed the relevant documents.[5] This first attempt, however, failed

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[4] During the 1980s, at least 171 trade remedy measures against Korean exports were reported. See below Chart 2 in Section I.C. See generally N. Han et al., *Cases of Trade Disputes of the Korean Industries* (Seoul: POSRI, 1999, *in Korean*) 37.

[5] GATT, *Basic Instruments and Selected Documents (hereinafter 'BISD')*, Vol. II (1952) 33-34. At that meeting, Austria, Peru, Philippines and Turkey also finished the accession negotiation. While Austria, Peru and Turkey formally became contracting parties in 1951, the Philippines formally joined the GATT on 27 December 1979.

when the Korean government could not complete the requisite domestic ratification procedures due to the Korean War during 1950-1953.[6]

The GATT regime underwent substantial changes to more explicitly embrace development issues during the late 1960s. The efforts to demonstrate a more forceful commitment to the interests of developing countries within the GATT system led to the adoption of the new provisions, Articles XXXVI – XXXVIII, as Part IV of the GATT.[7] In addition, the GATT as a whole tried to be perceived as a more favorable forum for developing countries. For example, the 1964 GATT publication titled "The Role of GATT in Relation to Trade and Development" emphasized considerable legal freedom for developing countries, such as non-reciprocity, infant industry protection for industrial development, and balance-of-payment protection measures.[8] These factors clearly demonstrated a strong GATT policy to expand its membership with developing countries. Moreover, in terms of the legal disciplines of the GATT, the late 1960s was probably the lowest point in the GATT's history.[9] During the period of 1959 – 1970, the GATT dispute settlement activities had dramatically declined, becoming virtually dormant in the late 1960s.[10] Such developments created undoubtedly a more favorable environment for developing countries to consider joining the GATT. In fact, the GATT membership increased most during the 1960s, in which 39 countries acceded.[11]

With such a favorable backdrop to developing countries within the GATT, the Korean government resumed its effort to accede to the GATT in 1965 when it pursued vigorously export promotion as the primary element of economic development policies. The revision of the GATT to include Part IV to deal with development issues also played an important role in inducing Korea to reconsider the GATT accession at that time. After extensive internal discussion on potential economic benefits and costs, the Korean government finally submitted its accession application to the GATT Secretariat on 20 May 1966, and conducted the tariff negotiations with 12 contracting parties from September to 2 December 1966.[12]

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[6] Tae-Hyuk Hahm, 'Reflections on the GATT Accession Negotiations', *Diplomatic Negotiation Case* 94-1 (1994, *in Korean*), at 5.

[7] The Protocol Amending the General Agreement on Tariffs and Trade to Introduce a Part IV on Trade and Development, which was adopted on 8 February 1965, entered into force on 27 June 1966. WTO, *Analytical Index: Guide to GATT Law and Practice* (Geneva, 1995) 1040.

[8] Robert E. Hudec, *Developing Countries in the GATT Legal System* (Trade Policy Research Center, 1987) 59-60.

[9] Ibid., at 65.

[10] Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* (2nd edn, Butterworth Legal Publishers, 1990) 235-250.

[11] The statistics for the accession to the GATT by the period is as follows:

| Years | 1948-1949 | 1950s | 1960s | 1970s | 1980s | 1990-1994 | Total |
|---|---|---|---|---|---|---|---|
| Number of Acceding Countries | 19 | 17 | 39 | 9 | 11 | 33 | 128 |

The accession to the GATT was also substantially increased in the early 1990s during which the Uruguay Round negotiation had been conducted. See generally WTO, above n. 7, at 1136.

[12] The Working Party for Korea's accession included 14 contracting parties. Hahm, above n. 6, 23.

Korea officially acceded to the GATT in 1967, in accordance with Article XXXIII of the GATT.[13] More specifically, on 16 December 1966, the Council of Representatives adopted the "Report of the Working Party" for the GATT accession.[14] After the Korean government completed the domestic ratification procedure, the "Protocol for the Accession of Korea" to the GATT entered into force on 14 April 1967.[15] On the other hand, Korea invoked Article XXXV for non-application of GATT with respect to Cuba[16], Czechoslovakia[17], Poland[18], and Yugoslavia[19]. These Article XXXV invocations were all simultaneously withdrawn in September 1971.[20]

Korea began its formal participation as a contracting party at the Tokyo Round of the multilateral trade negotiation, although it was merely as a minor player.[21] Subsequently, Korea joined the four so-called 'Side Codes': Subsidies Code[22], Standards Code[23], Customs Valuation Code[24] and Anti-Dumping Code[25].

Korea had never joined the sectoral agreements on bovine meat, dairy products and civil aircraft, nor the Agreement on Import Licensing Procedures as a plurilateral agreement. Korea joined the Agreement on Government Procurement during the Uruguay Round and implemented it only from 1 January 1997, while all other signatories except for Hong Kong applied it from 1 January 1996.[26]

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[13] GATT, 'Korea – Accession under Article XXXIII: Decision of 2 March 1967', BISD, No.15 (1968) 60.
[14] GATT, above n.13, at 106.
[15] GATT, above n.13, at 44.
[16] GATT, L/2783 (1967).
[17] GATT, L/2783 (1967).
[18] GATT, L/2874 (1967)
[19] GATT, L/2783 (1967).
[20] GATT, L/3580 (1971). See also WTO, above n. 7, at 1034-1036. On the other hand, it is noted that 50 contracting parties invoked Article XXXV in respect of Japan at its accession in 1955. Ibid.
[21] Chulsu Kim, 'Korea in the Multilateral Trading System: From Obscurity to Prominence', in The Kluwer Companion to the WTO Agreement (The Hague: Kluwer Law International, *forthcoming*).
[22] The Agreement on Interpretation and Application of Articles VI, XVI and XXIII. In Korea, it was signed on 10 June 1980 and entered into force on 10 July 1980 as Treaty No. 709. See Ministry of Foreign Affairs, Compilation of Multilateral Treaties, Vol.5 (*in Korean*).
[23] The Agreement on Technical Barriers to Trade. In Korea, it was signed on 3 September 1980 and entered into force on 2 October 1980 as Treaty No. 715. Ibid.
[24] The Agreement on Implementation of Article VII. The Customs Valuation Code entered into force on 1 January 1981 while the other three Codes entered into force on 1 January 1980. GATT, BISD, No.28 (1982) 40. In Korea, it was entered into force on 6 January 1981 as Treaty No. 729. Ministry of foreign Affairs, above n.22.
[25] The Agreement on Implementation of Article VI. Korea accepted the Anti-Dumping Code on 24 February 1986 and the Code entered into force for Korea on 26 March 1986 as Treaty No. 877. GATT, BISD, No.33 (1987) 207. See also Ministry of Foreign Affairs, Compilation of Multilateral Treaties, Vol.8 (*in Korean*).
[26] WTO, Agreement on Government Procurement, Article XXIV:3. Hong Kong also had one more year for implementation to apply from 1 January 1997.

**B. GATT Disputes Concerning Korea**

The Korean government's experience of dispute settlement under the GATT system is fairly limited.[27] Korea was challenged only once under Article XXIII of the GATT in 1988 and later one more time under the Tokyo Round Anti-Dumping Code in 1992. The former case, *Korea – Restrictions on Imports of Beef* ('*Korea – Beef I*'),[28] however, had an enormous impact on the subsequent Korean trading system by dismantling Article XVIII:B cover for import restriction. The latter case, *Korea – Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* ('*Korea – Polyacetal Resins*'), also set an important precedent for the inchoate Korean trade remedy system.[29]

In 1978, Korea brought the first case as a complainant under Article XXIII against the European Communities regarding a safeguard action. This case, *EC – Article XIX Action on Imports into the U.K. of Television Sets from Korea*,[30] did not, however, produce an actual ruling since Korea agreed with the European Communities on a voluntary export restraint arrangement and withdrew its complaint in 1979.[31]

Table 1. GATT Disputes Involving Korea

| Case Name | Complainants | Panel Decision | Notes |
|---|---|---|---|
| **As Respondent** | | | |
| Korea-Restrictions on Imports of Beef | Australia, New Zealand, US | BISD 36S/202, 36S/234, 36S/268 (adopted on Nov. 7, 1989) | Cases under Article XXIII |
| Korea-Anti-Dumping Duties on Imports of Polyacetal Resins from the United States | US | BISD 40S/205 (adopted on April 27, 1993) | Case under the Tokyo Round Anti-dumping Code |
| **As Complainant** | | | |
| EC – Article XIX Action on Imports into the U.K. of Television Sets from Korea | Korea | None (Settled) | Cases under Article XXIII |

Since the late 1980s, Korea began to participate in the GATT dispute settlement procedures as a third party. The first case as a third party was *US – Section 337 of the Tariff Act*

[27] For the GATT panel reports, see generally Pierre Pescatore et al., *Handbook of WTO/GATT Dispute Settlement* (looseleaf). On-line access to the GATT panel reports is available at <http://www.worldtradelaw.net/reports/gattpanels> (visited 25 March 2003) and <http://www.wto.org/english/tratop_e/dispu_e/gt47ds_e.htm> (visited 25 March 2003).
[28] GATT, BISD, No.36 (1990) 202, 234, 268, adopted 7 November 1989.
[29] GATT, BISD, No.40 (1995) 205, adopted 27 April 1993.
[30] GATT, C/M/124 (1978).
[31] GATT, C/M/134 (1979). See also Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Butterworth Legal Publishers, 1993) 283, 471.

*of 1930*[32], in which the European Communities brought a case against the United States concerning a discriminatory patent protection mechanism. In that case, Canada, Japan and Switzerland also joined as third parties. When the US intellectual property system was challenged in the GATT dispute settlement system, the Korean government determined to exercise its third party right because it was right after Korea was targeted by the Section 301 for the lack of effective protection of US intellectual property rights.[33] The second case was *EEC – Regulation on Imports of Parts and Components*[34] in which Japan challenged the European Communities' anti-circumvention duties on certain manufactured products. In this case, Korea was a third party along with Australia, Canada, Hong Kong, Singapore and the United States.

Furthermore, Korean government officials also occasionally contributed to panel works for GATT dispute settlements. In 1973, Mr. Eun Tak Lee was elected as one of the four panelists in the *UK – Import Restrictions on Cotton Textiles* case.[35] Mr. Ki-Choo Lee later worked as a panelist for *EC – Refunds on Exports of Sugar*[36] and *EEC – UK Application of EEC Directives to Imports of Poultry from the US*[37].

*1. Korea – Beef I case: Opening the Real GATT Period*

Since its accession to the GATT in 1967, Korea had imposed various import restrictive measures on the basis of the balance-of-payment (hereinafter 'BOP') exception under Article XVIII:B. In fact, it was the BOP exception that crucially motivated the Korean government to apply for the GATT accession despite serious concerns toward consequential import liberalization.[38] As of 1988, the Korean government still maintained such measures on 358 items, including beef.

Korea began the importation of beef in 1976 and made a GATT concession for a 20 percent bound tariff in 1979. In October 1984 when the price of domestic cows plummeted[39], the Korean government limited commercial imports of beef to the general market in order to

[32] GATT, BISD, No.36 (1990) 345, adopted 7 November 1989.
[33] The section 301 investigation was terminated on 14 August 1986 when the US government concluded an agreement with Korea that would dramatically improve protection of intellectual property rights. US Fed. Reg. 29445, 14 August 1986.
[34] GATT, BISD, No.37 (1991) 132, adopted 16 May 1990.
[35] GATT, BISD, No.20 (1974) 237, adopted 5 February 1973.
[36] GATT, BISD, No.27 (1981) 69, adopted 10 November 1980.
[37] GATT, BISD, No.28 (1982) 90, adopted 11 June 1981.
[38] The Korean government consulted with the GATT Secretariat prior to the accession application and was assured that, under Article XVIII:B, it might maintain the existing import restraints even more than a decade. Hahm, above n. 6, 10.
[39] The fluctuation in cow prices was indeed enormous during the early 1980s in Korea. The price for a cow was about $900 in 1981, $1,600 in 1983 and $1,000 in 1985. The price for a calf fluctuated even more substantially: about $180 in 1981, $900 in 1983 and $380 in 1985. Nevertheless, the domestic beef price remained relatively stable, showing about 15% change during 1981-1985. Hu & Lee, 'Economic Assessment of Beef Industry and Policy Development', 8 *Rural Economy* 9 (1985, *in Korean*), at 10.

protect domestic beef farmers, and from May 1985, even high-quality beef for the hotel market. Between May 1985 and August 1988, virtually no commercial imports of beef took place. Incidentally, Korea had accumulated, for the first time in its history, a trade surplus since 1986, until it was later reversed in 1990.

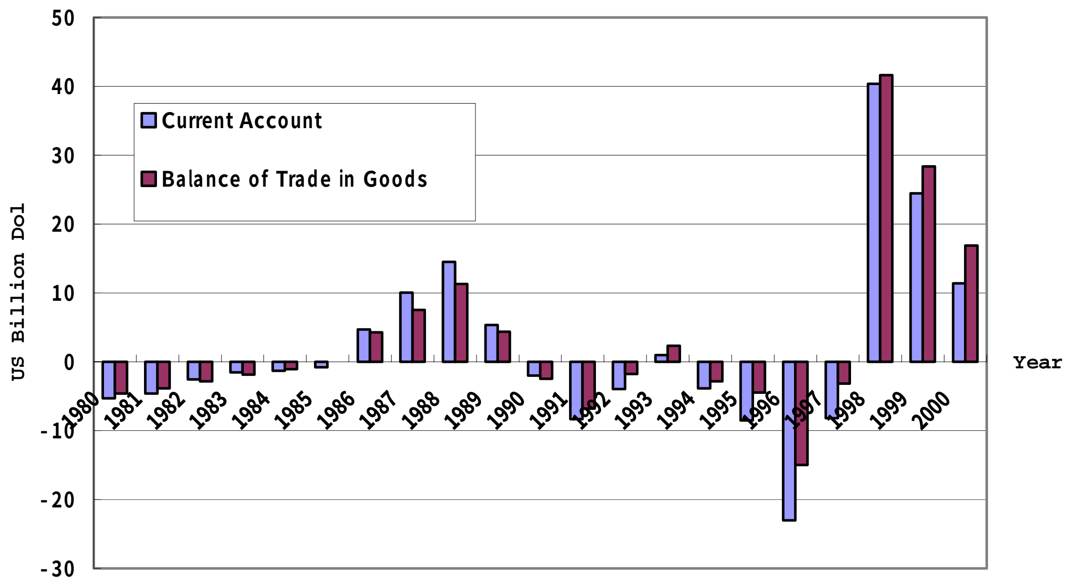


Figure 1. Trend of Balance of Payments in Korea[40]

On 16 February 1988, the American Meat Institute filed a Section 301 petition and the USTR initiated a Section 301 investigation on 18 March 1988.[41] Australia, New Zealand and the United States also brought complaints against Korea to the GATT dispute settlement system and thereby three panels were separately established, although the memberships of the panels were identical.[42] The Korean government decided to address the three panels separately because it thought it would be more advantageous to deal with complainants one-by-one, rather than confront with three counterparts simultaneously.[43] Interestingly, the Korean government was permitted to bring a foreign private counsel to assist its oral hearings during the panel

[40] Bank of Korea, Statistics Database <http://www.bok.or.kr> (visited on 2 April 2003).

[41] USTR, *Section 301 Table of Cases,* Beef (301_65) <http://www.ustr.gov/html/act301.htm>.

[42] GATT, above n.28.

[43] Interview with Young-Rae Lee, President of Korea 4-H (then Director General of Ministry of Agriculture, Forest and Fishery) (Aug.13, 2002). This strategy turned out to be burdensome in its procedural aspect, by requiring the duplicative oral hearings with three parties. The only other GATT cases in which separate panels were established basically on the same matter for different complainants are the cases concerning "Income Tax Practices" maintained by France, Belgium and the Netherlands. GATT, BISD, No.23 (1977) 114, 127, 137.

proceedings.[44]

On the basis of the BOP Committee consultation and the IMF opinion provided thereto, the panel held that the import restriction by Korea was not consistent with the GATT and could not be justified under the BOP exception of Article XVIII:B. The panel rejected the Korean government's argument that this issue should be confined to the determination not by the dispute settlement panel but by the BOP Committee.[45]

Accordingly, the panel recommended that Korea eliminate the import measures on beef and hold consultations with Australia, New Zealand and the United States to work out a timetable for the removal of import restrictions on beef that had been imposed on the basis of BOP reasons. This panel report was circulated to the GATT Contracting Parties on 24 May 1989. Korea repeatedly objected to adopting the panel reports in the subsequent Council meetings held on 22-23 June, 19 July and 11 October 1989, raising serious reservations about some of the panels' findings and conclusions. In particular, Korea argued that the panels had prejudged the result of the BOP Committee's work by making a ruling on the compatibility of BOP restrictions before the BOP Committee could have reached a conclusion.

On the other hand, in September 1989, the USTR made a positive determination[46] on the Section 301 investigation regarding the Korea's beef import sanction and subsequently announced that if there were no substantial movement toward a resolution by mid-November, a proposed retaliation list would be published. In response to this threat of Section 301 retaliation, Korea finally agreed to the adoption of the panel reports at the Council meeting on 7 November 1989[47], when the BOP consultation was indeed concluded. As a consequence, Korea agreed to disinvoke Article XVIII:B by 1 January 1990.[48] On 21 March 1990, Korea signed a

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[44] An European lawyer was allowed to attend a sitting of an oral hearing without a right to make a statement. The Korean government requested to suspend a meeting whenever it needed to consult with the foreign legal counsel. Interview with Young-Rae Lee, President of Korea 4-H (then Director General of Ministry of Agriculture, Forest and Fishery) (13 August 2002). Under the WTO system, the participation of a private counsel became a well-settled matter of law. See generally M. Bronckers & John Jackson, 'Editorial Comment: Outside Counsel in WTO Dispute Processes', 2 *JIEL* 155 (1999).

[45] The case raised an important issue of a proper jurisdictional dichotomy between panel and committees. For more detailed discussion on the institutional balance, see Frieder Roessler, 'The Institutional Balance between the Judicial and the Political Organs of the WTO', in Marco Bronckers and Reinhard Quick: *New Directions in International Economic Law – Essays in Honour of John H. Jackson* (The Hague: Kluwer Law International, 2000) 325. See also Dukgeun Ahn, "Linkages between International Financial and Trade Institutions – IMF, World Bank and WTO", 34 (4) Journal of World Trade 1 (2000), at 16-23.

[46] US Fed. Reg. 40769, 28 September 1989.

[47] GATT, C/M/237, dated 28 November 1989, at 19.

[48] GATT, BOP/R/183/Add.1, dated 27 October 1989, at 2. Since then, Korea has been perceived as having "graduated" from Article XVIII:B. Despite the persistent trade deficit during the most of 1990s, Korea never re-invoked Article XVIII:B.

In fact, Korea was the first developing country to dismantle the BOP exception cover in the GATT. Subsequently, there have been many gradual termination of the BOP exceptions in the GATT/WTO history. For example, 11 GATT contracting parties disinvoked the BOP exceptions under Articles XII or XVIII:B since 1979. See WTO, above n. 7, 395. After the WTO was established, 11 WTO

memorandum of understanding with the United States on beef imports and formally exchanged the letter on 26 April 1990, which terminated the Section 301 investigation.[49] Noting that the remaining restrictions were largely concentrated in the agricultural sector, Korea was permitted by the BOP Committee to phase-out the remaining restrictions or otherwise bring them into conformity with GATT provisions by 1 July 1997. However, the BOP Committee's decision on the transition period was later superseded by the Agreement on Agriculture in the Uruguay Round.[50]

The consequence of *Korea-Beef I* case was a legal completion of import liberalization in Korea. Although some import restrictive measures, notably the 'Import Diversification Program' to limit importation from Japan, remained in practice, a legal justification for overall import constraints was no longer available. Subsequently, by abrogating the Import Diversification Program on 30 June 1999, the Korean government abolished all the legal and practical grounds to constrain importation.

*2. Korea – Polyacetal Resins: Shaping the Trade Remedy System*

The *Korea – Polyacetal Resins* case is interesting because the underlying antidumping action was the very first formal decision taken by the main trade remedy authority, Korean Trade Commission ('KTC').[51] Following the Korean companies' petition on 8 May 1990, the KTC formally initiated an antidumping investigation involving two US and one Japanese polyacetal resins producers on 25 August 1990.[52] On 20 February 1991, the Office of Customs Administration found dumping margins ranging from 20.6 to 107.6 per cent for the three respondents.[53] On 24 April 1991, the KTC made a positive determination on material injury to the domestic industry. Subsequently, on 30 September 1991, the Ministry of Finance imposed anti-dumping duties that were due to expire on 3 October 1993.

On 21 June 1991 that was before the actual antidumping measure was imposed, the United States requested consultations regarding the antidumping decision under the Tokyo

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Members disinvoked the BOP exceptions. Only a handful of WTO Members, such as Bangladesh and Pakistan, are still invoking such exceptions. See generally WTO, WT/BOP/R/19, 37, 44, 47, 55.

[49] US Fed. Reg. 20376, 26 April 1990.

[50] Kim, above n. 21, 8.

[51] The KTC was established pursuant to Article 37 of the Foreign Trade Act in 1987. The KTC was originally composed of one chairman (part-time member) and four Commissioners (only one full-time member). Currently, the KTC has one chairman and seven Commissioners with one full-time member.

[52] This case was the fourth anti-dumping case for the KTC. But, it was in this case that the KTC began a formal investigation based on the pertinent regulations and made a positive determination to impose anti-dumping duties. See generally Korea Trade Commission, *A History of 10 Years for the KTC* (1997, *in Korean*) 280.

[53] The authority to make a dumping margin determination was transferred to the KTC in 1996 by the revision of the "Regulations for Implementation of the Customs Duties Act". See President Order No. 14871 (dated 30 December 1995). Since then, the KTC has maintained the authority to make determinations on both dumping margin and injury.

Round Anti-dumping Code. When the two consultation meetings on 24 July and 30 September 1991 failed, the Committee on Anti-Dumping Practices agreed to establish a panel on 17 February 1992. Canada, the European Communities and Japan joined the dispute as third parties. In this case, the panel ruled that various aspects of the KTC's determination on present material injury, a threat thereof and material retardation were inconsistent with disciplines and obligations under the Anti-dumping Code. The panel report was issued to the parties to the disputes on 10 March 1993 and circulated to the Committee on 2 April 1993.[54] This ruling was adopted by the Committee on 29 April 1993.[55]

Korea strongly disagreed with the panel's decision, particularly regarding the denial of evidentiary value of the transcript of the KTC's voting session on 24 April 1991 for the simple reason that it was not notified publicly. However, Korea did not object to the adoption of the panel report, saying it was refraining "because it believed that the multilateral dispute settlement system provided the best way to solve trade issues, and because it had in the past strongly supported the strengthening of the multilateral dispute settlement system."[56] In any case, the original due date of the pertinent antidumping duties remained only a little more than 5 months.

The dispute settlement experience from this case made an important contribution to refine the KTC in particular and the Korean trade remedy system in general, especially at the infant stage. The panel's ruling of violation mostly concerned with deficiency of proper analysis or sufficient explanation for injury determination. It was, therefore, basically perceived as a recommendation to augment and discipline transparency aspects of incipient trade remedy procedures.[57] Accordingly, the KTC tried to accommodate the multilateral obligations in all aspects of trade remedy actions including safeguard as well as anti-dumping measures and enhance functional expertise in a substantive set of practices. This case, however, did not result in any substantial regulatory modification regarding anti-dumping actions.

**C. Assessment**

Under the GATT system, Japan has been perceived as "one of those countries that leaned toward pragmatism as opposed to other countries, notably the United States, that favoured legalism".[58] Obviously, Korea was even more pragmatic.[59] It tried to avoid formal dispute settlement or

[54] GATT, ADP/M/40, para. 181.
[55] GATT, BISD, No.40 (1995) 198.
[56] GATT, ADP/M/40, para. 185.
[57] Interview with Wan-soon Kim, Investment Ombudsman, Korea Trade-Investment Promotion Agency (then Chairman of the KTC) (Aug. 14, 2002).
[58] Yuji Iwasawa, 'WTO Dispute Settlement and Japan', in Bronckers and Quick, above n. 42, at 474.
[59] For the Japanese experience of the GATT dispute settlement, see generally Saadia M. Pekkanen, 'Aggressive Legalism: The Rules of the WTO and Japan's Emerging Trade Strategy', 24 *World Economy* 707 (2001).

litigation as much as it could.

The fact that Korea rarely utilized the GATT dispute settlement system, however, should not be misunderstood to imply that Korea had hardly experienced much trouble with foreign trade barriers under the GATT system. As illustrated in Figure 2, exports from Korea during the GATT era routinely faced various trade restrictive measures by other GATT contracting parties, particularly the United States, the European Communities, Canada and Australia. From 1960 to 1994, at least 291 foreign trade remedy measures against Korean exports were reported,[60] about 94% of them imposed by the aforementioned countries. Furthermore, among 98 Section 301 cases initiated from 1975 until the end of 1994, Korea had been targeted ten times.[61]

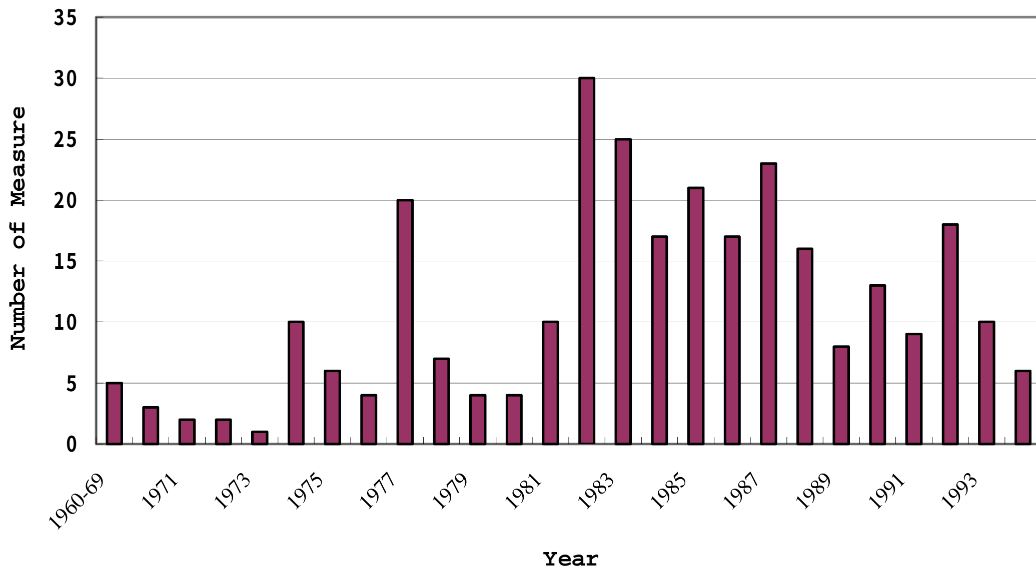


Figure 2. Trade Remedy Measures against Korean Exports (1960 - 1994)[62]

Considering such turbulent experiences and history, the Korean government was astonishingly hesitant to utilize the GATT dispute settlement system to cope with chronic foreign trade barriers. This may be explained partly by the fact that the Korean government lacked sufficiently competent officials to deal with the legal technicality of the GATT dispute settlement system. The

[60] Han et al., above n. 4, 37.
[61] These cases include: Thrown Silk Agreement with Japan (301_12), Insurance (301_20), Non-Rubber Footwear Import Restrictions (301_37), Steel Wire Rope Subsidies and Trademark Infringement (301_39), Insurance (301_51), Intellectual Property Rights (301_52), Cigarettes (301_64), Beef (301_65), Wine (301_67), Agricultural Market Access Restrictions (301_95). After the WTO was established in 1995, one more Section 301 case was initiated against Korea regarding Barriers to Auto Imports (301_115) in October 1997. See USTR, Section 301 Table of Cases: Initiated Cases <http://www.ustr.gov/html/act301.htm> (visited 9 April 2003).
[62] Statistics drawn from Han et al., above n. 4, 37.

different legal culture that used to consider legal confrontation as the demise of diplomatic or normal relation may also have some validity in explaining significant dispute aversion of Korea during the GATT period. But, it seems more importantly linked to the fact that Korea typically scored vast trade surpluses, at least in terms of trade in goods, with those major countries that had routinely imposed trade remedy measures. The substantial trade surpluses in major foreign markets generally undermined the political positions of the Korean government in asserting its legal rights under the GATT and led to a high propensity to avoid any legal confrontation. In other words, the persistent trade imbalance seemed to play a key role in setting the overall attitude towards the legal settlement of disputes under the multilateral trading system. It also explains why Japan, the trading partner that has constantly recorded huge trade surpluses against Korea, hardly ever raised trade remedy measures against Korean exports, especially since the 1980s.[63]

Table 2. Trade Remedy Measures against Korean Exports by Countries[64]

| | **1960s** | **1970-74** | **1975-79** | **1980-84** | **1985-89** | **1990-94** | **Total** |
|---|---|---|---|---|---|---|---|
| US | 1 | 2 | 8 | 29 | 39 | 17 | 96 |
| Canada | 1 | 2 | 4 | 12 | 11 | 3 | 33 |
| EC | 2 | 10 | 22 | 7 | 19 | 12 | 72 |
| Australia | 0 | 0 | 3 | 36 | 14 | 19 | 72 |
| Japan | 1 | 4 | 4 | 2 | 2 | 0 | 13 |
| Others | 0 | 0 | 0 | 0 | 0 | 5 | 5 |
| **Total** | 5 | 18 | 41 | 86 | 85 | 56 | 291 |

## II. DISPUTE SETTLEMENT DURING THE WTO PERIOD

The Uruguay Round negotiation crucially augmented the GATT dispute settlement system, rectifying several systemic problems by instituting, *inter alia*, a quasi-automatic adoption mechanism, an appellate procedure and a single unified system.[65] Generally speaking, the new

[63] Japan's less aggressive attitude toward formal trade dispute settlement is also explained by permanent trade surplus. See Hiroko Yamane, 'The WTO Dispute Settlement Mechanism and Japanese Traders', 1 *JIEL* 683 (1998), at 689.
[64] Han et al., above n. 4, 39.
[65] For detailed discussion on the WTO dispute settlement system, see generally John H. Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998); David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* (The Hague: Kluwer Law International, 1999); U.E. Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (The Hague: Kluwer Law International, 1997); *Special Issue: WTO Dispute Settlement System*, 1 *JIEL*, No.2 (1998); Jeff Waincymer, *WTO Litigation: Procedural Aspects of Formal Dispute settlement*

WTO dispute settlement system has so far turned out to be a very effective and reliable instrument in resolving trade disputes for the Member countries. As of 31 March 2003, 286 cases have been brought to the WTO dispute settlement body. Among them, 69 panel and Appellate Body reports were adopted, while 40 cases were resolved with mutually agreed solutions and 24 cases were settled or inactive.[66]

Under the WTO system, the Korean government changed a dispute aversion attitude and has become considerably more active in asserting its rights through the dispute settlement mechanism. Incidentally, since the middle 1990s, the trade balances with those major trading partners have been reversed and showed substantial deficits. For example, the trade deficit of Korea with respect to the United States began to occur from 1994 and remained throughout 1997, reaching $8.5 billion in 1997. This trend was again reversed in 1998 primarily due to the financial crisis which caused imports to plummet. Although there were some differences in the magnitude of the trade imbalances, the overall trends of trade balance were very much the same with respect to other major trading partners. As of March 2003, Korea has brought complaints to the WTO dispute settlement system in 7 cases while being challenged by 12 complaints. The details of the relevant cases are discussed below.

## A. Korea as Respondent

As of March 2003, Korea was challenged by 12 complaints on 9 distinct matters, as summarized in Table 3. It is noted that complainants against Korea have so far been raised mostly by the United States and the European Communities. The only two other complaints were filed by Australia and Canada. Since the Korean government commenced the litigation of WTO cases in *Korea - Taxes on Alcoholic Beverages*, it seems predetermined to exhaust the full procedure of the dispute settlement system, at least if contested by other Members.

### *1. Settlement by Consultation: Not Yet Ready to Litigate*

Korea was a respondent in some of the very early cases in the WTO dispute settlement, which concerned somewhat unfamiliar obligations under the SPS and TBT Agreements. The United States made a consultation request against Korea on 6 April 1995 (DS3) and basically on the same matter again on 24 May 1996 (DS41)[67]. Both cases were suspended because the United States did not take additional steps.

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(London: Cameron May, 2002).

[66] WTO, WT/DS/OV/12, dated 7 April 2003, ii. See also Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995-2002: A Statistical analysis', 6 *JIEL* 251 (2003).

[67] The second consultation request by the United States encompassed all amendments, revisions, and new measures adopted by the Korean government after the first consultation request. WTO, WT/DS41/1, dated 31 May 1996.

Table 3. WTO Cases Involving Korea as Respondent

| Cases Name | Complainant | Dispute Number |
|---|---|---|
| *Korea - Measures Concerning the Testing and Inspection of Agricultural Products* | US | DS3 & DS41 |
| *Korea - Measures Concerning the Shelf-Life of Products* | US | DS5 |
| *Korea - Measures Concerning Bottled Water* | Canada | DS20 |
| *Korea - Laws, Regulations and Practices in the Telecommunications Procurement Sector* | EC | DS40 |
| **Korea - Taxes on Alcoholic Beverages* (*Korea – Soju*) | EC, US | DS75 & DS84 |
| **Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* (*Korea – Dairy Product*) | EC | DS98 |
| **Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* (*Korea – Beef II*) | US, Australia | DS161 & DS169 |
| **Korea - Measures Affecting Government Procurement* | US | DS163 |
| *Korea – Measures Affecting Trade in Commercial Vessels* | EC | DS273 |

* Cases for which panel reports were issued.

On 5 May 1995, the United States made a consultation request regarding the regulation on the shelf-life of products (DS5). This case was settled with a mutually acceptable solution.[68] The Canadian request for consultation regarding the Korean regulation on the shelf-life and disinfection treatment of bottled water was also settled with a mutually satisfactory solution (DS20).[69] These four complaints were based on the SPS and TBT Agreements in addition to the GATT and could be settled promptly.

On 9 May 1996, the European Communities requested for consultations, alleging that the procurement practices for the Korean telecommunications sector were discriminatory against foreign suppliers, and that the bilateral agreement with the United States was preferential (DS40). The parties also agreed on a mutually satisfactory solution during the consultation.[70]

The Korean government basically tried to settle the first five complaints, rather than actually litigate the cases. This is partly because the merits of the cases were relatively clear and partly because the economic stakes at issue were not substantial. In addition, the Korean government was not sufficiently prepared to handle the newly instituted WTO dispute settlement system in the procedural aspect and unfamiliar legal issues concerning the SPS and TBT Agreements in the substantive aspect.

[68] WTO, WT/DS5/5, dated 31 July 1995.
[69] WTO, WT/DS20/6, dated 6 May 1996.
[70] WTO, WT/DS40/2, dated 29 October 1997. Korea and the European Communities signed the 'Agreement on Telecommunications Procurement between the Republic of Korea and the European Community' on 29 October 1997 and the Agreement entered into force on 1 November 1997. Subsequently, Korea entered into a similar bilateral agreement for telecommunications equipment procurement with Canada. See also Han-young Lie & Dukgeun Ahn, 'Legal Issues of Privatization in Government Procurement Agreements: Experience of Korea from Bilateral and WTO Agreements', 9 (2) *International Trade Law & Regulation* (*forthcoming*, 2003).

*2. Full Litigation: Fight to the End*

The very first case in which Korea experienced the whole WTO dispute settlement procedure was the *Korea – Taxes on Alcoholic Beverages* (‘*Korea – Soju*’) case (DS75 and DS84). The European Communities and the United States contended that the Korean liquor taxes of 100% on whisky and 35% on diluted *soju* were not consistent with the national treatment obligation under Article III of the GATT. Basically, this case was considered as a ‘revisited’ *Japan – Taxes on Alcoholic Beverages* (‘*Japan – Shochu’*) case (DS8, DS10 and DS11), in which the Japanese tax system to discriminate imported alcoholic beverages over *shochu* was found to be in violation of Article III of the GATT. As a legal strategy to distinguish this case from the *Japan-Shochu* case, the Korean government tried to inject more antitrust law principles and experts in the panel proceeding because a large price gap between *soju* and whiskey might be deemed to represent a non-competitive relationship of pertinent products in the antitrust law context.[71]

The panel and the Appellate Body held that the Korean taxes on *soju* and whisky were discriminatory and the Dispute Settlement Body (hereinafter ‘DSB’) adopted this ruling on 17 February 1999. The reasonable period for implementation was determined to be 11 months and two weeks, that is, from 17 February 1999 to 31 January 2000.[72] Subsequently, Korea amended the Liquor Tax Law and the Education Tax Law to impose flat rates of 72% in liquor tax and 30% in education tax, that entered into force on 1 January 2000.[73] The DSB recommendation was successfully implemented a month earlier than the due date.

This case awakened the Korean public about the role and influence of the WTO dispute settlement system. The media and newspapers closely covered every step pertaining to this case, from the consultation request to the panel proceeding and the Appellate Body ruling. It was not just because this case was the first WTO dispute settlement proceeding for Korea, but also because the popularity of the product concerned, *soju*, was probably incomparable to any other product in Korea. Despite objections by the general public as well as by *soju* manufacturers, the Korean government amended the tax laws to substantially increase liquor taxes on *soju*, instead of reducing the liquor tax on whisky to the original level on *soju*, in order to eliminate the WTO-illegal tax gap while minimizing the potential adverse impact on public health and consequent social costs.[74] In 2000, the tax revenue from the liquor tax, $1.72 billion, accounted

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[71] For example, the Korean government tried to include antitrust law experts regardless of their nationality as panelists, but failed due to the objection by the complainants. Hyun Chong Kim, ‘The WTO Dispute Settlement Process: A Primer’, 2 *JIEL* 457 (1999), at 465-466. Except for this case, the Korean government as a respondent did not resort to the Director-General for the panel selection.

[72] WTO, WT/DS75/16, WT/DS84/14, dated 4 June 1999.

[73] WTO, WT/DS75/18, WT/DS84/16, dated 17 January 2000.

[74] See generally Korea Institute of Public Finance, *Monthly Public Finance Forum* (September 1999, *in Korean*) 82-102.

for 2.4% of the total tax revenue.[75] The share of the tax revenue from *soju* increased from 17.3% in 1999 to 23.2%, whereas that from whisky was reduced from 10.8% to 8.3%.[76] By experiencing the impact of the WTO dispute settlement decision probably at the deepest and widest level of a daily life, this case played a crucial role to enhance the WTO awareness in Korea.

This case also contributed to set the procedural practice to permit private counsel in a dispute settlement proceeding, particularly a panel proceeding. The Korean government was not yet capable of dealing with complicated WTO litigation and thereby was very eager to rely on assistance by foreign private counsel.[77] Since the Appellate Body already ruled in favor of permission of private counsel for an appellate proceeding[78] and the panel in the *Indonesia – Auto* case allowed private counsel in a preliminary ruling on 3 December 1997[79], the panel composed on 5 December 1997 in *Korea-Soju* did not oppose to the request by the Korean government.[80] After the confirmation of the panel as regards the permissibility of private counsel in *Korea – Soju* case, it has become a part of well-settled dispute settlement practices under the WTO system.

The first dispute settlement case under the Agreement on Safeguards also involved the Korean safeguard measure concerning dairy products (DS98)[81]. On 12 August 1997, the European Communities requested consultations with Korea regarding the safeguard quotas that went into effect on 7 March 1997 and was to remain in force until 28 February 2001.[82] The panel and the Appellate Body held that the Korean safeguard measures were inconsistent with the obligations under the Agreement on Safeguards. The DSB adopted those rulings on 12 January 2000 and the reasonable implementation period was agreed to expire on 20 May 2000. Korea, through its administrative procedures, effectively lifted the safeguard measure on imports of the dairy products as of 20 May 2000.

Since its inception in 1987 to 1994, the KTC had relied more on safeguard measures than on antidumping measures to address injury to domestic industries incurred by

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[75] National Tax Service, *Statistical Yearbook of National Tax 2001* (2001). The dollar amount was calculated based on $1 = W1,300.
[76] Korea Institute of Public Finance, *Monthly Public Finance Forum* (September 2001, *in Korean*) 114.
[77] See also above n.44 and the accompanying text.
[78] WTO Appellate Body Report, *European Communities – Regimes for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, paras. 10-12.
[79] WTO Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54, DS55, DS59, DS64/R, adopted 23 July 1998, para. 14.1.
[80] Panel Report, *Korea – Soju*, WT/DS75, DS84/R, adopted 17 February 1999, para. 10.31.
[81] The first complaint brought under the Agreement on Safeguards was *US – Safeguard Measure against Imports of Broom Corn Brooms*. WTO, WT/DS78/1, dated 1 May 1997. This case was resolved without litigation although it remained technically pending. The actual panel decision concerning safeguard measures in the WTO system was issued for the first time in *Korea – Dairy Safeguards*. WTO, WT/DS98/R, adopted 12 January 2000.
[82] WTO, G/SG/N/10/KOR/1, dated 27 January 1997 and G/SG/N/10/KOR/1/Supp.1, dated 1 April 1997.

importation.[83] During 1987-1994, the KTC engaged in 25 safeguard and 12 anti-dumping investigations that resulted in 16 safeguard and 8 antidumping measures.[84] After this case, however, the KTC markedly abstained from using a safeguard measure whereas it substantially increased anti-dumping actions. For example, from 1997 to 2002, there were only 4 safeguard investigations but 46 anti-dumping cases.[85] Accordingly, subsequent safeguard actions by the KTC appeared seriously disciplined by the WTO dispute settlement system. The safeguard mechanism in Korea was further elaborated with new laws and regulations on trade remedy actions.[86]

On the other hand, it was reported that the importation of dairy products at issue was reduced by about $70 million during the period in which the safeguard measure remained in force. This result, along with the outcome from *Argentina – Safeguard Measures on Imports of Footwear* ('*Argentina – Footwear*')[87] case whose proceedings were conducted almost concomitantly, raised an important systemic issue for the WTO safeguard system. In the *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* case, the termination of illegal safeguard measures pursuant to the DSB recommendation was undertaken only 9 months prior to the original due date of the measures. In the *Argentina – Footwear* case, the implementation of the DSB recommendation by repealing the safeguard measure coincided with the original due date of the measure. Thus, the experience from these early safeguard cases raised imminent need for considering expeditious or accelerated dispute settlement procedures.[88]

On 1 February 1999, the United States requested consultations with Korea in respect of a dual retail system for beef ('*Korea – Beef II*'; DS161). On 13 April 1999, Australia also requested consultations on the same basis (DS169). On 10 January 2001, the DSB adopted the panel and the Appellate Body reports that held the Korean measures to be inconsistent with the WTO obligation. The parties to the dispute agreed that a reasonable implementation period would be 8 months and thus expire on 10 September 2001.[89] The Korean government subsequently revised the 'Management Guideline for Imported Beef' to abolish the beef import system operated by the Livestock Products Marketing Organization.[90] In addition, on 10 September 2001, the Korean government eliminated the dual retail system for beef by entirely

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[83] On the other hand, the KTC has never even initiated a countervailing investigation to date. See Korea Trade Commission, above n. 52, 280-299.
[84] Ibid.
[85] Korea Trade Commission, *Summary Report of Trade Remedy Action* (February 2003, *in Korean*) 1.
[86] Act on Investigation of Unfair Trade Practice and Trade Remedy Measures, Law 6417; Implementing Regulation, Presidential Order No.17222.
[87] WTO, WT/DS121/AB/R, adopted 12 January 2000. See also WTO, WT/DSB/M/75, dated 7 March 2000, at 2.
[88] See below n. 150 and the accompanying text.
[89] WTO, WT/DS161, DS169/12, dated 24 April 2001.
[90] Ministry of Agriculture Notification 2000-82.

abolishing the 'Management Guideline for Imported Beef'.[91] Thus, Korea considered that it had fully implemented the DSB's recommendation in this case.[92]

In terms of policy implementation, the *Korea – Beef II* case made an important contribution to underline the national treatment obligation for domestic regulations and their *de facto* application. Unlike the *Korea – Soju* case that addressed relatively clear discriminative treatment by vastly different tax rates, this case set an important precedent for a much broader scope of the national treatment principle, especially dealing with a retail distribution system often convoluted by ingenious regulations.

The only dispute settlement case concerning the Agreement on Government Procurement ('GPA') to date is *Korea - Measures Affecting Government Procurement* (DS163).[93] On 16 February 1999, the United States requested consultations regarding certain procurement practices of the Korean Airport Construction Authority ('KOACA'). The panel ultimately ruled that the KOACA was not a covered entity under Korea's Appendix I of the GPA, even if the panel noted that the conduct of the Korean government with respect to the US inquiries in the course of pertinent negotiation "[could], at best, be described as inadequate".[94] The United States did not make an appeal and the panel report was adopted on 19 June 2000.[95] One of the important lesson from this case for the Korean government was about the discrepancy between its organizational mechanism for governmental offices that is based on decision making structures and the WTO concession practice that is based on the institutional 'entities' in the context of the GPA. The Government Organization Act of the Republic of Korea prescribes various government entities that actually constitute mere positions of certain level. Moreover, the Korean government has often established a special 'task force', 'group', or 'committee' with specific mandates, whose legal foundations are obscure.[96] This issue of how to determine the scope of covered entities in relation to a newly established governmental organ may require a more elaborate approach in the context of the GPA.

On 24 October 2000, the Committee of European Union Shipbuilders Associations filed a complaint under the trade barriers regulation ('TBR') procedure concerning divergent financial arrangements for Korean shipbuilding industries. Although the Commission was mindful of the extraordinary situation in Korea that was caused by the financial crisis in 1997, it

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[91] Ministry of Agriculture Notification 2001-54.

[92] WTO, WT/DSB/M/110, dated 22 October 2001.

[93] This case is the fourth complaint concerning government procurement. The first complaint, *Japan – Procurement of a Navigation Satellite* (DS73), was settled with a mutually satisfactory solution. The second and third complaints, *US – Measure Affecting Government Procurement* (DS88, DS95), were in respect of the same issue. The panel's authority lapsed as of February 11, 2000, when it was not requested to resume the proceeding after suspension of the works. WTO, WT/DS88, DS95/6 (dated Feb. 14, 2000).

[94] WTO, WT/DS163/R (adopted on June 19, 2000), para.7.80.

[95] WTO, WT/DS163/7 (dated Nov. 6, 2000).

[96] Young-Joon Cho, 'Review of the Panel Report for *Korea - Measures Affecting Government Procurement*', 33 *International Trade Law* 127 (2000, *in Korean*), at 152.

found that parts of corporate restructuring programs and assistance through taxation for shipbuilding companies constituted prohibited subsidies within the meaning of the WTO Agreement on Subsidies and Countervailing Measures ('SCM Agreement').[97] Subsequent to the affirmative determination of the TBR procedure, the two parties had two rounds of bilateral negotiations in August and September 2002. On 21 October 2002, the European Communities made a formal request for a consultation with Korea under the WTO dispute settlement system on various corporate restructuring measures for the shipbuilding industry, alleging that they constituted prohibited subsidies under the SCM Agreement.[98]

This case was merely the beginning of much more controversial trade conflicts as regards corporate restructuring programs undertaken by the Korean government as parts of the IMF program to overcome the financial crisis. On 25 July 2002, the European Commission initiated a countervailing investigation on the Korean semiconductor producers, alleging that the governmental intervention in terms of debt-for-equity swaps and debt forgiveness for pertinent companies established illegal subsidies.[99] Apart from the EC's action against the Korean government, the United States had also closely monitored the Korean government's roles in financial and corporate restructuring programs.[100] Concerning various aspects of corporate restructuring programs for Korean semiconductor manufacturers, the US authorities initiated a countervailing investigation in November 2002 that ended up with a preliminary determination for countervailing duties up to 57.73%.[101] As of 21 March, 2003, it was reported that the European Commission would also make a preliminary countervailing determination of 30-35% on basically the identical matter.[102] These concomitant actions in the two major markets, if sustained in the final determinations, would risk the whole fate of the third largest semiconductor producer in the world. Furthermore, the legal validity of those actions would have significant implications for many other Korean industries that experienced similar restructuring programs in the course of the IMF program during the past few years. The Korean government seems to have no other choice than resorting to the WTO dispute settlement process to vindicate the legitimacy of its systemic and structural measures adopted during the IMF program. The outcome of the WTO dispute settlement related to this dispute would certainly be an interesting and important addition to the WTO jurisprudence.

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[97] Commission Decision 2002/818/EC, OJ 2002 L 281/15.
[98] WTO, WT/DS273/1, dated 24 October 2002.
[99] WTO, G/SCM/N/93/EEC, dated 12 March 2003.
[100] See, for example, USTR, *Subsidies Enforcement Annual Report to the Congress* (February 1999), 7-8.
[101] US Department of Commerce, *Preliminary Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, <http://ia.ita.doc.gov/download/drams-korea-draft-prelim-fr-notice.pdf> (visited on April 12, 2003).
[102] 'Hynix faces 30-35% EU import duties', *Financial Times*, March 21, 2003, 17.

*3. Overall Comments*

Considering the experience so far as a respondent in the WTO dispute settlement, the reaction by the Korean government appears to show a typical pattern as an average WTO Member. For half of the complaints, Korea tried to settle the trade disputes without resorting to legal procedures. But, as it obtained more experience and the WTO jurisprudence became more sophisticated, Korea has become determined to take a more legalistic approach in dealing with complaints by other Members.

When engaged in a WTO legal proceeding, Korea has been in full compliance with DSB recommendations. For all three cases in which Korea was found to be inconsistent with the WTO Agreements, Korea fully implemented the DSB recommendations within the determined or agreed reasonable periods of time, even in politically loaded areas such as taxes and agriculture. It is also noted that Korea made appeals for all three cases in which the panels found some violations for its own measures. Lastly, it should also be noted that the areas challenged by other Member countries are fairly diverse, ranging from SPS and TBT measures to government procurement, safeguard, domestic taxes and retailing distribution systems. This is starkly contrasted with the cases in which Korea brought complaints, which concentrated mainly on antidumping measures. Overall, the dispute settlement experience of Korea as a respondent in such divergent areas under the auspice of the WTO has played a significant role to enhance the public recognition of the importance of the multilateral trade norms in all aspects of economic activities and policy making.

**B. Korea as Complainant**

Until 2001, the Korean complaints in the WTO dispute settlement system focused primarily on the US antidumping measures. Five out of the total six complaints concerned with antidumping matters and five complaints were against the United States. Only one case was against the Philippines and one case was concerning a safeguard measure. In other words, the Korean complaints to the WTO dispute settlement system up to 2001 can be simply summarized as exclusive concentration on trade remedy issues, predominantly caused by US antidumping measures.

This tendency was changed since then. In 2002, Korea joined in the only one WTO dispute as complainant, along with seven other Members, regarding the U.S. safeguard action for the steel industry. In 2003, Korea brought complaints against the United States and the European Communities concerning countervailing measures imposed on semiconductors manufactured by Hynix. After it was challenged by the European Communities on the assistance for the shipbuilding industry during the financial crisis, Korea also sued the European

Communities concerning the government program for the shipbuilding industry under the name of Temporary Defense Measure. In 2004, Korea requested another consultation regarding the EC assistance program for the shipbuilding industry.

Table 4. WTO Cases Involving Korea as Complainant

| Cases Name | Respondent | Dispute Number |
|---|---|---|
| United States - Imposition of Anti-Dumping Duties on Imports of Color Television Receivers from Korea | US | DS89 |
| *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea (*US-DRAMS*) | US | DS99 |
| *United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea | US | DS179 |
| *United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea (*US-Line Pipe*) | US | DS202 |
| Philippines – Anti-Dumping Measures regarding Polypropylene Resins from Korea | Philippines | DS215 |
| *United States – Continued Dumping and Subsidy Offset Act of 2000 | US | DS217 |
| *United States - Definitive Safeguard Measures on Imports of Certain Steel Products | US | DS251 |
| United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea | US | DS296 |
| European Communities - Countervailing Measures on Dynamic Random Access Memory Chips from Korea | EC | DS299 |
| European Communities - Measures Affecting Trade in Commercial Vessels | EC | DS301 |
| European Communities - Aid for Commercial Vessels | EC | DS307 |

* Cases for which panel reports were issued.

While Korea had been challenged in the WTO dispute settlement system from the very early period[103], Korea appeared quite hesitant to bring complaints against other WTO Member countries. It was only in July 1997 that Korea began to use the WTO dispute settlement system as a complainant. The first WTO case Korea brought to the DSB was in respect of the US antidumping duties on Samsung color television receivers. On 10 July 1997, Korea requested a consultation, alleging that the United States had maintained an antidumping duty order for the past 12 years despite the cessation of exports as well as the absence of dumping. Subsequently, in response to the US preliminary determination of 19 December 1997 to revoke the anti-dumping duty order, Korea withdrew its request for a panel. On 27 August 1998, the United States made a final determination to revoke the anti-dumping duty order which had been imposed on Samsung color television receivers since 1984. At the DSB meeting on 22 September 1998, Korea announced that it definitively withdrew the request for a panel because the

[103] In 1995, three consultation requests were brought against Korea. The first two requests for *Korea – Measures Concerning the Testing and Inspection of Agricultural Products* (DS3) and *Korea – Measures Concerning the Self-Life of Products* (DS5) were made on April 6 and May 5, 1995.

imposition of anti-dumping duties had been revoked.[104]

For a similar case regarding antidumping duty orders on DRAMS, however, the United States did not readily revoke the orders and, on 6 November 1997, Korea requested the establishment of a panel. The DSB established a panel at its meeting on 16 January 1998. On 19 March 1998, the Director-General completed the panel composition and thereby Korea began its first panel proceeding as a complainant. The Panel found the measures at issue to be in violation of Article 11.2 of the WTO Antidumping Agreement.[105] The United States did not make an appeal and the DSB adopted the panel report on 19 March 1999.

Incidentally, this first 'win' as a complainant in *US – DRAMS* came just 11 days after Korea lost its first WTO litigation as a respondent in *Korea – Soju*.[106] This somewhat fortunate timing of winning a WTO case contributed to alleviating the general concern and resistance of the Korean public about the fairness and objectivity of the WTO dispute settlement system.

The two parties agreed on an implementation period of 8 months, expiring on 19 November 1999. At the DSB meeting on 27 January 2000, the United States stated that it had implemented the DSB recommendations by amending the pertinent Department of Commerce ('DOC') regulation, more specifically, by deleting the 'not likely' standard and incorporating the 'necessary' standard of the WTO Antidumping Agreement. The DOC, however, issued a revised 'Final Results of Re-determination' in the third administrative review on 4 November 1999, concluding that, because a resumption of dumping was likely, it was necessary to leave the antidumping order in place. On 6 April 2000, Korea requested the referral of this matter to the original panel pursuant to Article 21.5 of the DSU and the European Communities reserved its third-party right. On 19 September 2000, Korea requested the panel to suspend its work and, on 20 October 2000, the parties notified the DSB of a mutually satisfactory solution to the matter, involving the revocation of the antidumping order at issue as the result of a five-year 'sunset' review by the DOC.[107]

This case was the first case ever in which Korea won a favorable panel decision throughout the GATT/WTO system. Although it took one and half more years for the United States to satisfactorily comply with the DSB recommendation after the adoption of the panel report, the sheer fact of winning a WTO dispute concerning chronic trade barriers of the major trading partners furnished the Korean government with confidence in the new WTO dispute

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[104] WTO, WT/DS89/9, dated 18 September 1998.

[105] WTO Panel Report, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* (*'US – DRAMS'*), WT/DS99/R, adopted 19 March 1999.

[106] The Appellate Body report for *Korea – Soju* case was circulated on 18 January 1999, while the panel report for *US – DRAMS* case was circulated on 29 January 1999. See WTO, *Korea – Soju*, WT/DS75, DS84/AB/R, adopted 17 February 1999 and above n.102.

[107] WTO, WT/DS99/12, dated 25 October 2000.

settlement system. Unfortunately, however, the dismal implementation by the United States after the panel proceeding compromised confidence of a relatively new user concerning the effectiveness and fairness of the WTO dispute settlement system.[108] In any case, *US – DRAMS* clearly led the Korean government to adopt a more legal approach by utilizing the WTO dispute settlement system to address foreign trade barriers in subsequent cases. In other words, the experience and confidence gained from this case clearly led the Korean government to move to the direction of 'aggressive legalism' in handling subsequent trade disputes.[109]

The *United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* ('*Korea-Stainless Steel*') case dealt with two separate antidumping actions by the US authorities concerning stainless steel plate in coils ('plate') and stainless steel sheet and strip in coils ('sheet'). For the antidumping case on plate, the DOC selected 1 January to 31 December 1997 as the period of investigation. The DOC issued the preliminary dumping margin of 2.77% for Korean exporters including Pohang Iron and Steel Company ('POSCO'). But, the DOC later issued the final dumping margin of 16.26%. The antidumping case for sheet covered 1 April 1997 through 31 March 1998 as the period of investigation. The DOC issued the preliminary dumping margin of 58.79% for Taihan steel company and 12.35% for other Korean exporters including POSCO. Upon the allegation of miscalculation, the dumping margin for POSCO was revised to 3.92%. But, the DOC issued the final dumping margin of 58.79% for Taihan and 12.12% for other Korean exporters including POSCO. Regarding these antidumping measures, the Korean government requested consultations with the United States on 30 July 1999 and the panel establishment on 14 October 1999. The European Communities and Japan joined the panel proceeding as third parties. In this case, the panel was established on 19 November 1999 but actually composed on 24 March 2000.[110]

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[108] For more positive assessment for Article 21.5 proceedings, see generally Jason Kearns and Steve Charnovitz, 'Adjudicating Compliance in the WTO: A Review of DSU Article 21.5', 5 *JIEL* 331 (2002).
[109] For the discussion of "aggressive legalism" by the Japanese government to deal with trade disputes, see Pekkanen, above n. 56, at 707-737.
[110] It took 126 days to compose the panel, which is so far the longest period of time required for the panel appointment in cases involving Korea.

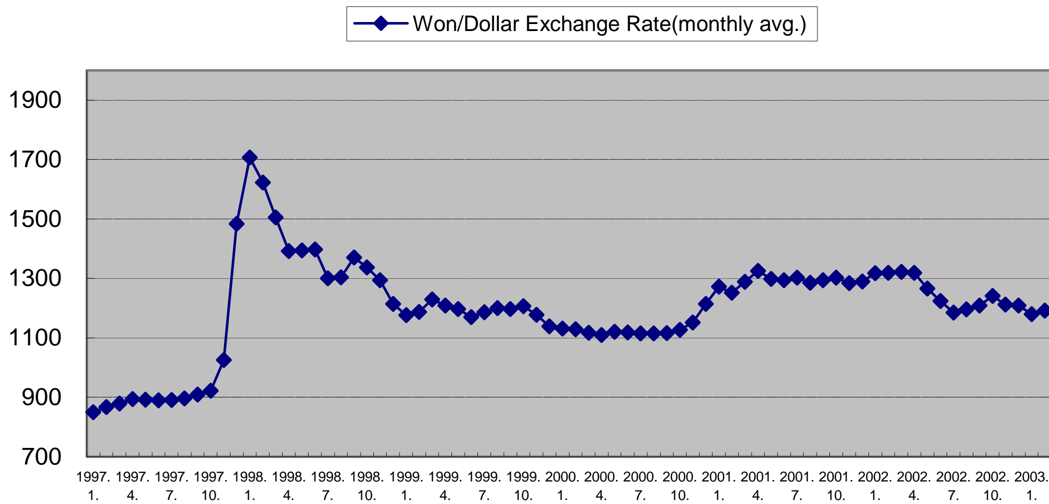


Figure 3. Won/Dollar Exchange Rate Trends[111]

The underlying economic situation for this case is remarkably aberrational.[112] The pertinent investigation periods included unprecedented fluctuation of exchange rates caused by the financial crisis. As illustrated in Figure 3, the value of the Korean currency, Won, precipitated to a half just in a time span of three months. The WTO panel found that the methodology adopted by the DOC to deal with such abnormity, including double currency conversion and the use of multiple averaging periods, were not consistent with the WTO obligations. Without the US' appeal, the DSB adopted the panel report on 1 February 2001. They had agreed on the reasonable period of 7 months to expire on 1 September 2001. On 28 August 2001, the International Trade Administration of the DOC issued the 'Notice of Amendment of Final Determinations' on the relevant antidumping duty order, in which the recalculation of dumping margins substantially reduced antidumping duties.[113] At the DSB's

[111] Bank of Korea, *Principal Economic Indicators* (March 2003). See also <http://www.bok.or.kr> (visited 25 March 2003).
[112] Timothy Lane et al., 'IMF-Supported Programs in Indonesia, Korea and Thailand: A Preliminary Assessment', *Occasional Paper 178* (Washington D.C.: International Monetary Fund, 1999).
[113] US Fed. Reg. 45279, 28 August 2001. The changes of dumping margins are as follows:

| Exporter/Manufacturer | Original Dumping Margin | | Recalculated Dumping Margin | |
|---|---|---|---|---|
| | SSPC | SSSS | SSPC | SSSS |
| Pohang Iron $ Steel Co. Ltd. | 16.26% | 12.12% | 6.08% | 2.49% |
| Inchon Iron % Steel Co. Ltd. | 16.26% | 0.00% | 6.08% | 0.00% |
| Taihan Electric Wire Co. Ltd. | 16.26% | 58.79% | 6.08% | 58.79% |
| All others | 16.26% | 12.12% | 6.08% | 2.49% |

meeting of 10 September 2001, the United States announced that it had implemented the DSB's recommendation and Korea acknowledged the satisfactory implementation.[114]

This case showed how vulnerable exporters might be in terms of antidumping actions as the exchange rates became abnormally fluctuating. Since dumping margin calculation permits various price adjustment to find 'ex-factory' prices but no modification for volatile exchange rates except for averaging, unstable exchange rates can cause serious distortion in calculating dumping margins. This systemic problem may expose more exporters in developing countries that suffer from vacillating exchange rates to additional risks of being targeted by antidumping actions. Based on the Korean experience during the financial crisis, in which foreign exchange rates fluctuate at more than a normal or reasonable level, Members may consider suspension of antidumping actions at least for certain range of dumping margins that should reflect potential methodological errors. In other words, Members may consider an increase of the current *de minimis* level for a period with exchange rate aberration.

On 13 June 2000, Korea made its fourth consultation request, again with the United States, in respect of the definitive safeguard measure imposed on imports of circular welded carbon quality line pipe. The definitive safeguard measure actually imposed by the President on 11 February 2000 was much more restrictive than that recommended by the International Trade Commission ('ITC'), disproportionately injuring the largest suppliers, i.e., Korean exporters.[115] The exemption of Mexican and Canadian suppliers from the safeguard measure led them to become the largest and third largest suppliers.

Korea considered that the US procedures and determinations that led to the imposition of the safeguard measure, as well as the measure itself, contravened various obligations under the Agreement on Safeguards and the GATT 1994. The panel was established on 23 October 2000 and composed by the Director-General on 22 January 2001. Australia, Canada, European Communities, Japan and Mexico reserved their third party rights. In the panel report circulated on 29 October 2001, the panel concluded that the US measure was imposed in a manner inconsistent with the WTO obligations. In the Appellate Body proceeding[116], the Korea's argument on the permissible extent of a safeguard measure was accepted, which seems one of

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For the original dumping margin determination, see US Fed. Reg. 15443, 31 March 1999 for SSPC and US Fed. Reg. 30664, 8 June 1999 for SSSS.

[114] WTO, WT/DSB/26, dated 12 October 2001, 18.

[115] The imports above the first 9,000 short tons from each country would be subject to a 19%, 15% and 11% duty for the first, second and third year. See WTO Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ('*US – Line Pipe*'), WT/DS202/R, adopted 8 March 2002, para.2.5.

[116] WTO Appellate Body Report, *US – Line Pipe*, WT/DS202/AB/R, adopted 8 March 2002. The United States initially filed an appeal on 6 November 2001 (WT/DS202/7), but withdrew it for scheduling reasons on 13 November (WT/DS202/8). The appeal was re-filed on 19 November 2001 (WT/DS202/9).

the key findings for the WTO jurisprudence on safeguard.[117]

It is also noted that this appellate proceeding was the first WTO dispute settlement litigation handled entirely by Korean government officials. It was a substantial development for Korea in terms of capacity building for WTO dispute settlement, particularly considering the previous cases in which foreign legal counsels played primary roles in WTO litigations. Moreover, when considering the fact that Korea is one of the WTO Members that did contribute to set the procedural practices to permit private counsel in a dispute settlement proceeding, the outcome of the *US – Line Pipe* appellate proceeding substantially enhanced self-confidence and capacity in terms of much needed legal expertise.

When both parties agreed on the reasonable period of time for implementation with expiration on 1 September 2002, the arbitration under DSU Article 21.3 was suspended.[118] The US government agreed to increase the in-quota volume of imports to 17,500 tons and lower the safeguard tariff to 11%, with the termination due of 1 March 2003.[119] But, considering the original due date of the safeguard measure that was set at 24 February 2003, the practical impact of the WTO dispute settlement system was to increase the in-quota volume from 9,000 to 17,500 tons only for the period of 1 September 2002 to 24 February 2003, while the latter measure remained until the end of February 2003. Thus, this case again illustrated the systemic problem for implementation in a safeguard dispute.

On 15 December 2000, Korea requested consultations with the Philippines concerning the dumping decision of the Tariff Commission of the Philippines on polypropylene resins. This antidumping order was actually the first antidumping measure by the Philippines against Korean exporters, since the first antidumping investigation against Korean electrolytic tinplates was dismissed for lack of merit.[120] The Tariff Commission of the Philippines imposed the provisional antidumping duties on polypropylene resins ranging from 4.20% to 40.53% and subsequently the final duties at slightly lowered levels.[121] Following the consultation on 19 January 2001 under the purview of the WTO dispute settlement system, the Philippines withdrew the antidumping order on 8 November 2001 and Korea did not pursue further action in the DSB.[122] This case is so far the only trade dispute for Korea elevated to the formal dispute settlement procedure as opposed to a developing country.

The fifth WTO complaint by Korea against the United States was also related to antidumping matters. On 21 December 2000, Korea, along with Australia, Brazil, Chile, European Communities, India, Indonesia, Japan and Thailand, requested consultations with the

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[117] See generally Dukgeun Ahn, 'Critical Review of the WTO Jurisprudence on Safeguard' (*mimeo*).
[118] WTO, WT/DS202/17, dated 26 July 2002.
[119] WTO, WT/DS202/18, dated 31 July 2002.
[120] WTO, G/ADP/N/65/PHL, dated 21 September 2000.
[121] WTO, G/ADP/N/72/PHL, dated 6 March 2001.
[122] WTO, G/ADP/N/85/PHL, dated 22 February 2002.

United States concerning the amendment to the Tariff Act of 1930, titled ‘Continued Dumping and Subsidy Offset Act of 2000’ that is usually referred to as the ‘Byrd Amendment’. By distributing the antidumping and countervailing duties to domestic petitioners, the Byrd Amendment aimed to create more incentives to bring trade remedy actions. As the third frequent target for antidumping and countervailing measures in the US market, Korean exporters were very keen on the outcome of this case.[123]

The panel established by the requests from 9 Members was later merged with the panel requested by Canada and Mexico. The panel and the Appellate Body found that the Byrd Amendment is inconsistent with the Antidumping and SCM Agreement. Furthermore, the panel suggested that the United States bring the Byrd Amendment into conformity by repealing it. The arbitrator concluded that the "reasonable period of time" for the United States should be 11 months from the date of the DSB's adoption and therefore expire on December 27, 2003. The United States had later mutually agreed to modify the reasonable period of time with Thailand, Australia and Indonesia, respectively, so as to expire on December 27, 2004. On 15 January 2004, Brazil, Chile, the EC, India, Japan, Korea, Canada and Mexico requested the DSB authorization to suspend concessions pursuant to Article 22.2 of the DSU. Article 22.6 arbitration is currently under way.

Ironically, a subsidiary company of a Korean manufacturer received a substantial ‘offset’ disbursement under the Byrd Amendment. Zenith Electronics owned by LG Electronics received the disbursement of $24.3 million in 2001 and $9 million in 2002 from antidumping duties collected on Japanese television imports. The offset payment for Zenith Electronics in 2001 was indeed more than 10% of the total disbursement of $231.2 million in 2001.[124] In 2002, the total disbursement under the Byrd Amendment was increased to $329.8 million.[125]

On 20 March 2002, Korea requested consultation with the United States regarding the definitive safeguard measures on the imports of certain steel products and the related laws including Section 201 of the Trade Act of 1974 and Section 311 of the NAFTA Implementation Act. The DSB established a single panel to include complaints by other Members such as the

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[123] For antidumping measures, exporters from China and Japan are more frequent targets than those from Korea in the US market. US countervailing measures have targeted Italy, India, Korea and France. WTO, ‘Statistics on Anti-dumping’, <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> and ‘Statistics on Subsidies and Countervailing Measures’, <http://www.wto.org/english/tratop_e/scm_e/scm_stattab8_e.htm> (visited 9 April 2003).

[124] US Customs and Border Protection, ‘CDSOA FY2001 Disbursements Final’, <http://www.customs.ustreas.gov/xp/cgov/import/add_cvd/> (visited 10 April 2003). On the other hand, it is noted that only two ball bearing companies, Torrington and MPB (The Timken Company), received more offset payments in gross than Zenith Electronics in 2001. Their total disbursements amount to $62.8 million and $25 million, respectively. But, the disbursement for Zenith Electronics is the second largest one in terms of individual claims, following $34.7 million offset payment for Torrington in relation to ball bearings dumping from Japan.

[125] US Customs and Border Protection, ‘CDSOA FY2002 Disbursements Final’, <http://www.customs.ustreas.gov/xp/cgov/import/add_cvd/> (visited 10 April 2003).

European Communities, Japan, China, Switzerland, Norway, New Zealand and Brazil.[126] In addition to most complainants that reserved third party rights, Chinese Taipei, Cuba, Malaysia, Mexico, Thailand, Turkey and Venezuela also participated as third parties in the proceeding. On 25 July 2002, the Director-General composed the panel. Chinese Taipei later determined to become a more active participant and made an independent consultation request with the United States on 1 November 2002.[127]

Concerning this US Section 201 action, the Korean government made the first trade compensation request pursuant to Article 8 of the Agreement on Safeguards.[128] When the US government did not agree on satisfactory compensatory arrangements, several WTO Members, such as the European Communities[129], Japan[130], Norway[131], China[132], and Switzerland[133], notified to the Council for Trade in Goods of proposed suspension of concessions. Instead of proposing suspension of concessions, the Korean government notified the Council for Trade in Goods of the agreement that the 90-day period set forth in Article 8.2 of the Agreement on Safeguards and Article XIX:3(a) of the GATT shall be considered to expire on 19 March 2005.[134] This agreement to postpone potential retaliation for about three years, however, practically eradicates all real impact on balancing trade interests, since the original safeguard measure is supposed to end on 20 March 2005.[135] In other words, the Korean government tried to avoid the possibility to actually exercise the suspension of concession against one of its major trading partners without the DSB authorization, while it still maintained a political gesture that it exercised a legal authority specifically enunciated under the Agreement on Safeguards.

The panel concluded that all the United States' safeguard measures at issue were inconsistent with at least one of the WTO obligations for the imposition of a safeguard measure. The Appellate Body upheld the panel's ultimate conclusions. On December 4, 2003, the President of the United States had issued a proclamation that terminated all of the safeguard measures subject to this dispute, pursuant to section 204 of the US Trade Act of 1974.

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[126] WTO, WT/DS251/10, dated 12 August 2002.

[127] WTO, WT/DS274/1, dated 11 November 2002. Chinese Taipei did not, however, pursue this case with the independent panel request.

[128] About 12 % of trade remedy measures against Korean exports are safeguard actions. For example, as of 31 December 2002, Korean exporters are subject to 10 safeguard measures and 5 investigations in India, United States, Venezuela, China, Argentina, Canada, and European Communities. Korea Trade Investment Promotion Agency (KOTRA), 'Summary of Import Restrictions against Korean Exports 2002' (December, 2002; *in Korean*).

[129] WTO, G/C/10, dated 15 May 2002.

[130] WTO, G/C/15, dated 21 May 2002.

[131] WTO, G/C/16, dated 21 May 2002.

[132] WTO, G/C/17, dated 21 May 2002.

[133] WTO, G/C/18, dated 22 May 2002.

[134] WTO, G/C/12, dated 16 May 2002. On the other hand, Australia, Brazil and New Zealand extended the deadline for retaliation to 20 March 2005. See WTO, G/C/11, dated 16 May 2002 and G/C/13, 14, dated 17 May 2002.

[135] WTO, G/SG/N/10/USA/6, dated 14 March 2002.

In addition to these cases already completed, Korea is currently dealing with several major WTO disputes that are in fact originated from the same root causes – the government intervention during the financial crisis. The Korean government played a significant role in overcoming the financial crisis by undertaking various economic restructuring programs that covered corporate as well as financial and exchange areas. Some of these programs were challenged by other Members as illegal subsidies under the WTO Agreement. Especially, the third largest semiconductor manufacturer in the world, Hynix, was subject to the countervailing duties of 44.29% in the US market[136] and 34.8% in the EC market.[137] The Korean government brought the complaints against these measures. Also, in retaliation to the EC challenge of the governmental assistance for the shipbuilding industry, the Korean government brought the two complaints to the WTO dispute settlement system.[138]

As described above, Korea had major problems regarding the US antidumping practices. In some sense, its experience as a complainant in the WTO dispute settlement system almost exclusively against US antidumping practices until 2001 is puzzling because, during the period of 1 January 1995 to 20 June 2002, it was the European Communities that initiated the most antidumping investigations against exported products from Korea, and it was South Africa and India that actually imposed the most antidumping measures.[139] This fact seems to imply that the US market still occupies an unbalanced economic importance for Korea.[140] Currently, Korea is actively engaged in pushing the agenda to revise the Antidumping Agreement in the Doha Development Agenda.[141]

For five cases in which the entire dispute settlement procedure including implementation ended, the major problem Korea faced was the failure to ensure prompt and effective implementation by a respondent. The implementation for the *US –DRAMS* and *US –*

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[136] 66 Fed. Reg. 44290 (2003).
[137] Council Regulation (EC) No 1480/2003 of 11 August 2003, L212/1.
[138] There may be still more cases related to the governmental role during the financial crisis. For example, the United States recently raised the concern for the governmental assistance provided to the paper industry. USTR, 2003 National Trade Estimate Report on Foreign Trade Barriers, 248 (2004). In case this concern leads to another countervailing measure, the Korean government will surely pursue another WTO challenges.
[139] WTO, 'Statistics on Anti-dumping', <http://www.wto.org/english/tratop_e/adp_e/adp_e.htm> (visited 9 April 2003).

<AD Actions against Korea (From 01/01/95 to 30/06/02)>

| | Argentina | Australia | EC | India | South Africa | US | Others | Total |
|---|---|---|---|---|---|---|---|---|
| AD Initiation | 9 | 11 | 21 | 18 | 13 | 19 | 54 | 145 |
| AD Measures | 6 | 4 | 9 | 13 | 13 | 11 | 18 | 74 |

[140] On the other hand, Japan, a country with similar trade structure and attitude toward trade dispute settlement, has shown much diverse interest as a complainant concerning its target markets. See generally Iwasawa, above n. 55, 473.
[141] For the Korean proposal regarding antidumping issues, see, for example, WTO, WT/GC/W/235/Rev.1, dated 12 July 1999; TN/RL/W/6, dated 26 April 2002; TN/RL/W/10, dated 28 June 2002.

*Line Pipe* cases was in fact not much more than the mere expiration of the original trade remedy measures. *US- Byrd Amendment* case would create another difficult situation in which Korea should either take retaliatory measures against the major trading partner risking whole kind of disastrous economic consequences or abstain from exercising its WTO authority for retaliation, which may entail political, not merely economic, integrity issue for the Korean government.

This result raises concern for effectiveness and fairness of the WTO dispute settlement system, especially when dealing with the WTO litigation demands sizeable financial and human resources. In particular, the lack of legal systems to represent private parties' interest in line with Section 301 and TBR procedures would inevitably result in a less enthusiastic approach for resorting to the legal activism for many WTO Members including Korea, because government officials in charge of WTO disputes may not have an incentive to initiate all those costly procedures merely for 'paper' winning.

## III. SYSTEMIC CONCERN FOR THE WTO DISPUTE SETTLEMENT SYSTEM

Despite the overall consensus of satisfactory operation of the WTO dispute settlement system, the WTO Member countries are currently engaged in active discussion and negotiation to improve the rules and procedures concerning the dispute settlement process. In fact, a ministerial decision adopted on 15 December 1993 'invited the Ministerial Conference to complete a full review of dispute settlement rules and procedures under the World Trade Organization within four years after the entry into force of the Agreement Establishing the World Trade Organization, and to take a decision on the occasion of its first meeting after the completion of the review, whether to continue, modify or terminate such dispute settlement rules and procedures.'[142] After the failure in the Seattle Ministerial Conference to complete the DSU revision, the WTO Members agreed to finish the negotiation for the DSU improvements and clarifications not later than May 2003 as a part of the Doha Round negotiation.[143] As of April 2003, many WTO Members including Korea, individually or jointly, have submitted their proposals on the DSU improvement.

The formal proposal submitted by Korea concerned primarily about prompt compliance with recommendations or rulings of the DSB.[144] While Korea agrees on the basic principle that a multilateral determination on the WTO-consistency of an implementation

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[142] Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes. WTO, *The Results of the Uruguay Round of Multilateral Trade Negotiations: Legal Text* (Geneva, 1994) 465.
[143] Ministerial Declaration. WTO, WT/MIN(01)/DEC/1, dated 20 November 2001, para.30.
[144] WTO, TN/DS/W/11, dated 11 July 2002.

measure should precede a request for retaliation[145], it suggested expediting other parts of the implementation stage, especially considering the possibility of additional delay caused by appellate review procedure for compliance panel rulings.[146] More specifically, Korea proposed the deletion of 30 days for informing the intention to implement after the DSB adoption and also suggested concomitant determination of the level of nullification or impairment by a compliance panel.[147]

Based on the practical experience of Korea, another obstacle for the prompt resolution of WTO disputes has been caused by a panel selection process that demands an increasingly longer period of time. In particular, it took much more time to select panelists when Korea engaged in WTO disputes as a complainant than as a respondent, ranging from 62 to 126 days.[148] This problem may be mitigated by the appointment of permanent panelists, for example, as proposed by the European Communities[149], or by mandating specific due dates for panel selection such as 'within 30 days after the panel establishment'.

Another systemic issue concerning the current dispute settlement procedure drawn from the Korean experience is the need to adopt an accelerated procedure for safeguard measures.[150] In the *Korea – Dairy Products* case, the safeguard measure in the form of quota went into effect from 7 March 1997, with a duration of four years. On the other hand, the panel requested by the European Communities was established on 22 July 1998 and the subsequent panel and the Appellate Body proceeding ended on December 14 1999. After the adoption of those reports by the DSB on 12 January 2000, the reasonable period of time for implementation was agreed to end on 20 May 2000. Hence, even with successful implementation of the DSB recommendation by repealing it, the 'illegal' safeguard measure had been in force for more than three years. As explained above, this problem is not unique to Korean safeguard measures, nor the consequence of lack of implementation intent by Korea. In fact, the implementation period agreed in the *Korea – Dairy Product* case is the shortest one so far for WTO safeguard disputes.[151] In the *US – Line Pipe* case in which Korea was a complainant, the United States imposed the safeguard duty on 1 March 2000 with a duration of three years and one day.[152]

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[145] In this regard, Korea co-sponsored a concept paper on the sequencing issue. WTO, JOB(02)/45, dated 31 May 2002.
[146] As of April 2003, eight Article 21.5 panel rulings were appealed and the Appellate Body issued rulings on those cases.
[147] WTO, TN/DS/W/35, dated 22 January 2003.
[148] WTO, TN/DS/W/7, 11-13 (dated May 30, 2002).
[149] WTO, TN/DS/W/1 (dated March 13, 2002).
[150] In fact, Australia made the proposal regarding this issue. WTO, TN/DS/W/8 (dated July 8, 2002).
[151] In *Argentina – Footwear* case, Argentina revoked the WTO-inconsistent safeguard measure on 25 February 2000, after the DSB adoption of the panel and Appellate Body reports on 12 January 2000. The safeguard measure was, however, due to expire on 25 February 2000 and thus Argentina did not even engage in negotiation or arbitration to determine the implementation period.
[152] WTO, G/SG/N/10/USA/5/Rev.1, dated 28 March 2000.

After the DSB adopted the panel and Appellate Body reports, both parties agreed on the reasonable period of implementation that was to expire on 1 September 2002, merely six months earlier than the original due of the safeguard measure. But, practically, the US measure was maintained until the end of February 2003, surpassing the original due date of the safeguard measure set on 24 February 2003. In the *US – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* case, the actual due dates of the original safeguard measures coincided with the expiry of the reasonable period of implementation.[153] Therefore, the effectiveness of the current WTO dispute settlement system seems seriously undermined particularly in the context of "temporary" safeguard actions. An accelerated dispute settlement procedure, in line with those currently available for prohibited or actionable subsidy, would be able to discipline prevalent abuse of safeguard measures under the WTO system.[154]

## CONCLUDING COMMENTS

During the past half century, Korea achieved a remarkable economic development and became one of the major trading countries in the world. For example, in 2001, Korea was ranked as the eighth exporter and importer in the world according to the statistics on merchandise trade that exclude intra-EU trade,.[155] Accordingly, Korea made the thirteenth largest contribution to the budget of the WTO by providing 2.381% of the budget in 2002.[156] Considering such a position in the world trading system, it is not surprising that Korea has become more active in asserting its rights under the WTO Agreements, although it initially showed a strong tendency to avoid legal confrontation with its major trading partners. In that regard, the Korean government became recently keener to monitor the foreign trade barriers and environment.[157]

From the practical aspect of dispute settlement, the Korean government has heavily relied on foreign private counsels to deal with the GATT/WTO disputes, particularly when the cases have been actually litigated at a panel or the Appellate Body level.[158] This situation,

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[153] WTO, WT/DS166/12, dated 12 April 2001.

[154] Active utilization of safeguard measures by developing countries, notably India, Chile and Czech Republic, is one of the salient features of the WTO system, in contrast with the GATT system. See Dukgeun Ahn, 'WTO Safeguard System: Present and Perspective', in *Korea-China Joint Workshop Proceeding for Trade Remedy Institutions* 3 (2002, *in Korean*).

[155] WTO, *International Trade Statistics 2002* (Geneva, 2002) 26.

[156] WTO, *Annual Report 2002* (Geneva, 2002) 165-167. The United States made the largest contribution by providing 15.723% of the budget. China's contribution accounted for 2.973% in the 2002 WTO budget. Ibid.

[157] The Korean Ministry of Foreign Affairs and Trade began to publish "A Comprehensive Survey of the Trade Environment" since 1998. This can be viewed as a Korean version of "National Trade Estimate Report" by the USTR, but without Section 301 linkage.

[158] In fact, this situation is not peculiar to Korea. The legal technicality and formality of WTO dispute

therefore, raised serious concern about building 'in-house' expertise to deal with WTO litigation. Indeed, when the Ministry of Foreign Affairs was expanded to become the Ministry of Foreign Affairs and Trade by establishing the Office of Trade Negotiation in 1998[159], a special body titled the 'International Trade Law Team' was created with the mandate to provide legal support regarding the WTO Agreements and, more broadly, legal matters on international economic relations. The role of this special team in relation to handling WTO dispute settlement cases, however, has not been very visible except for the very recent cases. On the other hand, Korean experts began to contribute to WTO panel works more actively in recent years.[160]

Assessing from the experience to date, Korea appears to have been at quite a defensive side in dispute settlements. According to the statistics until the end of 2002, no other WTO Member country, except for Argentina, has been so disproportionately challenged by the dispute settlement system.[161] And yet, Korea has been fully cooperative in implementing the DSB recommendations. The overall Korean practice in terms of the WTO dispute settlement would be viewed as exemplary in its contribution to enhance the international economic order.[162] Conversely, the role of the WTO dispute settlement system for future economic development for Korea would remain vital.

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settlement proceedings has become increasingly complicated. Many developing countries find themselves without the proper capacity to deal with trade disputes under the WTO system. In this regard, 32 countries agreed to establish the "Advisory Centre on WTO Law", an independent body to assist its signatories on WTO dispute settlement. Korea is not yet a signatory to this Centre. See <http://www.acwl.ch> (visited 25 March 2003).

[159] The Presidential Order, No. 15710 (28 February 1998).

[160] As of April 2003, Korean experts worked as a panelist in three cases. Korean legal experts also contributed to the works of the WTO Secretariat in relation to trade disputes. No Appellate Body Member has been elected from Korea.

[161] Until the end of 2002, Argentina was challenged in 15 cases whereas it brought only 8 cases.

[162] Professor Jackson raised this question to assess how the Japanese international law practice was related to the maintenance of international economic order. John H. Jackson, 'Western View of Japanese International Law Practice for the Maintenance of the International Economic Order', in Nisuke Ando: *Japan and International Law: Past, Present and Future* (The Hague: Kluwer Law International, 1999) 208.

## Appendix. Profiles of the WTO Cases Involving Korea

Appendix 1. WTO Cases Involving Korea as Respondent

| Cases Name | Complainant | Dispute Number | Panelists | Appellate Body Division | Adoption Date |
|---|---|---|---|---|---|
| *Korea - Measures Concerning the Testing and Inspection of Agricultural Products* | US | DS3 & DS41 | *Pending Consultation* | | |
| *Korea - Measures Concerning the Shelf-Life of Products* | US | DS5 | *Settled* | | |
| *Korea - Measures Concerning Bottled Water* | Canada | DS20 | *Settled* | | |
| *Korea - Laws, Regulations and Practices in the Telecommunications Procurement Sector* | EC | DS40 | *Settled* | | |
| **Korea - Taxes on Alcoholic Beverages* | EC, US | DS75 & DS84 | Mr. Åke Lindén (Chairperson), Professor Frédéric Jenny, Mr. Carlos da Rocha Parahnos | Matsushita (Presiding Member), Ehlermann, Feliciano | 17 February 1999 |
| **Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products* | EC | DS98 | Mr. Ole Lundby (Chairperson), Ms. Leora Blumberg, Ms. Luz Elena Reyes | El-Naggar (Presiding Member), Ehlermann, Feliciano | 12 January 2000 |
| **Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef* | US, Australia | DS161 & DS169 | Lars Anell (Chairperson), Paul Demaret, Alan Matthews | Ehlermann (Presiding Member), Abi-Saab, Feliciano | 10 January 2001 |
| **Korea - Measures Affecting Government Procurement* | US | DS163 | Mr. Michael D. Cartland (Chairperson), Ms. Marie-Gabrielle Ineichen-Fleisch, Mr. Peter-Armin Trepte | *Not Appealed.* | 19 June 2000 |

| | | | | | |
|---|---|---|---|---|---|
| *Korea – Measures Affecting Trade in Commercial Vessels* | EC | DS273 | Mr. Said El Naggar (Chairperson),<br>Mr. Gilles Gauthier,<br>Ms. Ana Novik Assael | | *Ongoing* |

* Cases for which panel reports were issued.

Appendix.2. WTO Cases Involving Korea as Complainant

| **Cases Name** | **Respondent** | **Dispute Number** | **Panelists** | **Appellate Body Division** | **Adoption Date** |
|---|---|---|---|---|---|
| *United States - Imposition of Anti-Dumping Duties on Imports of Color Television Receivers from Korea* | US | DS89 | *Withdrawal* | | |
| **United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of One Megabit or Above from Korea* | US | DS99 | Mr. Crawford Falconer (Chairperson), Mr. Meinhard Hilf, Ms. Marta Lemme | *Not Appealed.* | 19 March 1999 |
| **United States - Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea* | US | DS179 | Mr. José Antonio S. Buencamino (Chairperson), Mr. G. Bruce Cullen, Ms. Enie Neri de Ross | *Not Appealed.* | 1 February 2001 |
| **United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* | US | DS202 | Mr. Dariusz Rosati (Chairperson), Mr. Roberto Azevedo, Mr. Eduardo Bianchi | Lacarte-Muro (Presiding Member), Bacchus, Abi-Saab | 8 March 2002 |
| *Philippines – Anti-Dumping Measures regarding Polypropylene Resins from Korea* | Philippines | DS215 | *Pending Consultation* | | |
| *United States – Continued Dumping and Subsidy Offset Act of 2000* | US | DS217 | Mr. Luzius Wasescha (Chairperson), Mr. Maamoun Abdel-Fattah, Mr. William Falconer | Sacerdoti (Presiding Member), Baptista, Lockhart | 27 January 2003 |
| *United States - Definitive Safeguard Measures on Imports of Certain Steel Products* | US | DS251 | Mr. Stefan Johannesson (Chairperson), Mr. Mohan Kumar, Ms. Margaret Liang | Bacchus (Presiding Member), Abi-Saab, Lockhart | 10 December 2003 |
| United States - Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea | US | DS296 | Mr. Hardeep Puri (Chairperson), Mr. John Adank, Mr. Michael Mulgrew | | *Ongoing* |
| European Communities - Countervailing Measures on Dynamic Random Access Memory Chips from Korea | EC | DS299 | Ms. Luz Elena Reyes de la Torre (Chairperson), Mr. Scott Gallacher, Ms. Thinus Jacobsz | | *Ongoing* |
| European Communities - Measures Affecting Trade in Commercial Vessels | EC | DS301 | | | *Ongoing* |

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| European Communities - Aid for Commercial Vessels | EC | DS307 | | | *Ongoing* |

* Cases for which panel reports were issued.