



TRADE LAW AND REGULATION IN KOREA

Edited by Seung Wha Chang and Won-Mog Choi



ELGAR KOREAN LAW

IN ASSOCIATION WITH THE LAW RESEARCH
INSTITUTE OF SEOUL NATIONAL UNIVERSITY

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Seung Wha Chang

Professor of Law, Seoul National University, Korea

and

Won-Mog Choi

Professor of Law, Ewha Womans University, Korea



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Contributors

Seung Wha Chang

Professor of Law at Seoul National University School of Law
LL.M., S.J.D. (Harvard Law School)
LL.B. (Seoul National University)

Won-Mog Choi

Professor of Law at Ewha Womans University School of Law
LL.M., S.J.D. (Georgetown University Law Center)
LL.B., M.P.A. (Seoul National University)

Deok-Young Park

Professor of Law at Yonsei Law School
LL.B., LL.M., Ph.D. (Yonsei University)
Ph.D. Coursework (Edinburgh University)
LL.M. (Cambridge University)

Seung-Hwan Choi

Professor of Law at Kyung Hee University School of Law
B.A., LL.M., S.J.D. (Seoul National University)
LL.M. (New York University)

Dukgeun Ahn

Professor of International Trade Law and Policy at Graduate School of
International Studies, Seoul National University
J.D. (Michigan Law School)
Ph.D. in Economics (University of Michigan)
B.A. in International Economics (Seoul National University)

Joon-Gi Kim

Professor of Law at Yonsei University School of Law
J.D. (Georgetown University Law Center)
M.A. in International Studies (Yonsei University)
B.A. (Columbia University)

Youngjin Jung

Attorney at Kim & Jang (Seoul)
LL.M., J.S.D. (Yale Law School)
LL.B., LL.M. (Seoul National University)

Jaemin Lee

Professor of Law at Hanyang University School of Law
J.D. (Boston College Law School)
LL.B., LL.M., Ph.D. (Seoul National University)
LL.M. (Georgetown University Law Center)

Jong Bum Kim

Professor of Trade Law at Graduate School of International Studies of
Yonsei University
J.D. (Duke University School of Law)
Ph.D. in Economics (University of California, Riverside)
M.Phil. in Economics (University of Oxford)
B.A. in Economics (Columbia University)

Preface: Trade laws and regulations in Korea – Introduction and overview

Seung Wha Chang

In 1967, Korea became a signatory to the General Agreement on Tariffs and Trade (GATT), which paved the way, for the first time, for Korea to formally live with international or multilateral rules of world economic relations. It is well known that, in the 1960s–1980s, the Korean government put heavy emphasis on export-driven economic policies. During that era Korea enjoyed developing country status and, under the relatively loose trade rules of the GATT for such countries, Korea was able to achieve substantial economic success. For instance, the Korean government protected key domestic industries from foreign competition by establishing tariffs or non-tariff barriers. In addition, Korean export industries benefited from direct or indirect subsidies, and became worldwide leaders in several key sectors, such as semiconductors, shipbuilding etc. Korea is currently in transition from a developing country to a developed country.

In light of its small domestic market and high level of exposure to the international economy, trade is the most important aspect of the Korean economy. In consequence, it is not surprising that Korea was an active and enthusiastic negotiator at the Uruguay Round and has continued to be actively involved in the post-Uruguay Round negotiations. Although the Korean government has not been particularly forward-thinking with regard to the country's position in the agricultural industry, its basic trade position is that Korea must work within the internationally prevailing trade norms. Indeed, Korea should avoid becoming a country that impedes further progress of multilateral efforts to liberalize world trade.

Given the foregoing, Korean trade laws and regulations have changed in many different ways over the last few decades. Naturally, the trade laws and regulations in the past did not meet international standards in many respects. However, since the birth of the World Trade Organization (WTO), the Korean government has taken a positive stance in trade policy, and virtually all the major trade-related legislation was amended or newly enacted to comply with the WTO obligations. One of the principal

aims of this book is to show how Korea has implemented its WTO obligations under the domestic legal and regulatory regime.

Under the Korean Constitution, the Korean President has the authority to negotiate and sign international treaties. To be legally effective in Korea, important international treaties must be ratified by the Korean National Assembly. Interestingly, Article 6.1 of the Korean Constitution provides that “treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.” Academic commentators are divided as to how the above provision should be interpreted. This is a question of the so-called “direct applicability” of international treaties. A related question is whether and to what extent international treaty obligations prevail over domestic laws when a conflict arises between them. A few years ago, the Supreme Court of Korea invalidated a municipal ordinance, while pointing out its inconsistency with relevant WTO obligations. This Supreme Court’s judgment was based on Article 6.1 of the Constitution. It triggered, rather than settled, more heated debate over the WTO Agreement’s legal status in the domestic legal system. Some scholars argued that this judgment confirmed the direct applicability of the WTO Agreement and its supremacy over domestic laws in the Korean legal system. Other scholars attempted to minimize the impact of this judgment on the WTO Agreement’s legal status in Korea. According to this group of scholars, this Supreme Court’s judgment is applicable to this type of case only, i.e., only when the validity of a municipal ordinance is called into question in circumstances where it conflicts with relevant WTO Agreement provisions. When a domestic law at the national level is inconsistent with provisions of the WTO Agreement, they argue that the former might prevail, and consequently the WTO-inconsistent domestic legislation is still valid under the Korean legal system, although the government may not avoid international discipline by the WTO for its failure to implement WTO obligations.

The latter position was recently upheld by the Supreme Court in a case where an importer challenged the legitimacy of the Korean government’s imposition of an anti-dumping duty on imported goods while alleging that it was inconsistent with the relevant provisions of the WTO Anti-dumping Agreement. The Supreme Court held that such provisions of the WTO Agreement cannot be directly applicable, and inconsistencies of the government measure at issue with the relevant WTO Agreement alone cannot invalidate that measure under the domestic legal system. In the view of the Supreme Court, whether a government measure is inconsistent with the WTO Agreement should be dealt with at the WTO dispute settlement forum. Interestingly, in this recent case, the Supreme Court did not make

any comment on the relationship between its recent decision and the past one.

Regardless of the legal status of the provisions of the WTO Agreement under the domestic legal system, around the time of Korea's ratification of the WTO Agreement in 1994, the Korean government decided to implement WTO obligations through its domestic legislation. In other words, the Korean government did not naively expect all provisions of the WTO Agreement *per se* to be directly applicable and administrable in the domestic legal system without any implementing law. Such legislative efforts took the forms of both *amendments* to the then existing trade-related laws and regulations and *enactments* of new legislation.

First of all, the Korean government enacted the "Special Act on the Implementation of the Agreement Establishing the World Trade Organization," which became effective as of January 3, 1995. This Act was designed to declare Korea's commitment to its WTO obligations (Article 3.1), while preserving the rights of Korea under the WTO Agreement and minimizing any adverse impact on the Korean economy as a result of implementing WTO obligations (Article 1). Other major trade laws included the "Foreign Trade Act," "Customs Act," "Act on the Investigation of Unfair International Trade Practices and Remedy against Injury to Industry (Trade Remedy Act)," "Foreign Investment Promotion Act," and "Foreign Exchange Transactions Act."

The Foreign Trade Act was first enacted in 1986 and, since then, has been amended several times. The December 1994 amendment to the Foreign Trade Act was for the purpose of implementing WTO obligations and reflecting the then recently changed world trade order. The Foreign Trade Act is the basic statute regarding trade and is applicable to all types of trade activities. This Act provides for general policy directions and principles, and empowers the establishment of subordinate regulations, i.e., enforcement decrees and rules, to deal with specific matters. The subordinate regulations include Presidential Decrees, Ordinances of Ministries, and Public Notices etc. To reflect prevailing international standards and comply with WTO obligations, the Foreign Trade Act adopts a minimal approach to the regulation of export and import activities. For instance, an export/import approval system was, in principle, repealed. Under exceptional circumstances (e.g., the protection of national security, environment, or public health), however, the Foreign Trade Act empowers the government to restrict export/import activities (Article 5). In addition, the Foreign Trade Act provides legal grounds for imposing import relief against a sudden increase of imports (e.g., safeguard) and protecting against exports/imports that infringe intellectual property rights or misrepresent the origins of goods (Articles 39 through 42). The Foreign Trade

Act also directly regulates traders when it is necessary to secure compliance with international law or when relevant trading activities may violate the laws of Korea or its trading partners (Article 46).

The Customs Act was originally enacted in 1949 and has been amended a number of times between then and December 2000. It regulates trade through various types of tariffs or duties of any kind. The Tariff Schedule constitutes an integral part of the Customs Act. The subordinate regulations include the Enforcement Decree, the Ministerial Regulation for the Customs Act, and the Regulations for Conceded Tariffs pursuant to the WTO Agreement. Most importantly, the Customs Act contains national rules for implementing the WTO Anti-dumping Agreement (Articles 51 through 56) and the Agreement on Subsidies and Countervailing Measures (Articles 57 through 62).

The Trade Remedy Act provides detailed rules for administering safeguard measures in accordance with the WTO Safeguard Agreement. It sets forth substantive conditions for the imposition of safeguard measures and related procedural requirements (Articles 15 through 22-6). It also contains detailed rules for regulating “unfair trading practices,” which include (i) trading activities infringing intellectual property rights; (ii) misrepresentation of the origins of goods; and (iii) trading activities impeding export/import-related orders (Articles 4 through 14-3). In addition, the Trade Remedy Act authorizes the Korea Trade Commission (KTC) to investigate whether laws, policies and practices of foreign countries constitute violations of international trade rules and thereby have injured domestic industries (Article 25-2). The Trade Remedy Act also sets out the institutional framework for the KTC (Articles 27 through 35).

Which governmental agencies are in charge of trade matters in Korea? The External Economy Committee advises the President on trade matters and suggests how to shape general trade policy. The Ministerial Meeting for Foreign Economic Affairs (MMFEA) is composed of ministers in charge of trade-related matters and is a decision-making body for important trade policies, e.g., whether to negotiate a Free Trade Agreement (FTA). A key ministry, which is in charge of trade matters, is the Ministry of Foreign Affairs and Trade (MOFAT). The Office of the Minister for Trade (OMT) was established as a sub-unit under the MOFAT to comprehensively formulate and conduct foreign policies on trade, trade negotiations and foreign economic affairs. Therefore, the OMT is the most relevant government body managing trade negotiations and disputes.

The KTC is another important trade agency. It operates under the Ministry of Knowledge and Trade and, as described above, is a quasi-judicial body undertaking investigations and making determinations on the extent of injury caused to Korean industries by imports. Most

importantly, the KTC plays a key role in anti-dumping, countervailing, and safeguard investigation/determination procedures, although it shares to a certain extent its authority with the Ministry of Strategy and Finance (MOSF). It is also authorized to investigate unfair trade practices such as infringements of intellectual property rights and violations of rules of origin. Basically, the functions, jurisdiction, and composition of the KTC are set forth under the Trade Remedy Act. It is composed of one chairperson and eight commissioners. However, only one commissioner is a standing member, and in consequence most of the day-to-day functions are conducted by the Office of Investigation, which is affiliated to the MKE.

With this background of the basic trade laws and regulations in Korea, the remaining chapters are organized as follows:

The first two chapters address the very basic trade issues arising at the border of Korea's customs territory. The first chapter by **Deok-Young Park** covers the import side of border measures. He deals with institutional arrangements on customs, customs duties, customs valuation, customs clearance systems, and rules of origin. After sketching the Korean Customs Act, Professor Park describes how Korea Customs Service, an administering body, operates for import-related systems and procedures, and then shows the details of the import-related procedures.

Seung-Hwan Choi's chapter covers laws and regulations for export control on strategic items. He shows how Korea has strengthened its legal basis for controlling "dual-use" items that may jeopardize national, regional, and international peace and security. South Korea's export control regulations on strategic items include the Foreign Trade Act, the Enforcement Decree of Foreign Trade Act, and the Combined Public Notice. Professor Choi demonstrates how South Korea set forth adequate legal and administrative systems to implement the United Nations Security Council Resolution 1540 adopted in April 2004, and to comply with the multilateral export control regimes, including the Wassenaar Arrangement on Export Controls for Conventional Arms and Dual Use Goods and Technologies (WA). With a view to reflecting properly the changes in international export control rules, South Korea made significant revisions to its export control regulations on strategic items in 2006 and 2007, including the introduction of a brokering license system, and strengthened penalties for the violation of laws and regulations on export controls.

Chapters 3 and 4 address Korea's laws on trade (import) remedies. **Won-Mog Choi** covers anti-dumping and countervailing remedies. The principal laws governing the trade remedy system are the Trade Remedy Act and the Customs Act. He introduces procedural and substantive rules concerning the investigation of dumping/subsidies and injuries to

domestic industries caused by such unfair trade practices. The organizational structure and function of the KTC are also addressed. This chapter also provides descriptive reviews and legal analysis of petitions for the investigation, comparison between the normal value and export price, price undertakings, imposition of trade remedy measures, and their review.

Another author, **Dukgeun Ahn**, deals with safeguard measures. He observes that, in the early years of the KTC, Korea frequently relied on safeguard measures, although their use has substantially declined recently. Professor Ahn describes why and how the KTC has constantly amended the safeguard systems that deal with China's accession to the WTO, FTAs and even domestic trade adjustment assistance programs. These elements include some interesting features distinctively different from the WTO system.

The chapter by **Joon-Gi Kim** (Chapter 5) covers trade in services. With the acceleration of liberalization and deregulation, the importance of the services sector in the Korean economy has reached a critical turning point. Korea's continued economic growth and ability to join advanced economies depends largely on whether it can unlock sufficient added value from the free flow of international trade in services. From this perspective, he provides an overview of the legal and regulatory framework that applies to trade in services in Korea. He reviews the relevant laws and leading cases to assess how Korea is responding to the transition from a manufacturing-based economy to one that is service-oriented. Recent developments in specific service sectors, such as the financial and banking sector, transportation sector, and legal services, are also covered within the context of multilateral and bilateral trade negotiations.

The next two chapters cover two areas of policy that have a linkage with and impact on trade: competition and investment policies. Competition law or antitrust law, once considered to be the sole domain of domestic law, has gone global. It now reaches beyond the realm of domestic jurisdiction. **Youngjin Jung** proves in Chapter 6 that Korean competition law is no exception. He demonstrates that the Korea Fair Trade Commission (KFTC) routinely stretches the Monopoly Regulation and Fair Trade Act (MRFTA) overseas to pursue and regulate anticompetitive behavior by foreign companies located in foreign jurisdictions. While analyzing actual cases, he highlights that the KFTC has been active in enforcing competition laws extraterritorially against cartels, in connection with mergers and acquisitions, and to redress abuse of market dominance. He also points out some of the downsides of the extraterritorial application of competition laws, e.g., how to accommodate US-style discovery processes.

The last, but not the least, trade-related area (foreign investment) is addressed in Chapter 7 by **Jaemin Lee**. This chapter provides an overview

of the Korean legal framework affecting foreign investment. It also shows how international investment agreements have an impact on the investment-related regime in Korea and how domestic laws and regulations implement international obligations. He suggests that, as Korea's recent experiences indicate, since both foreign investment and trade are indispensable for Korea's prosperity and survival as a global state, Korea needs to be apprised of the close relationship between foreign investment and trade, and coordinate domestic policies regulating them in a way that promotes Korea's interests on both fronts.

In Korea, at least, some of the most hotly debated areas in trade policy are regional trade agreements, e.g., FTAs. The final chapter by **Jong Bum Kim** examines Korea's domestic legal and institutional framework relevant to negotiating and concluding FTAs. It also describes the legal framework under which the government administers concluded FTAs. This chapter not only examines the procedural aspects of concluding an FTA but also considers dispute settlement and amendment issues that arise once FTAs come into effect. Professor Kim explores a critical question regarding whether the existing institutional frameworks under which the government negotiates and amends FTAs are adequate in effectively channeling the diverse interests of different domestic stakeholders. In particular, he focuses on trade in goods, including the administration of rules of origin and tariff reduction chapters of enacted FTAs. He also examines potential areas of dispute involving rules of origin under Korea's FTAs and the mechanisms available to resolve and settle such disputes under domestic implementation laws.

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1. Border measures: customs and import-related measures

Deok-Young Park

1. INTRODUCTION

As a Member of the World Trade Organization (WTO), Korea has tried to and is fully committed to facilitating trade, safeguarding public security and promoting a fair trade environment. Among Korea's relevant trade measures, the customs issue is thought to be one of the core trade-related measures because it directly affects the "trade," which means the activity of buying and selling or of exchanging goods or services between countries.¹ If measures taken by one country's customs office are discriminative or unjustifiable, the trading systems will suffer and trade-related disputes may arise.

Against this backdrop, it is meaningful to review one's customs clearance rules or other trade-related legislations or regulations. This chapter introduces the operation and application of the Customs Act of Korea (KCA) and other trade-related rules.² In addition, this chapter introduces the customs-regulating governmental body, the Korea Customs Service (KCS).

2. INTRODUCTION TO THE CUSTOMS ACT AND RELATING DECREES OF KOREA

Korea has one customs act and its regulations, as well as another special act to apply customs rules in the case of the WTO or Free Trade Agreement (FTA). The Decree of Customs Act provides specific matters on the implementation of trade-relating measures not stipulated in, but delegated by

¹ Oxford Advanced Dictionary.

² The English version of these acts is found in this website: <http://elaw.klri.re.kr>.

the Customs Act.³ Another special law provides the implementation of obligations by the FTAs.⁴

2.1. The Purpose and the Characteristics of the KCA

The purpose of this Act is to properly administer the imposition and collection of customs duties and the customs clearance of goods exported and imported, and to secure revenues from customs duties, with the aim of contributing to the development of the national economy.⁵ The KCA consists of General Provisions (Chapter I), Dutiable Value and Imposition and Collection of Customs Duties (Chapter II), Tariff Rates and Tariff Classification (Chapter III), Duty Reduction or Exemption, Refund and Installment Payment (Chapter IV), Right of Duty Payer and Procedures for Filing Objections (Chapter V) and so on. The Korea Customs Law has characteristics of administrative law, tax law, customs clearance law, and criminal law.

2.2. Interpretation of the KCA

According to Article 5, this Act shall be interpreted and applied in a manner that the property rights of any taxpayer are not unfairly infringed on in light of the equity of duty imposition and the basic objectives of the relevant provisions. Once an interpretation of this Act and the practices of the tariff administration are accepted by taxpayers without objection, any act performed or any calculation made according to such interpretation and practices shall be deemed justifiable and no customs duties shall be imposed retroactively according to any such new interpretation or new practices.

The KCA stipulates that each taxpayer shall fulfill his obligations in good faith and sincerity and each customs officer shall also perform his duties in such a manner.⁶ When Customs Officers do their jobs, there are limits on discretion. According to Article 7, each Customs Officer shall, in carrying out his discretion, strictly adhere to the limits generally deemed reasonable in light of the equality of duty imposition and the objectives of this Act.⁷

³ Enforcement Decree of the Customs Act (“EDCA”).

⁴ Act on Special Cases of the Customs Act for the Implementation of Free Trade Agreements (“ASCCAIFTA”).

⁵ Article 1 of the KCA.

⁶ Article 6 of the KCA.

⁷ Article 7 of the KCA.

2.3. Application of the KCA

Customs duties shall be levied on imported goods in accordance with Acts and related regulations in force at the time when an import declaration thereon is filed. With respect to imported goods falling under any of the following subparagraphs, customs duties shall be levied on them on a day falling under either of the following subparagraphs: 1. Goods falling under any subparagraph of Article 16:⁸ The day on which the fact accrues, and; 2. Foreign goods shipped into a bonded construction work site in accordance with Article 192:⁹ The day on which an import declaration is accepted before such foreign goods are used.¹⁰

3. TYPES OF TARIFF AND TARIFF RATES

3.1. Types of Tariffs in Korea¹¹

3.1.1. Statutory tariff

Statutory tariff consists of the basic tariff and the temporary tariff which are both regulated by the national legislation. Basic tariff is the basis of all tariffs, which is shown in the first line of rates of the duty column in the tariff schedule. Temporary tariff, which is shown in the second line of rates of the duty column in the tariff schedule, shall be temporarily applied instead of the basic tariff in case there are considerable economic reasons.

3.1.2. Conventional tariff

There are two types of conventional tariff; one is the WTO conventional tariff, and the other is conventional tariff for developing member countries of ESCAP (United Nations Economic and Social Commission for Asia and the Pacific). As a Member of WTO, Korea currently applies the WTO concession tariff rates to the products from the WTO Members.

⁸ It is about the time for determining dutiable goods.

⁹ It stipulates about import declaration prior to use.

¹⁰ Article 17 of the KCA.

¹¹ Article 49 (Tariff Rates)

The rates of customs duties levied on imported goods in accordance with the provisions of Article 14 shall be as follows:

1. The basic tariff rate;
2. The provisional tariff rates; and

3. Other tariff rates prescribed by the Presidential Decree or the Ordinance of the Ministry of Finance and Economy in accordance with the provisions of Articles 51 through 77.

Korea's trade statistics are classified using a 10-digit code based upon the "Harmonized Commodity Description and Coding System (HS)." The HS-based statistical nomenclature of Korea contains 10 589 10-digit commodity subdivisions as the "Harmonized System of Korea (HSK)." The first six of ten digits correspond to the HS, the rest are national subheadings established for the purposes of tariff and trade statistics. Specific rates of customs duties are stipulated in Appendix 1 of the KCA.

As for preferential tariff, it is applied for 57 items imported from the developing member countries of ESCAP. It is also applied for products imported from contracting parties of FTAs. In order to get information on the preferential tariff rate applicable to import of FTA goods, relevant persons or companies need to check out first whether the goods fall under the category of FTA preferential tariff before import declaration, when importing the goods from the country with which Korea concluded an FTA.

Notwithstanding the general purpose of an FTA, which is to eliminate the customs duty between the concluding countries, the applicable eliminations can differ depending on individual goods; immediate elimination of all customs duty, elimination of customs duty in stages within 5 years or 10 years, exclusion of application of elimination of customs duty, etc. For example, when importers are going to import some goods from Singapore into Korea, they need to be invited to confirm the stipulation in the Addenda of the Presidential Decree of the Act on the Special Cases of the Customs Act for the Implementation of FTA, from which they can find out the specific FTA customs rate applicable per item under the FTA between Korea and Singapore.

3.1.3. Elastic tariff

The Korean government implements an elastic tariff system with a view to effectively dealing with a rapidly changing economic situation at home and abroad through adjustment of tariff rates. There are two types of elastic tariff; one is for regulating foreign trade and the other is for stabilization of import goods by the Presidential Decree. When there is an urgent need to regulate foreign trade for the protection of domestic industry, anti-dumping duty, retaliatory foreign trade measures, emergency duty, countervailing duty and beneficial duty are levied on some designated imported goods as provided by the Presidential Decree.

In addition, when it is necessary to encourage or to discourage the import of particular goods to balance the supply and demand of such goods, customs duties may be imposed on a certain portion of the said goods imported, at the rate computed within the limit of the basic rate plus or minus 40 percent by the Presidential Decree. The details are as follows: