

# Assessment of Korea's FTAs: Focusing on Trade Remedies Rules

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## Abstract

**Purpose** – We assess the trade remedies rules in a host of Korea's FTAs to explore the trade policies for the effective implementation of FTA trade remedies rules. Also we develop the strategies of the future FTA negotiations of trade remedies rules.

**Design/methodology** – After we review the key features of FTA trade remedies rules, we examine whether the rules are WTO-consistent or not. Next, we touch upon the WTO-plus characteristics of some provisions. Our main methodology is to compare the trade remedies rules in the numerous Korea's FTAs. Another methodology is to link those rules to the relevant WTO agreements and WTO dispute cases with a view to drawing lessons for trade policies and FTA negotiations.

**Findings** – We find that most of the trade remedies rules are WTO-consistent. Moreover, we find that notification and consultation requirement, mandatory lesser duty rule, explicit prohibition of zeroing method, and public interest clause are WTO-plus. We also find that there are limitations in the application of some global safeguard exclusion rules because of their non-mandatory nature.

**Originality/value** – While most of previous studies focus mainly on the unique aspects of specific FTAs, our study analyzes comprehensively the trade remedies rules in the various Korea's FTAs. Based on the comprehensive analysis, we figure out the areas to be clarified and improved for the effective implementation of FTAs and the strategies for the future FTA trade remedies negotiations. As a consequence, our paper is expected to contribute to the academic research on FTA policies as well as the national economy.

**Keywords:** Anti-dumping Duty, Countervailing Duty, FTA, Safeguard, Trade Remedies

**JEL Classifications:** F13, F15, F53

## 1. Introduction

Korea had embarked on numerous FTA negotiations.<sup>1</sup> As a result, it has concluded FTA negotiations with a variety of countries as well as regional economies such as the European Union and ASEAN.<sup>2</sup> Korea has negotiated comprehensive issues including agriculture, trade remedies, sanitary and phytosanitary (SPS), technical barriers to trade (TBT), services, intellectual property rights, investment, environment, competition, labor, and electronic commerce. Korea has considered the trade remedies rules as one of the most important issues which are to be put at its FTA negotiation tables. Kim Hyun-Chong (2010) illustrates in detail how the trade remedies issues had been dealt at the Korea-US FTA negotiations.<sup>3</sup>

Korea has been one of top target countries of anti-dumping measures by the WTO Member countries.<sup>4</sup> Thus, it is not surprising that the Korean government has attached considerable importance to the anti-dumping provisions and other trade remedies provisions in its FTA negotiations with a view to reducing the abusive use of anti-dumping measures and other measures.<sup>5</sup> Though the trade remedies provisions in Korea's FTAs are of significant interest to the Korean economy, they did not receive enough attention from academia.<sup>6</sup>

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There are numerous studies on Korea's FTAs. Most of them including Cheong In-Kyo (2014), Ko Jong-Hwan (2014) and Lee Soon-Cheul (2019) focus primarily on the economic effects of FTAs. In sharp contrast to a wealth of the economic analyses, there are limited number of studies which analyze Korea's FTAs from the policy and legal perspective. Lee Ji-Hyung (2011) and Sohn Ki-Youn (2015a/2015b/2016) examine the policy and legal aspects of the trade remedies provisions of Korea's FTAs.

Other studies analyze the industry-specific or country-specific trade remedy issues which are of interest to the Korean exporters. Sohn Ki-Youn (2011) analyzes the special motor vehicle safeguard provisions of the Korea-U.S. FTA Supplemental Agreement. Lee Yoon-Hee (2016) addresses the options available under the Korea-EU FTA, which the Korean steel industry could take in response to the changes in the EU trade remedies regulations. Cho Soo-Jung (2019) also discusses the effects on the Korea-EU FTA trade remedies provisions of the recent amendments in the EU anti-dumping regulation and countervailing regulation.

There are studies on the trade remedies provisions in a wide variety of regional trade agreements. Teh, Prusa and Budetta (2007) examines the trade remedies rules on the basis of the extent of modifications in seventy-four regional trade agreement including Korea-Chile FTA. Prusa and Teh (2011) also compares the trade remedies rules in numerous FTAs. Emerson (2008) analyzes modifications to both the substantive and the procedural aspects of the various regional trade agreements including Korea-Singapore FTA and Korea-EFTA FTA. He emphasizes the important role of the dispute settlement rules for antidumping and countervailing duty decisions in some FTAs such as NAFTA and Canada-Chile FTA. Voon (2010) focuses her analysis on the extent to which RTA members agreed to eliminate trade remedies on imports originating in other Parties.

Another studies analyze the trade remedies rules in specific country's FTAs. Jones (2012) and Winham and Grant (1994) examine the trade remedies rules in the U.S. FTAs such as

<sup>1</sup> Korea kicked off its journey to FTAs in December 1999 when Korea and Chile held the first round of FTA negotiations.

<sup>2</sup> As of November 30, 2020, more than dozen FTAs are in force. They are FTAs with ASEAN, Australia, Canada, Chile, China, Colombia, EFTA, EU, India, New Zealand, Peru, Singapore, Turkey, U.S., Vietnam, and five Central American countries of Costa Rica, El Salvador, Honduras, Nicaragua and Panama. On the other hand, there are a number of FTAs which concluded their negotiations, but are not in effect yet. They are Korea-Israel FTA, Korea-UK FTA, Korea-Indonesia CEPA, and Regional Comprehensive Economic Partnership (RCEP).

<sup>3</sup> Both Mr. Kim Hyun Chong, the Korean trade minister during the initial Korea-US FTA negotiations, and Ms. Yoo Myung-hee, the Korean chief negotiator of the supplemental Korea-US FTA negotiations, had expressed the importance of trade remedies issues for Korea. Also, prior to the second round of the supplemental Korea-US FTA negotiations in Seoul on January 31, 2018, Yoo stated that since trade remedies issue was an important issue, Korea would raise this issue. "Korea will raise the safeguard issue at the negotiation table", *The Hankyoreh*. Available from [http://www.hani.co.kr/arti/economy/marketing/830163.html?\\_fr=mt2#csidx5102aabd2b69751a09c4c753a950ac3](http://www.hani.co.kr/arti/economy/marketing/830163.html?_fr=mt2#csidx5102aabd2b69751a09c4c753a950ac3) (accessed April 12, 2019)

<sup>4</sup> Recent WTO statistics shows that during the period of January 1, 1995 to December 31, 2019, WTO Members had imposed 3,950 anti-dumping measures. During the period, the top target country is China whose products are subject to 1,033 anti-dumping measures, followed by Korea whose exports are subject to 289 anti-dumping measures.

<sup>5</sup> For example, during the Korea-US FTA negotiations, Korea made enormous efforts to convince the United States to accept certain preferential anti-dumping rules. One of them is non-application of the cumulative assessment rule to imports originating in Korea under Article 3.3 of the WTO Anti-Dumping Agreement.

<sup>6</sup> By contrast, the comprehensive research of the trade remedies provisions of Korea's FTAs has been in high demand from both trade policy-making community and business community, especially the Korean exporters.

NAFTA and Canada-U.S. FTA. By examining the WTO dispute of *Dominican Republic-Safeguard Measures*, Bown and Wu (2014) analyzes a number of issues which are related to the safeguard rules of Dominican Republic's FTAs. In addition, Sohn Ki-Youn (2019) and Sun and Whalley (2016) analyze the trade remedies rules of China's FTAs.

We can classify the approaches of studies on the FTA trade remedies rules in three categories. The first category is the overall approach which compares the trade remedies rules of numerous FTAs in the world. It may capture some meaningful features. The second category is the specific approach which analyzes the trade remedies provisions of a singled-out FTA. The third category is a hybrid approach which combines the above two approaches. Under the hybrid approach, we examine comprehensively the trade remedies rules in all or nearly all FTAs of a specific country. While most studies fall under either the first or the second category, it is not easy to find studies which adopt the third approach.

Most of previous studies fail to analyze comprehensively the trade remedies rules in Korea's FTAs. In particular, they do not conduct the cross-sectional analysis which compares the trade remedies rules in a variety of Korea's FTAs. Rather, they focus mainly on the unique aspects of specific FTAs. Recognizing that trade remedies rules of Korea's trading partners have been of great interest to the Korean exporters, we are of the view that it is essential to assess comprehensively the extremely complicated trade remedies rules of Korea's FTAs. Most important, the comprehensive analysis is expected to draw useful lessons for the effective implementation of FTAs and the future FTA trade remedies negotiations.

Our paper is organized as follows. In Section 2, we highlight the key features of trade remedies provisions of Korea's FTAs. In Section 3, we evaluate the trade remedies rules in comparison with the WTO Anti-Dumping Agreement, the WTO Agreement on Subsidies and Countervailing Measures, and the WTO Agreement on Safeguards. We also discuss whether certain trade remedies rules are WTO-plus, where applicable. In Section 4, we suggest a number of policy recommendations with a view to supporting the effective implementation of Korea's FTAs. Finally, in Section 5, we conclude with some future issues which are deemed to be of interest to Korea.

## 2. Key Features of the Trade Remedies Rules

### 2.1. Anti-umping and Countervailing Duty

#### 2.1.1. Notification and Consultation

Korean government claimed that one of the notable achievements in the trade remedies area is the explicit requirement to notify in writing the other Party of the receipt of anti-dumping petition and countervailing duty petition prior to the importing Party's decision of whether or not to initiate an investigation. The Parties also shall provide a consultation opportunity for the other Party whose product could be subject to an anti-dumping or countervailing duty investigation.

There are some differences in the notification and consultation provisions among Korea's FTAs. Some FTAs simply provide that the Parties are required to notify the receipt of properly documented anti-dumping and countervailing duty petition and provide the consultation opportunity before the initiation decision, but they do not stipulate the timeline for the notification and consultation. On the other hand, other FTAs including Korea-EU FTA specify the timeline. Article 3.9.1 of Korea-EU FTA provides that Parties agree to notify their receipt of the petition no later than 15 days before initiating an investigation. While Article

2.14 of Korea-India CEPA specifies the timeline of no later 10 working days prior to initiating an anti-dumping investigation, both Article 4.8.1 of Korea-Turkey FTA and Article 7.7.1 of Korea-Vietnam FTA require to notify their receipt of anti-dumping duty petition at least 15 days before initiating an anti-dumping investigation.

There are differences in the coverage of and timeline for notification and consultation. Articles 3.9.1 and 3.9.2 of Korea-EU FTA do not require explicitly the consultation opportunity before initiating an anti-dumping duty investigation. Interestingly the above-mentioned timeline applies only to the anti-dumping duty investigation, not to the counter-vailing duty investigation.

### 2.1.2. Prohibition of Zeroing Practice

After initiating an anti-dumping investigation, the competent investigating authorities shall examine whether or not conditions for imposing an anti-dumping duty are satisfied. The conditions are the existence of dumping, material injury to the domestic industry<sup>7</sup> and the causal relationship between the dumped imports and injury. After determining that the subject imports were dumped, the investigating authorities shall calculate the margin of dumping which is the difference between their normal value<sup>8</sup> and their export price. For calculation of the margin of dumping<sup>9</sup>, certain WTO Members use the so-called “zeroing” approach.<sup>10</sup>

Some WTO Members had brought several anti-dumping measures based on the zeroing method to the WTO Dispute Settlement Body. The first case is *EC-Bed Linen* case brought by India against the European Communities. Even after it was ruled that the zeroing practice by the EC was inconsistent with the WTO Anti-Dumping Agreement, the United States had continued to use zeroing method in calculation of the margin of dumping in both the initial investigation and the review investigation. To date, the WTO Panels and Appellate Body found that the U.S. zeroing practices were inconsistent with the WTO Anti-Dumping Agreement, in particular, Article 2.4.2.<sup>11</sup>

Korea has sought vigorously to prohibit explicitly the zeroing practice at the multilateral<sup>12</sup> as well as the bilateral or regional fora. As a result, certain Korea’s FTAs contain the provision prohibiting explicitly the zeroing method. For example, Article 2.18 of Korea-Singapore FTA provides that when dumping margins are established, assessed or reviewed under Articles 2,

<sup>7</sup> The domestic industry refers to the domestic industry which produces a like product of the allegedly dumped imports.

<sup>8</sup> The normal value means in general the price in the domestic market of the exporting country. It is noted that there are circumstances under which the domestic price in the exporting country may not be used.

<sup>9</sup> The WTO Anti-Dumping Agreement stipulates three methodologies for calculation of the margin of dumping. They are comparison of a weighted average normal value with a weighted average export price, comparison of normal value and export prices on transaction-to-transaction basis and, in special circumstances, comparison of a weighted average normal value with prices of individual export transactions.

<sup>10</sup> Pursuant to the zeroing approach, the investigating authorities treat the negative margin of dumping for individual transactions as zero. Consequently, it could lead to increasing the likelihood of finding the existence of dumping and then increase the amount of an anti-dumping duty in the event of a preliminary or final affirmative determination.

<sup>11</sup> WTO cases involving U.S. zeroing practice include *US-Zeroing (EC)*, *US-Zeroing (Japan)*, *US-Continued Zeroing*, and *US-Zeroing (Korea)* for the initial investigation, and *US-Anti-Dumping Measures on PET Bags* for the review investigation.

<sup>12</sup> At the ongoing WTO DDA Rules negotiations, Korea made concerted efforts for the explicit prohibition of zeroing method with other members of the Anti-Dumping Friends Group.

9.3, 9.5 and 11 of the WTO Anti-Dumping Agreement regardless of the comparison bases under Article 2.4.2 of the Anti-Dumping Agreement, all individual margins, whether positive or negative, should be counted toward the average. In addition, Article 7.7.2(a) of Korea-Colombia FTA, Article 4.7.3(a) of Korea-Turkey FTA, and Article 7.6.3(c) of Korea-Vietnam FTA prohibit the zeroing practice explicitly.

Some FTAs simply confirm that the Parties currently do not use the zeroing method. In other words, the FTAs do not prohibit the zeroing method explicitly. Article 7.7.5 of Korea-China FTA and Article 7.7.2(a) of Korea-New Zealand FTA confirm their current practices which do not use the zeroing method.

### 2.1.3. Lesser Duty Rule

Both Article 9.1 of the WTO Anti-Dumping Agreement and Article 19.2 of the WTO SCM Agreement provide the lesser duty rule. A rule similar to the lesser duty rule may also apply to the price undertakings under Article 8.1 of the Anti-Dumping Agreement and to the undertakings under Article 18.1(b) of the SCM Agreement. Under the lesser duty rule, the WTO Members may impose anti-dumping duty or countervailing duty at the level which is less than the margin of dumping or the amount of subsidy found to be existed if such lesser duty would be adequate to remove the injury to the domestic industry.<sup>13</sup> However, the lesser duty rules are not mandatory, but optional.

Since the mandatory lesser duty rule is expected to bring benefits for exporters,<sup>14</sup> Korea put the issue on the table. As a result, several FTAs contain the mandatory lesser duty provisions. The FTAs containing the mandatory lesser duty rule include Korea-EU FTA, Korea-Turkey FTA, Korea-Singapore FTA, Korea-EFTA FTA and Korea-India CEPA.

There are some differences in the coverage of the lesser duty rule. Article 3.13.1 of Korea-EU FTA and Article 4.7.3(b) of Korea-Turkey FTA stipulate that the mandatory lesser duty rule apply to both anti-dumping and countervailing duty. On the other hand, Korea-Singapore FTA, Korea-EFTA FTA, Korea-India CEPA, Korea-New Zealand FTA and Korea-Colombia FTA apply the mandatory lesser duty rule only to the anti-dumping duty under Article 6.2.3(b) of Korea-Singapore FTA, Article 2.10.1(b) of Korea-EFTA FTA, Article 2.17 of Korea-India CEPA, Article 7.7.2(b) of Korea-New Zealand FTA and Article 7.7(b) of Korea-Colombia FTA, respectively.

Finally, there are variations in the degree of obligations under the lesser duty rule among FTAs. While the term of “shall” is used in Korea-EFTA FTA, Korea-India CEPA and Korea-New Zealand FTA, the term of “should” is used in Korea-EU FTA, Korea-Singapore FTA and Korea-Colombia FTA. Moreover, Korea-Turkey FTA uses the term of “is expected to systematically impose a duty lesser than the dumping margin or amount of subsidy”. It is noted that Korea-Vietnam FTA contains the lesser duty rule, but the lesser duty rule under Article 7.6.3(b) of Korea-Vietnam FTA is optional, not mandatory.

<sup>13</sup> In contrast to the dumping margin which is the difference between the normal value and the export price, the amount of duty adequate to remove the injury to the domestic industry of the importing country is called as the injury margin.

<sup>14</sup> Pursuant to the mandatory lesser duty rule, when the injury margin is less than the dumping margin, the amount of definitive anti-dumping duty shall be the injury margin. As a result, when the lesser duty rule becomes mandatory, it confers a benefit of lower anti-dumping duty to the exporters. However, when the injury margin is greater than the dumping margin, the authorities are permitted to impose the anti-dumping duty up to the dumping margin.

#### 2.1.4. Other Provisions

Korea's FTAs provide additional rules in the trade remedies Chapters. They include provisions concerning public interest, limitations on anti-dumping initiation and cumulative assessment. First, we discuss the public interest provision in Korea-EU FTA. Article 3.10 of Korea-EU FTA stipulates that the Parties shall endeavor to consider the public interests before imposing an anti-dumping or countervailing duty. Pursuant to the public interest rule, before determining whether or not to impose an anti-dumping or countervailing duty, the investigating authorities may decide to apply the rate lower than a proposed anti-dumping or countervailing duty rate, taking into account the effects of the proposed rate on the various interested parties in the importing country. Sohn Ki-Youn (2008, 414) explains that the interested parties in the importing country include normally the domestic industry, the importers of and the industrial users of the allegedly dumped or subsidized imports.

Second, some FTAs place some limitations on the initiation of anti-dumping duty investigations. Article 3.11 of Korea-EU FTA provides that if anti-dumping measures have been terminated in the previous twelve months as a result of a review, the investigation shall not be proceeded unless the pre-initiation examination indicates that the circumstances have changed. Article 2.19.1 of Korea-India CEPA stipulates also that under certain circumstances the importing Party shall not initiate an anti-dumping duty investigation. In particular, when the investigating authorities determine that the anti-dumping measures against imports from the other Party be terminated as a result of review under Articles 11.2 and 11.3 of the Anti-Dumping Agreement, the importing Party shall not initiate an investigation on the same goods during one year after the termination of the anti-dumping duty.

### 2.2. Safeguard Measures

#### 2.2.1. Bilateral Safeguard Measures

##### *a) Conditions for the Application of Bilateral Safeguard Measures*

FTAs stipulate three conditions for applying bilateral safeguard measures. The first condition is an increase in imports from the other Party, which shall be as a result of reduction or elimination of a customs duty under FTA in question, absolute terms or relative to domestic production. The second condition is a serious injury or threat thereof to a domestic industry producing like or directly competitive goods of the imports originating in the other Party. The last condition is the causal link between the increased imports and the serious injury.

Concerning the causal link, certain FTAs require that the increased imports shall be "a substantial cause" of serious injury or threat thereof, to a domestic industry rather than just being a cause of serious injury or threat thereof. The relevant provisions are Article 10.1 of Korea-US FTA, Article 6.1 of Korea-Australia FTA, Article 7.1 of Korea-Colombia FTA, Article 7.1 of Korea-Vietnam FTA, Article 6.4.1 of Korea-Singapore FTA and Article 2.22 of Korea-India CEPA. On the other hand, the term of "substantial cause" is defined to be "a cause that is important and not less than any other cause" in Article 10.6 of Korea-US FTA, Article 7.12 of Korea-Colombia FTA, Article 7.12 of Korea-Vietnam FTA and Article 6.1 of Korea-Singapore FTA. However, there could be practical limitations in the determination of whether or not the increased imports were a substantial cause or threat thereof to the domestic industry.

### *b) Notification and Consultation*

Certain FTAs include provisions concerning the bilateral safeguard investigation procedures. One of them is the notification requirement. When a Party initiates a bilateral safeguard investigation, it shall notify the other Party in writing upon its initiation. The provisions containing the notification requirement are Article 2.23(a)(i) of Korea-India CEPA, Article 6.2.2 of Korea-Australia FTA, Article 4.2.1 of Korea-Turkey FTA, Article 7.3.2 of Korea-New Zealand FTA, Article 7.2.1 of Korea-China FTA, Article 3.2.1 of Korea-EU FTA, Article 6.4.1 of Korea-Singapore FTA, Article 10.2.1 of Korea-US FTA, Article 7.2.1 of Korea-Vietnam FTA and Article 7.2.1 of Korea-Colombia.

The other provision is the consultation requirement. Before applying a bilateral safeguard measure, a Party shall provide adequate opportunity for prior consultation with the other Party as far in advance of taking any such measure as practicable. The consultation requirement is contained in Article 2.23(c) of Korea-India CEPA, Article 6.2.2 of Korea-Australia FTA, Article 10.2.1 of Korea-US FTA, Article 7.3.2 of Korea-New Zealand FTA, Article 4.2.1 of Korea-Turkey FTA, Article 7.2.1 of Korea-Vietnam FTA, Article 3.2.1 of Korea-EU FTA, Article 6.4.1 of Korea-Singapore FTA, Article 7.2.1 of Korea-China FTA. It is notable that Article 7.2.1 of Korea-Colombia FTA specifies the timeline for the consultation. The FTA requires the consultation to be held within 30 days after the initiation of the investigation.

### *c) Grace Period and Maximum Number of Applications*

A Party is not allowed to apply a bilateral safeguard measure on the good which has previously been subject to such a measure for a specified period of time. In particular, Article 2.23(j) of Korea-India CEPA and Article 7.2.6 of Korea-China FTA require the grace period to be at least two years. This grace period or non-application rule reflects Article 7.5 of the WTO Agreement on Safeguards.

Parties may apply a bilateral safeguard measure to a product only once. In other words, Parties are not allowed to apply a bilateral safeguard measure more than once against the same good. The trade remedies rules restricting the frequency of safeguard applications are Article 6.3.5 of Korea-Australia FTA, Article 7.2.5 of Korea-Colombia FTA, Article 7.3.3 of Korea-New Zealand FTA and Article 4.2.7 of Korea-Turkey FTA.

### *2.2.2. Exclusion from Global Safeguard Measures<sup>15</sup>*

Besides the bilateral safeguard measures, Parties may apply the global safeguard measures when it is determined that the increased imports caused or threatened to cause a serious injury to the domestic industry that produces like or directly competitive product of the imports. More important, Article 2.2 of the WTO Agreement on Safeguards requires the global safeguard measures to be applied to a product being imported irrespective of its source.

Despite the MFN principle of application, some FTAs allow to exclude the imports originating in the other Party from the application of a global safeguard measure, provided that certain conditions are met. For example, Article 10.5.1 of Korea-US FTA provides that a Party taking a global safeguard measure may exclude imports of an originating good of the other Party if such imports are not a substantial cause of serious injury or threat thereof.

<sup>15</sup> While bilateral safeguard measures refer to the measures to be applied only to the imports from other FTA Party under the FTAs, global safeguard measures refer to the safeguard measures to be applied to a product being imported from any country under the WTO Agreement on Safeguards.

Similar rules are found in other FTAs which are Article 2.27 of Korea-India CEPA, Article 7.1.1 of Korea-Canada FTA, Article 7.5.1 of Korea-Colombia FTA, Article 8.1.2 of Korea-Peru FTA and Article 7.5.1 of Korea-Vietnam FTA. However, Article 6.5 of Korea-Australia FTA permits a Party to exclude the imports from the other Party from a global safeguard measure without any condition such as being a substantial cause of serious injury.

### 2.3. Subsidies

Unlike most of Korea's FTAs, Korea-EU FTA contains disciplines on subsidies in the competition Chapter. In particular, the Parties shall endeavor to remedy or remove through the application of their competition laws or otherwise, distortions of competition caused by subsidies in so far as they affect international trade, and to prevent the occurrence of such situations. Article 11.11 of Korea-EU FTA stipulates that certain types of subsidies shall be deemed to be specific under the conditions of Article 2 of the WTO SCM Agreement. More important, the subsidies shall be prohibited for the purpose of Korea-EU FTA in so far as they adversely affect international trade of the Parties.

Korea-EU FTA illustrates the examples of prohibited subsidies in Article 11.11(a). They include subsidies granted under any legal arrangement whereby a government or any public body is responsible for covering debts or liabilities or certain enterprises within the meaning of Article 2.1 of the SCM Agreement. Moreover, Article 11.1(b) of Korea-EU FTA clarifies that there is not any limitation, in law or in fact, as to the amount of those debts and liabilities or the duration of such responsibility.

## 3. Assessment of the Trade Remedies Rules

### 3.1. Anti-dumping and Countervailing Duty

A number of Korea's FTAs contain several provisions in the anti-dumping and countervailing duty rules, which could be deemed to be WTO-plus.<sup>16</sup> First, some FTAs require the importing FTA Party to notify the receipt of the application for investigations concerning the products originating in the other Party prior to their initiation decisions. In addition, under certain FTAs, the importing Party shall afford a consultation opportunity to the exporting Party before the investigating authorities make a decision to initiate an anti-dumping or countervailing duty investigation.

Concerning the notification obligations, since neither the WTO Anti-Dumping Agreement nor the Subsidies Agreement contain the obligations, the notification requirements are deemed to be WTO-plus. Since the Anti-Dumping Agreement does not provide the consultation requirement, the requirement could be WTO-plus. On the other hand, since Article 13.1 of the Subsidies Agreement stipulates clearly that the exporting Members shall be invited for consultations, the consultation provision concerning the countervailing duty investigation is not WTO-plus. Rather, it reflects just the Subsidies Agreement in the FTAs.

Second, the mandatory lesser duty rule is another WTO-plus provision. Both the Anti-Dumping Agreement and the Subsidies Agreement provide the lesser duty rule, but they are

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<sup>16</sup> The definition of "WTO-plus" may vary with trade experts. We are of the view that when an FTA contains provisions which are not included in any WTO Agreement, the new provisions could be deemed to be WTO-plus. In addition, when the FTA negotiations result in provisions clarifying or improving the existing WTO Agreements, we consider the provisions to be WTO-plus.

not mandatory, but optional. By contrast, some Korea's FTAs require the FTA Parties to apply the lesser duty rule when they decide the amount of anti-dumping duty and/or countervailing duty. When an FTA Party shall apply the lesser duty rule, the exporters from other Party are expected to enjoy the benefit from the anti-dumping duty or countervailing duty which could be lesser than the dumping margin or subsidy margin found.

Third, certain FTAs require the investigating authorities to examine whether or not the proposed amount of anti-dumping and countervailing duty is in the public interest. Since neither the Anti-Dumping Agreement nor the Subsidies Agreement contains the public interest clause, the inclusion of the clause in FTAs is deemed to be WTO-plus. Moreover, when the investigating authorities decide to apply the lower anti-dumping duty or countervailing duty than the proposed amount in the public interest, taking into account the effects on a variety of interested parties, the decision will bring the substantial benefit to the exporters under investigation.

Another WTO-plus provision is the provision limiting the initiation of anti-dumping duty investigations. Korea-EU FTA stipulates that if anti-dumping measures have been terminated in the previous twelve months as a result of a review, the investigation shall not proceed unless the pre-initiation examination indicates that the circumstances have changed. Korea-India CEPA also provides that when the investigating authorities determine that the anti-dumping measures against imports from the other Party be terminated as a result of review under Articles 11.2 and 11.3 of the Anti-Dumping Agreement, the importing Party shall not initiate an investigation on the same goods during one year after the termination of the anti-dumping duty. Since the Anti-Dumping Agreement does not contain any rule limiting the initiation of anti-dumping investigation, the trade remedy rules in Korea-EU FTA and Korea-India CEPA could be deemed WTO-plus.

Finally, the explicit prohibition of zeroing practices could be another WTO-plus provision. Some countries, primarily the United States, have used the zeroing methodology in calculation of the dumping margin. Up to date, panels and the Appellate Body ruled in a number of WTO disputes that the zeroing practices are in violation of the Anti-Dumping Agreement. Despite a series of rulings against the zeroing practices, when a WTO member calculates the margin of dumping using the zeroing methodology, it will cause adverse effects on the exporters in question. Thus, it is a wise step to prohibit explicitly the zeroing practices in FTAs because it will prevent FTA Parties from conducting those practices. The preemptive step is expected to contribute the international trade by reducing the abusive use of the anti-dumping regulations. It is noted that, rather than prohibiting explicitly the zeroing methodology, some FTAs such as Korea-China FTA state simply that the Parties agree to follow the existing practices of calculating the dumping margin whose calculation does not base on the zeroing methodology in practice. This approach is also expected to bring a benefit to the exporters because it preempts the room for the abusive use of the Anti-Dumping Agreement.

## 3.2. Safeguard Measures

### 3.2.1. *Global Safeguard Exclusion and WTO Cases*

The exclusion of imports originating in FTA Parties from global safeguard measures could be in violation of WTO Agreement on Safeguards. Pursuant to the WTO Safeguard Agreement, when it is determined that all conditions for applying a global safeguard measure are met, the global safeguard measure shall be applied to a product being imported irrespective of its source. Despite the MFN principle of application, some Korea's FTAs allow not to make imports from the other Party be subject to global safeguard measures, provided

that such imports are not a substantial cause of serious injury or threat thereof. The global safeguard exclusion rules are Article 7.1.1 of Korea-Canada FTA, Article 7.5.1 of Korea-Colombia FTA, Article 2.27 of Korea-India CEPA, Article 10.5.1 of Korea-US FTA and Article 7.5.1 of Korea-Vietnam FTA.

Certain Korean steel exporters had enjoyed the benefit of being excluded from the global safeguard measures under Article 7.1.1 of Korea-Canada FTA. After the Canadian International Trade Tribunal (CITT) initiated a safeguard investigation on seven categories of steel imports in October 2018, it made final affirmative safeguard determinations on two categories of steel products, heavy plate and stainless steel wire in April 2019. Furthermore, pursuant to the exclusion provision of Korea-Canada FTA, CITT examined whether the subject steel imports from Korea were a principal cause of threat of serious injury to the Canadian domestic industry.<sup>17</sup> It concluded that both heavy plate and stainless steel wire from Korea were not a principal cause of threat of serious injury. As a result, CITT decided to exclude Korean imports from the application of the global safeguard measures. Details of the CITT determinations are available from *Safeguard Inquiry into the Importation of Certain Steel Goods* whose inquiry number is GC-2018-001.

However, there are a number of WTO cases which ruled on the global safeguard exclusion provisions under certain FTAs. One of key issues was whether the practices of excluding imports from FTA Parties from the application of global safeguard measures are consistent with WTO Agreement on Safeguards. The Appellate Body of *Argentina-Footwear*, *US-Wheat Gluten* and *US-Line Pipe* ruled that once the imports from other Party has been subject to an investigation which led to the imposition of safeguard measures, exclusion of imports from the other FTA Party is in violation of the WTO Agreement on Safeguards.<sup>18</sup> Therefore, Korea needs to apply the global safeguard exclusion provision in a WTO-consistent manner, taking into account the WTO cases. Mavroidis (2016) and Van den Bossche and Zdouk (2017) discuss the WTO dispute cases comprehensively.

### 3.2.2. Criteria for a Substantial Cause

One of limitations of the safeguard provisions is the lack of appropriate criteria for determination of a substantial cause. Only in the event of not being a substantial cause of serious injury or threat thereof, the importing country may exempt the imports from FTA Parties from the application of global safeguard measures. While Article 10.6 of Korea-US FTA defines the substantial cause as a cause that is important and not less than any other cause, most FTAs fail to define the term of “substantial cause”. However, the definition is deemed not to offer appropriate criteria for the “a substantial cause” determination. In practice, the importing country could exercise a wide discretion in their determinations, which may in turn undermine the benefits of FTAs. Thus, to overcome the inherent problem of the exclusion provision, it is necessary to explore appropriate criteria with a hope of materializing the benefits of FTAs.

Recent U.S. cases highlight the need for exploring reasonable and practical criteria. In 2017,

<sup>17</sup> CITT also attempted to examine whether steel imports from other FTA members such as Panama, Peru, Colombia and Honduras were a principal cause of threat of injury to the Canadian domestic industry, but it found that there was no import of subject steel products from those four countries.

<sup>18</sup> When the investigating authorities investigate the imports from FTA Parties as well as from non-FTA Parties and make a definitive affirmative determination, it is reasonable for the importing country to make the imports of subject product from any source be subject to global safeguard measures. Thus, this approach is called as “parallelism”.

the United States International Trade Commission (USITC) instituted safeguard investigations on two products, crystalline silicon photovoltaic cells (CSPV) and large residential washers. In November 2017, USITC made a final affirmative determination that CSPV imports had caused serious injury or threat thereof to the U.S. domestic industry. Also it recommended a tariff-rate quota as a remedy to the President.<sup>19</sup> Pursuant to Article 10.5.1 of Korea-US FTA, USITC examined further whether or not the subject products from Korea are a substantial cause of serious injury or threat thereof. Since finding that imports of CSPV products from Korea are a substantial cause of threat of serious, USITC recommended that the safeguard measure shall be applied to the Korean CSPV imports. USITC determinations are described in detail in *Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Product)*, 82 FR 55394 which was published on November 21, 2017. Finally, in January 2018, the U.S. President accepted the USITC's recommendation of a tariff-rate quota which is also applied to imports from Korea.<sup>20</sup>

In contrast to CSPV case, the washer safeguard case followed a slightly different course. In December 2017, USITC made another final affirmative determination on imports of large residential washers. Later USITC examined whether or not imports from Korea are a substantial cause of serious injury or threat thereof. After USITC determined that Korean products are not a substantial cause of serious injury, it recommended the U.S. President to exclude Korean washer imports from the global safeguard measure.<sup>21</sup> However, the President determined to apply the global safeguard measure to Korean washers.<sup>22</sup>

At first glance, the President's rejection of USITC recommendation concerning Korean washers could appear to be in violation of Korea-US FTA. However, since the global safeguard exclusion provision of Korea-US FTA stipulates that a Party *may* exclude imports from the other Party from a global safeguard if such imports are not a substantial cause of serious injury or threat thereof, U.S. is *not* required to exclude Korean imports from a global safeguard measure even when the condition is satisfied. In other words, it is difficult to find any compelling ground to claim that the U.S. President's decision not to exclude Korean washer imports could violate Korea-US FTA.

### 3.3. Subsidies

The subsidy provisions of the Korea-EU FTA could be in conflict with the SCM Agreement. While the SCM Agreement specifies two types of prohibited subsidies,<sup>23</sup> Article 11.11(a) of Korea-EU FTA provides additional prohibited subsidies which are supporting debts or liabilities.

<sup>19</sup> Under the U.S. legislation, the U.S. President may accept, reject or modify the USITC recommendations.

<sup>20</sup> Proclamation 9693 of January 23, 2018: To Facilitate Positive Adjustment to Competition from Imports of Certain Crystalline Silicon Photovoltaic Cells (Whether or Not Partially or Fully Assembled into Other Products) and for Other Purposes, 83 FR 3541 (January 25, 2018).

<sup>21</sup> *Large Residential Washers*, 82 FR 58026 (December 8, 2017). USITC also recommended non-application of the safeguard measure to imports from Canada, Mexico, Australia, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Nicaragua, Panama, Peru, Singapore, the beneficiary countries under the Caribbean Basin Economics Recovery Act.

<sup>22</sup> *Proclamation 9694 of January 23, 2018: To Facilitate Positive Adjustment to Competition Imports of Large Residential Washers*, 83 FR 3553 (January 25, 2018). The U.S. President determined to exclude only Canadian washers from the safeguard measure.

<sup>23</sup> The prohibited subsidies are export subsidies and import substitution subsidies.

There are some problems with the new prohibited subsidies. First, the new prohibited subsidies appear not to satisfy the conditions for prohibited subsidies within the meaning of Article 3.1 of the SCM Agreement. Second, the additional restrictions or conditions could limit Parties' rights under the SCM Agreement. Thus, the additional prohibited subsidies under the Korea-EU FTA could be deemed to be "WTO-minus".

The Korea-EU FTA's subsidy provisions also fail to define a number of important conditions for being a prohibited subsidy. The conditions include "affect international trade" in Article 11.9 and "adversely affect international trade of the Parties" in Article 11.11. Moreover, the criteria for determining whether or the conditions are met could be left to the Parties' discretion. Therefore, there is a need for Parties to clarify the critical terms for the effective implementation of the FTA.

## 4. Policy Implications

The Korean government has continuously participated in arduous FTA negotiations with an aim of enjoying a variety of benefits under the deeper economic integration. To the aim, it is essential to implement the FTAs as effectively as possible in a manner to fully utilize the benefits. Thus, after we figure out certain trade remedies provisions which are needed to be improved or clarified, we would like to explore policies which could help the effective implementation of the trade remedies provisions of Korea's FTAs.

We may draw policy implications in various aspects. First, based on the experiences over recent years, we are well aware that there could be some shortcomings in the application of the global safeguard exclusion rule in FTAs such as Korea-US FTA. Thus, we suggest policies for improving the global safeguard exclusion provision with a view to helping FTA Parties to enjoy the benefits expected to the full extent. In addition, we would make policy recommendations to improve the application of notification and consultation provisions.

Second, in the event that any Korea's FTA Party amends its trade remedy legislations, we may encounter a situation where the FTA Party could have competing views on the application of the FTA trade remedies rules under the new circumstances. To resolve the potential conflict on the interpretation of certain trade remedies provisions, there is a need for a useful guidance. To the aim, we make policy recommendations by offering practical policy direction for the appropriate action. In particular, when a potential conflict is expected to result from the amendment of any FTA Party's national trade remedies regulations, we make policy suggestions which could help to clarify the application of trade remedies provisions at issue. For example, our analysis could provide a useful policy guidance for the Korean government in response to the recent amendment of the lesser duty rule in the EU anti-dumping and countervailing duty regulations.

### 4.1. Exclusion from Global Safeguard Measures

A number of Korea's FTAs including Korea-US FTA and Korea-Canada FTA allow a Party to exclude the imports originating in the other Party from the application of the global safeguard measures. The exclusion is not automatic, but a Party may exclude imports of an originating good of the other Party if such imports are not a substantial cause of serious injury or threat thereof. There are two policy recommendations for the global safeguard exclusion rule.

First, the recent cases highlight a need for the mandatory global safeguard exclusion rule.

During the period of 2017 to 2019, Canada and U.S. had conducted global safeguard investigations and made determinations. After initiating a safeguard investigation on seven categories of steel imports in October 2018, the Canadian International Trade Tribunal (CITT) made final affirmative determinations on two categories of steel products, heavy plate and stainless steel wire in April 2019. Furthermore, pursuant to Article 7.1.1 of Korea-Canada FTA, CITT examined whether the subject steel imports from Korea were a principal cause of threat of serious injury to the Canadian domestic industry.<sup>24</sup> It concluded that both heavy plate and stainless steel wire from Korea were not a principal cause of threat of serious injury. As a result, CITT decided to exclude Korean imports from the application of the global safeguard measures.

There are some issues to be explored. First, it is desirable to make the global safeguard exclusion rule mandatory once the conditions are satisfied. All global safeguard exclusion clauses in Korea's FTAs provide the term of "may". Consequently the Korean national safeguard laws stipulate the term of "may" rather than "shall" or "should" in Article 22 *bis* 4 of Unfair Trade Practices Investigation Act and Article 24 *bis* 2 of its Enforcement Decree. By contrast, Article 802.1 of NAFTA provides that any Party *shall* exclude imports of a good from each other Party from the global safeguard measure unless the two conditions, a substantial share and important contribution, are not met. Therefore, to help Korean exporters enjoy the potential benefits of FTAs, Korea may consult with its Parties about the possibility of making the global safeguard exclusion rules be mandatory.

Second, it would be better for Korea and its Parties to clarify and improve the conditions for the global safeguard exclusion. Most of Korea's FTAs define "a substantial cause" as a cause that is important and not less than any other cause. This ambiguous definition will allow the importing country to exercise wide discretion which in turn could lead to more uncertainty in the implementation of FTAs. As we witnessed in the recent U.S. safeguard decision on washers, Korea needs to discuss with its FTA Parties about the practical criteria for determining whether or not the imports from the other Party are a substantial cause of serious injury or threat thereof.

Therefore, recognizing the inherent limitations of non-mandatory nature of the exclusion provision, Korea and its Parties need to have opportunities to consult about the issue of exploring appropriate criteria for determination of a substantial cause. WTO cases and safeguard determinations by FTA Parties could provide a useful guidance for the criteria. The Appellate Body of *US-Tyres from China* interpreted that the contribution made by rapidly increasing imports to the material injury of the domestic industry must be important or notable. Article 802.2(b) of NAFTA stipulates that imports from a Party normally shall not be deemed to "contribute importantly" to serious injury or threat thereof if the growth rate of imports from a Party is appreciably lower than the growth rate of total imports from all sources. Article 802.2 of NAFTA states that the important contribution is one of two requirements for the global safeguard exclusion.<sup>25</sup>

<sup>24</sup> CITT also attempted to examine whether steel imports from other FTA members such as Panama, Peru, Colombia and Honduras were a principal cause of threat of injury to the Canadian domestic industry, but it found that there was no import of subject steel products from those four countries.

<sup>25</sup> NAFTA requires two conditions for the exclusion of imports originating in a Party from a global safeguard measure: a substantial share of total imports and important contribution. It also specifies the criteria for the determination of whether or not imports from a Party, considered individually, account for a substantial share of total imports.

## 4.2. Notification and Consultation Rules

Additional notification and consultations provisions are expected to contribute to the more transparent anti-dumping and countervailing investigations. They, however, have some limitations. After receiving the anti-dumping and countervailing duty application, the investigating authorities shall make a decision of whether or not to initiate an investigation within a specified time.<sup>26</sup> Thus, there is a room to improve the notification provisions by specifying the timeframe for the investigating authorities to provide notification for the other Party. Moreover, there is a need to clarify what shall be included in the written notification.

Korea may request U.S. for sufficient time for consultation. Under the U.S. law, U.S. Department of Commerce (USDOC) is given only 20 calendar days to make a decision of whether or not to initiate anti-dumping duty or countervailing duty investigation. In practice, it is too tight for the exporters to prepare for the consultation opportunity. Also it is too short for USDOC to take into account the positions of exporters and/or the exporting country government into its initiation decision. Thus, to utilize the consultation opportunity effectively, it is important for Korea to request U.S. for practical or preferential timeframe concerning opportunity. For example, in the anti-dumping and countervailing duty cases against imports originating in Korea, USDOC is given more than 20 days, say 30 days, to make the initiation decision. It is noted that while the European Commission had often decided not to initiate the anti-dumping or countervailing duty investigation after consultation, it is extremely difficult to see the case where USDOC decided not to initiate the investigation. Even when the European Commission decided to initiate a countervailing duty investigation, the EU's longer initiation decision timeframe could be considered to contribute to the outcome of investigating the less number of subsidy programs than those claimed by the EU domestic industry.

## 4.3. Lesser Duty Rule

Korea and its Parties may exchange views on the application of lesser duty rule with an aim of exploring the appropriate methodology for calculating the injury margin. Since neither the WTO Anti-Dumping Agreement nor the Subsidies Agreement stipulates any established methodology for determination of the injury margin, they could explore the reasonable and practical methodology for calculation of the injury margin.

There are three major methods for calculating the injury margin. Sohn Ki-Youn (2005, 124) states that the methods are price undercutting method, representative cost plus profit method and non-dumped import price method. In practice, the European Commission determines the injury margin by comparing the weighted average import price of the exporting producers under investigation as established for the price undercutting calculation with the weighted average non-injurious price<sup>27</sup> of the like product sold by the EU producers on the EU market during the period of investigation. For the countervailing duty case, the European Commission calculates the injury margin in a similar manner to one applied for the anti-dumping duty case. Once a reasonable and practical methodology for the injury margin is developed, it will contribute to the effective implementation of FTAs.

<sup>26</sup> The investigating authorities in the United States, the European Union and China shall determine whether or not to initiate an investigation within 20 days, 45 days and 60 days after the receipt of an application, respectively.

<sup>27</sup> The non-injurious prices are established by adding to the cost of production a reasonable profit level.

Another issue concerning the lesser duty rule is the areas to which the mandatory lesser duty rule shall be applied. While some Korea's FTAs require the Parties to apply the rule to both anti-dumping and countervailing duty investigation, other FTAs require to apply it only to the anti-dumping duty investigation. Thus, we suggest that after the Korean government reviews the lesser duty rules in the existing Korea's FTAs, it considers whether to extend the rules to the countervailing duty investigations. In addition, when the Korean government decides to seek for a mandatory lesser duty rule at the future FTA negotiations, it shall clarify whether it will permit the rule just for anti-dumping duty investigations or for both anti-dumping and countervailing duty investigations.

Next, there is a need for Korea to review closely the EU's new lesser duty rule. In June 2018, the EU announced the amended anti-dumping regulation and anti-subsidy regulation. The EU regulation is Commission Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018, amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidized imports from countries not members of the European Union (OJ L 143, 7.6.2018, p. 1). The key feature of the amended regulations is the introduction of new eligibility criteria for the application of lesser duty rule regarding the provisional anti-dumping duty, price undertaking and definitive anti-dumping duty. Prior to the amendment, the European Commission was obliged to impose anti-duty duty at the amount less than the margin of dumping established if such lesser duty would be adequate to remove the injury to the EU industry. However, under the new EU anti-dumping regulation, the application of lesser duty rule is not mandatory. Only when the Commission finds that the distorted raw materials account for less than 17% of the cost of production of the product in question, it should examine whether the anti-dumping duty less than the dumping margin is sufficient to remove the injury to the EU industry. On the other hand, there is no substantive change in the lesser duty rule for a countervailing duty.

At first glance, it appears that Korean exports will be eligible for the mandatory lesser duty rule without any condition because of the lesser duty rule of Korea-EU FTA. Article 3.14 of Korea-EU FTA provides that when a Party should decide to impose an anti-dumping or countervailing duty, it should be less than the margin if such lesser duty would be adequate to remove the injury the domestic industry. As a result, Korean exporters will be at advantage in comparison with their competitors from the countries which do not have FTAs with the EU because the competitors shall be subject to the new eligibility test. However, we cannot exclude the possibility of disagreement between Korea and the EU on whether or not the EU's amended lesser duty rule could be applied to imports from Korea. It is possible for the EU to claim that Article 3.14 of Korea-EU FTA could cover the whole part of the EU's amended lesser duty rule, not limited to the first part of its amended lesser duty rule, which is the same as the old lesser duty rule. One related issue could be whether Korea-EU FTA shall be applied only to Parties' national laws which were in effect at the conclusion of FTA negotiations or those laws at the time of its entry or whether the FTA shall be applied to the national laws as amended. Therefore, Korea needs to establish its position on the scope of the new EU lesser duty rule, especially Articles 7.2(a) to (d) of EU's new anti-dumping Regulation, which could be applied to Korean imports under Korea-EU FTA. Cho Soo-Jung (2019, 123) argues that if the EU does not apply the lesser duty rule to the imports from Korea, it would be in violation of Korea-EU FTA.

## 5. Conclusion

We analyzed the trade remedies provisions in the Korea's FTAs. After examining key provisions, we analyzed whether or not they are consistent with the relevant WTO agreements. We also examined the WTO-plus characteristics of certain provisions. We found that while some of them are WTO-consistent, other provisions are WTO-plus. The WTO-plus rules are expected to contribute to the further trade liberalization by helping to clarify and improve the existing WTO Anti-Dumping Agreement, Subsidies Agreement and Agreement on Safeguards. The WTO-plus rules could also play as a catalyst for other countries' FTA trade remedies negotiations.

Most importantly, we make a number of practical policy recommendations with a view to helping the effective implementation of the FTA trade remedies provisions. First, we highlight the limitations of certain provisions under the Korea's FTAs. Then, we make suggestions for issues which Korea may address at the bilateral dialogues with its FTA partners. In particular, we touch upon the rule on exclusion from global safeguard measures, improved notification and consultation rules, and lesser duty rules.

There are additional issues which FTA Parties could exchange their views for the implementation and appropriate application of the FTA rules at the bilateral meetings of the Free Trade Commission and the Working Group on Trade Remedy Cooperation. The issues could also be put on the table of future FTA negotiations.<sup>28</sup> Future issues include the more specific sunset review rules for definitive anti-dumping duty and countervailing duty, introduction of mandatory lesser duty rule, rules on initiation decision procedures, and specific criteria for invoking bilateral safeguard measures.

When Korea sets its strategies for FTA trade remedies negotiations, it is vital to take into account the rulings by panels and the Appellate Body in the WTO disputes concerning Anti-Dumping Agreement, Subsidies Agreement and Agreement on Safeguards. In addition, after the FTAs enter into effect, Korea shall keep monitoring the WTO cases concerning trade remedies rules with a view to applying the FTA rules in the WTO-consistent manner. Regarding the application of parallelism, Piérola (2014, 282) notes that the WTO Appellate Body has not yet expressed its views on the question of whether a combined negative global safeguard determination on all excluded imports may be equivalent to a positive global safeguard determination on the non-excluded imports.

Finally, it is equally important for Korea to keep monitoring developments in the other Party's anti-dumping and countervailing duty legislations and practices. In the event of notable changes in the other Parties' laws and practices, Korean authorities shall establish positions and consult with them for an amicable resolution, if necessary. For example, Korea may request the U.S. for the fair, reasonable and transparent application of its adverse facts available (AFA) rule and the particular market situation rule for anti-dumping investigations against imports from Korea.<sup>29</sup>

<sup>28</sup> As of November, 30, 2020, Korea's FTAs under negotiations are China-Japan-Korea FTA, Korea-Cambodia FTA, Korea-Ecuador SECA, Korea-Malaysia FTA, Korea-MERCOSUR TA, Korea-Philippines FTA and Korea-Russia FTA.

<sup>29</sup> There has been growing concern about the U.S. investigating authorities' manner to apply these rules.

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