PART 6

TRADE POLICIES AND TRADE SYSTEM

22. Bilateral Trade Relations: The U. S. Trade Policies toward Korea

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BILATERAL TRADE RELATIONS: U. S. TRADE POLICES TOWARD KOREA

INTRODUCTION

U.S. protectionist measures against Korean exports and U.S. pressure on Korea to open up its economy increased phenomenally since 1982 when the U.S. trade deficit began to grow at an unprecedented rate. This paper examines the nature of the U.S. trade policies toward Korea. It focuses on the trade barriers in Korea alleged by the United States, as well as the trade barriers maintained by the United States itself alleged by the European Community (EC) and GATT. It also examines the mechanism of United States enforcing the opening-up of Korean economy. The last section gives concluding remarks.

The GATT safeguard rules for domestic industries experiencing temporary adjustment difficulties call for non-discriminatory application of restrictions and compensation. But the safeguard rules were almost completely replaced by trade restriction measures that are beyond the discipline of GATT, such as VRA, MFA, and "arbitrary" countervailing and anti-dumping duties.

In January 1985, four U.S. photo album makers charged Korean photo album exporters with dumping. The U.S. ITC determined the existence of injury on March 13. The album industry in Korea is the textbook example of perfect competition among extremely small-sized firms with no room for price discrimination. The U.S. Department of Commerce (DOC), however, made a preliminary judgement of 4.04% dumping in June. The U.S. album makers did not accept the result and refiled the dumping charge. The DOC, without investigating the allegations, accepted the makers' charge and, on October 23, 1985, decided on a 64.81 percent dumping margin uniformly applicable to all 34 small-sized Korean album exporters to the U.S. market. The amount of albums exported to the United States dropped from $26.6 million in 1985 to $0.3 million in 1986.[1]

[1]In United States, the number of anti-dumping duty orders in effect, as well as undertakings in effect by exporters through suspension agreement, increased from 85 cases as of June 1981 to 199 cases as of July 1989 (see GATT, 1991: 178). According to Bark (1991: 55), "an examination of the anti-dumping cases against Korean exports by the United States. . . shows that in general the investigation periods were very long,

The DOC orders the accused foreign exporters to supply staggering amounts of production and sales information (all recorded in computer tapes) in 45 days. But it can rely on the information supplied by U.S. petitioners, "deciding" that foreign countries or companies are not cooperating in supplying data necessary for the Department's anti-dumping or countervailing duty investigations. Indeed, Article IV of the GATT allows the punitive use of "the facts available" when exporters' replies are late or do not fully meet the standard of requirements set out by the importing Signatory, and allow the use of false information supplied by domestic companies.[2] In the Korean album case, there was an administrative review in 1989, but the same 64.81% dumping margin was maintained because the DOC still relied on the so-called "best" information available in calculating the constructed value. Korean album exporters have long since given up their struggle.

Both the GATT and U.S. laws require the existence of material injury as a prerequisite for imposing anti-dumping or countervailing duties. Neither of them, however, clearly distinguishes the injury caused by subsidies and that caused by shifts in comparative advantage.[3]

U.S. PRESSURES ON KOREA TO OPEN UP

Every year, the office of the U.S. Trade Representative (USTR) releases National Trade Estimate Report as required by the U.S. Omnibus Trade and Competitiveness Act of 1988. It reports other countries' barriers to, and distortions of, trade as perceived by the United States. Each year the EC also releases a report on the U.S. trade practices that impede EC and other countries' exports to the United States. The EC report on the U.S. trade barriers and unfair practices confirms that the United States is itself not free

anywhere from an average of 7 to 14 months. . . restrictions were also relatively long once anti-dumping duties were enforced, ranging from an average of two to three years. . . there was a wide disparity in the determination of dumping margins between the preliminary and final verdicts and a wide variation in the margin rates imposed on the different firms. . . there was a large discrepancy between the final dumping margins derived by the Department of Commerce and the Court of International Trade. This seemingly arbitrary nature of determining dumping margins causes great ambivalence and uncertainty for Korean firms. . . ."

[2]With price fluctuations, the weighted average dumping margin is computed over a 6-month period taking account of only the positive dumping transactions and excluding the negative dumping activities during the period (see KFTA, 1990: 24-25).

[3]As of July 1989, there were 75 countervailing duty orders and 16 undertakings in effect (see GATT, 1991:179).

of the type of trade and investment barriers it alleges in others in its *National Trade Estimate Report on Foreign Trade Barriers*.

This section highlights the alleged trade barriers in Korea alleged in the USTR Report as well as samples of alleged trade-distorting policies practiced by the United States itself alleged by the EC report. We also examine the data provided by the GATT and the American Chamber of Commerce in Korea (AmCham). These selected set of data suggest that, although the United States is by any standard the most open economy in the world, the basic principle of external trade policies of the Unite States may still be the culmination of its own trade barriers while condemning everyone else's barriers.

Tariff Barriers

U.S. Allegations Against Korea

In 1989 Korea implemented a five-year tariff reduction plan to bring the average tariff rate down from 12.7% in 1989 to 7.9% in 1993. The schedule will be delayed for one year due to the elimination of 2.5 percent defense surtax in January, 1991. Duties, however, remain very high on a large number of high value and value-added agricultural and fisheries products. Examples include: a 50 percent duty for most fresh fruits and fruit juices; a 40 percent duty for assorted tree nuts; and a 30 percent duty for frozen potatoes. Tariffs for these products are projected to remain at these levels through 1994. Combinations of current tariff and "non-discriminatory" value-added taxes for agricultural and manufactured product are often sufficient either to keep imports out of the market or be priced too high to compete effectively.

Almonds, for example, are subject to a high 35 percent tariff but are under no other significant import barrier. Completely eliminating this tariff could increase U.S. exports between $5 million and $25 million a year. Export of kiwi fruit and grapefruit could also be greatly enhanced by reducing the current 50% tariff rate.

In trade discussions with Korea, the United States had sought significant tariff reductions for products of special U.S. interest. Effective on March 14, 1989, Korea reduced the tariffs on 1,188 items (based on the 10-digit Harmonized System Classification) to the lower tariff rate level originally legislated for 1990. More than 200 of these items are of export interest to the Untied States. The overall tariff reduction program addressed some priority areas of U.S. export interest but the United States does not regard it a

sufficient relief for agricultural products. The United States wants deeper, accelerated reductions on products of greater U.S. interest.

EC Allegations Against the United States

Certain textile articles, ceramics, tableware, glassware, vegetables and footwear are all subject to tariffs of 20% or more. Examples of high U.S. tariffs include: 20-34.6% for certain clothing; 38% (+ 48.5 cents/kg) for silk and woolen blended fabrics; 20% for ceramic tiles; 26-35% for certain tableware; 20-38% for certain glassware; 37.5-48% for certain footwear; 19% (+ 48.5 cents/kg) for zinc alloys; and 35% for garlic and dried onions.[4] Furthermore, the United States imposes customs user fees amounting to 0.17 percent ad valorem, and a harbor maintenance fee amounting to 0.04 percent of the value of cargo.

Contrary to the EC approach of across-the-board formula cuts of tariffs at Uruguay Round, the United States has taken a pick-and-choose approach for sectors of interest to the United States which concentrates on eliminating low tariffs but generally leave its own high tariffs untouched in order to protect U.S. industry in these sectors.

The United States enacted a law in 1986 to establish a "Superfund" to pay for the clean-up of toxic waste sites, financed by the imposition of two discriminatory taxes on imports: (1) Since January 1987, a tax of 11.7 cents per barrel on imported petroleum products (compared with 8.2 cents per barrel on domestic products); and (2) As from 1989, a tax on imported chemical derivatives of feedstocks subject to the Superfund tax or 5 percent ad valorem.

The United States applies a 50 percent tariff on non-emergency repairs of U.S. ships abroad, and on equipment (including fish nets) purchased outside the United States. The U.S. justifies this measure on the grounds that it protects an industry essential for defense purposes.

The Omnibus Budget Reconciliation Act of 1990 introduced as of January 1, 1991 a 10% luxury excise tax on the portion of the retail price of the following items in excess of specified thresholds: automobiles above $30,000; private boats and yachts above $100,000; aircraft above $250,000; jewelry above $10,000; and furs above $10,000. This luxury excise tax may

[4]According to GATT (1990: 176), the weighted average U.S. tariff rates stood at 3.3% for agricultural products; and 5.0% for industrial products. Weighted average tariffs are, however, substantially higher in cases of apparel (19.8%), vegetables (12.7%), textiles (10.5%), tobacco (10.5%), benzenoid chemicals and products (10.3%) and ceramic products (10.0%).

be discriminatory in that imports account for much of the market for the designated items. For automobiles, the case can be made that the $30,000 threshold has been set at a level so as to cause minimum pain to the domestic automobile industry. This Act also doubled the Gas Guzzler tax, beginning at $1,000 for the automobiles that do not meet the 22.5 miles per gallon standard and increasing to $7,700 for those with less than 12.5 miles per gallon. This gas guzzler tax falls almost exclusively upon imports. The U.S. manufacturers are able to average gas mileage over fuel-efficient and fuel-inefficient models within a car line and escape the tax. The benefit to domestic manufacturers derives from the definition of *model type* which is the basis for determining the applicability of the tax. Beer and wine excise taxes also provide preferential treatment for domestic producers through tax credits.

U.S. Allegations Against Korea

A government-inspired campaign to curb "excessive consumption" in Korea led to the removal of imported products from store shelves, limitation on promotional activities, and threats of tax audits on Korean purchasers of imported automobiles. U.S. firms also reported increased delays in port clearances of imported consumer goods. A comic book distributed by the National Agricultural Cooperative Federation (a quasi-government organization) to school children illustrated the anti-import bias of many Korean special interest groups in its suggestions that foreign food is poisonous and purchases of imports jeopardize the livelihood of Korean farmers. This USTR position seems to be based on AmCham's accusation in April 1990: "To curb *excessive consumption* [of imported luxury goods], a media campaign was launched [in mid-1989] which attacked importers, sellers and buyers of imported *luxury goods*. . . No matter who is responsible for the *excessive consumption* campaign, it should be stopped because it is bad for the Korean consumer. The. . . campaign. . . is merely an exercise in increasing the anti-foreign bias in the Korean market." It is said that the U.S. officials believe that the *anti-luxury import campaign* demonstrates Korea's pursuit of a *mercantilistic policy.*

Quantitative Restrictions

U.S. Allegations Against Korea

All imports require an import license with most receiving routine automatic approval. Among more than 10,000 import items, however, 283

items (categorized by their 10-digit Harmonized System Classification) still remain "restricted" under the Foreign Trade Act (as of January 1991). Of these, 273 are classified as agricultural products and 10 are non-agricultural products (none of which are of U.S. export interest). Restricted items are either subject to quotas or banned from importation.

In trade consultations with Korea, the United States has repeatedly sought elimination of all quantitative restrictions on agricultural products. In mid-1988 the United States provided Korea with a list of some 100 restricted agricultural items of particular interest to U.S. exporters. In April 1989 Korea announced a three-year agricultural liberalization package which addresses some of the items on the U.S. priority list. The import liberalization ratio for agricultural and fishery products was scheduled to increase from 71.9% in 1989 to 85.2% in 1991 and the average rate of tariffs for agricultural products is scheduled to be 16.6% by 1994. The United States believes that exports of high value and value-added agricultural products remain limited due to both quantitative and phytosanitary restrictions. The United States seems determined to force elimination of all quantitative import restrictions through bilateral bilateral negotiations.

In February 1988, the United States initiated a Section 301 investigation on Korea's beef import restrictions, and in March asked the GATT Council to establish a review panel. A bilateral beef agreement in April 1990 affirmed Korea's commitment to eliminate its remaining import restrictions or otherwise bring them into conformity with GATT provisions cited in the Panel report. Import quota will gradually increase and a simultaneous buy/sell system will be established in order to provide direct access to the Korean beef market.

USTR made a statement that it was deeply upset over the Korean submission of the list in 1991 to liberalize agricultural product imports as called for under its BOP commitment to the GATT. USTR did not consider the list a meaningful proposal because it did not include any of the important products such as cheese and other processed dairy products. USTR stated that it could not accept Korea's desire to save major products for the UR tariff negotiations so they can be included in its offer list.

Korea still maintains about 40 "individual laws" which allow relevant ministries to make certain products subject to "recommendation" for a quota or a ban. The scope of these laws is under review. In the agricultural sector imports of certain products such as feedgrains, soybeans and peanuts are tightly controlled through quotas authorized under the individual laws. Korea has not notified these restrictions to GATT nor justified them under GATT. In May 1989, as a part of a bilateral agreement by which Korea avoided iden-

tification as a "priority country" under the Super 301 provision, Korea agreed to enhance transparency and make them consistent with GATT Code. Korea also agreed to repeal border closure provisions contained in Technology Development Promotion Law and the Pharmaceutical Affairs Law. These provisions used to let Korean firms petition the government to close the market to competing imports once domestic production has begun. All remaining border closure measures were terminated by July 1, 1990.

EC Allegations Against the United States

The United States regulates imports of a variety of agricultural products through the establishment of quotas. These cover certain dairy products (including milk, cream, butter, and cheese), margarine, ice cream, sugar and syrups, certain articles containing sugar (including chocolate crumb, iced tea mixes and pancake mixes), cotton of certain staple lengths, cotton waste and strip, and peanuts. Section 22 of the U.S. Agricultural Adjustment Act of 1933 requires import restrictions to be imposed when products are imported in such quantities and under such conditions as to render ineffective, or materially interfere with, any U.S. agricultural program.[5] Such restrictions are a breach of GATT Article II and XI. Therefore, the United States sought and was granted in March 1955 a waiver for its GATT obligations. More than 35 years have since elapsed and, in the Community's view, the continuation of the waiver cannot be justified.

When the United States imposes unilateral quota restrictions on imports, the merchandise to be customs cleared must be accompanied by a special invoice authorizing importation. However, such a clearance cannot be obtained until the goods (such as specialty steel) are physically in the U.S. customs territory. Thus, importers and exporters have no assurance at the time of the shipment that the goods will be allowed to enter the United States. If the quota has been filled, the goods must be re-exported or stocked in a warehouse until a quota is available. The fact that the import authorization cannot be obtained prior to the shipment creates a barrier to trade and is a violation of the GATT Agreement on Import Licensing Procedures. The uncertainty created is an additional obstacle to trade.

Following the application by the U.S. machine tools industry for import relief under the national security provisions (Sect. 232 of the Trade

[5]When it appeared that meat imports would exceed the specified level, the U.S. government negotiated VRA with supplying countries, such as Australia and New Zealand. The share of meat imports subject to VRA amounted to 53% of total imports of meat products in 1988 (see GATT, 1991: 204).

Expansion Act of 1962), in December 1986, the Administration concluded VRA with Japan and Taiwan. Subsequently, the United States established maximum market share levels for certain types of machine tools imported from Germany. These levels are being monitored and the United States has threatened unilateral action if they are exceeded. In May 1986 the United States introduced quotas on imports from the Community of certain wines, beers, apple pear juice, candy and chocolate.

The U.S. Merchant Marine Act of 1920 requires that only U.S.-registered vessels may be used in the U.S. territorial waters for activities other than transporting passengers or merchandise (e.g., dredging, towing and salvaging). However, only vessels constructed in the United States are eligible for U.S. registration for these purposes. U.S. law also requires that vessels registered in the United States for use in coast-wise commerce (e.g., between U.S. ports), be constructed in the United States. Similarly, U.S. flag vessels engaged in fisheries (including processing, storing and fish transporting) in U.S. waters must, with very few exceptions, be built in the United States, and owned and manned by U.S. citizens.

Customs Practices

U.S. Allegations Against Korea

Despite recent improvements in Korea's customs procedures, U.S. firms continue to report cases in which Korean customs clearance procedures are excessively slow and arbitrary. On several occasions Korean customs has reclassified products from categories eligible for importation to restricted categories. Several phytosanitary barriers prohibit access or inhibit customs clearance procedures without a sound scientific basis. Nearly all food products entering Korea must have quarantine approval as part of the clearance process, which often take up 30 days.

Procedures requiring the inspection of every box of imported cherries for quality, box-sealing conditions and pesticide residues, for example, create one or two-day delays in customs clearance. Since these products are not refrigerated during the inspection procedures, their shelf life can be significantly reduced.

EC Allegations Against the United States

The U.S. Customs Service requires various information that are irrelevant for customs or statistical purposes. For example, for garments with an outershell of more than one construction or material, it is necessary to give

the relative weight, percent-age values, surface area of each component, and relative weights of each component material. Exporters of footwear and machinery have to provide the names of the manufacturers of the numerous spare parts. Exporters of chemicals can be required to disclose the exact composition, listing of ingredients and individual components, etc.

The United States has periodically and unilaterally changed the tariff classification of a number or imported products. This has in most cases resulted in an increase in the duties payable or a unilateral extension of a quantitative restriction. For instance, U.S. Customs reclassified wire ropes with fittings so that the former now requires an export certificate for entry into the United States.

As a result of laws enacted in 1985 and 1986, the United States imposes user fees for customs, harbor and other arrival facilities on all imported merchandise. The Merchandise Processing fee, for instance, was fixed at 0.17% ad valorem in 1988, and is still based on the value of the imported goods. The Budget Reconciliation Act of 1990 increased the Harbor Maintenance fee from 0.04 percent to 0.125 per cent ad valorem.

The U.S. Customs follow a sampling and inspection procedure which does not distinguish between perishable and non-perishable products. Thus, perishable products stand in line (behind long queues of non-perishable goods such as steel commodities) waiting to be tested and are often spoiled in the process. In this manner whole shipments, for example, of citrus fruit from Spain had to be dumped with no compensation to the producers and/or importers. Likewise, cut flowers have been subjected to very lengthy procedures to determine what insect species, if any, might be present, leading to quality decreases. The methods used for cocoa powder during a routine drug inspection rendered the contents unfit for food-manufacturing. FDA sampling test for listeria in case of smoked salmon makes them unacceptable for their intended market.

Korea's Allegations Against the United States

The U.S. Customs officers arbitrarily change tariff classification to increase the duties payable. For instance, they classified plastic-coated footwear with fabric footwear, and reclassified sweaters made with a mixture of yarns as to increase the duties payable.[6] On polyester sewing-yarn, Los

[6]In case of plastic-coated footwear, if the customs officers can identify the use of plastics by examining with the naked eye, they charge 6% tariffs. But if they can not, then they regard the products as fabric footwear and charge 39.5% tariffs, completely ignoring the scientific statement on the content of plastics. Sweaters made of man-

Angeles (LA) Customs charged 12% duties and New York Customs charged 13%. The U.S. Customs reclassified fabric bags with leather content taking more than 50% of total product value into textile products (according to weight). U.S. Customs refused the clearance for spectacle frames by demanding the label of "Korea" to be changed into "Frame Korea," the clearance for women's trousers by arbitrarily demanding the label of origin to be attached on the belt, in addition to that attached on the main body of the product; the clearance of transformers by arbitrarily demanding the card expressing the origin of product be attached on "both" sides of packing, and so on. The U.S. Customs demands quota visa for samples of textile products that are valued less than $250. It requires detailed written statements on 25 items of information (mostly business secrets) including design and production techniques in case of footwear, complete statement of entire parts for auto cassettes (especially in the LA Office), statement of the production costs including the amount of domestic taxes and discounts, and so on. Due to excessively lengthy period of time required for inspection and excessively strict inspection, Korean products are often denied clearance and the exporters have to pay excessive amount of dock demurrage.[7] For fur products they also have to pay $25 per item as inspection cost, irrespective of actual inspection (see KFTA, 1990: 4-6).

Standards, Testing, Labelling and Certification

U. S. Allegations Against Korea

Korean standards, testing requirements and rules for certification procedures for certain sectors are outlined in several individual, sector-specific laws which continue to create regulatory barriers for U.S. exports. Restrictive approval procedures have affected cosmetics, food products, medical equipment, veterinary instruments, pharmaceutical products, electrical products

made fibers are subject to 6% tariffs and those of cotton are subject to 20.7% tariffs. When the sweaters are made of both man-made fibers and cotton, for example, they classify the products as cotton sweaters, regardless of the relative proportion of man-made fibers and cotton. The U.S. Customs classified the extra lace (in different colors) for sneakers as textile products and demanded quota visa (see NFTA, 1990: 12 & 15).

[7]The U.S. Customs waive the inspection of Korea's exports, such as Korean personal computers handled by American customs agent but it inspects every time if the export merchandises are handled by the customs agent owned by Korean, delaying the customs clearance by more than a month (see KFTA, 1990: 19).

and telecommunications equipment. Unduly restrictive phytosanitary requirements on several fruit products addressing insects, blight and so forth also serve to protect domestic producers of comparable products rather than provide quality or safety assurances consistent with international practice. Korea is issuing new standards on food safety without first notifying the GATT. They are often vague and do not provide basic information on testing procedures or documentary requirements. Individual port inspection officers are free to issue their own standards and regulations. The new standards often affect only imported goods and are not applied to domestic products.

The United States will continue to encourage Korea to institute transparent procedures for developing and applying standards and technical regulations and not to use these as a disguised trade barrier. Korea has indicated that an active review of the individual laws will continue.

EC Allegations Against the Untied States

In the United States, hundreds of private organizations are engaged in standardizing, testing and certification activities. Local governments often have legal requirements of their own. There is no central point where information on all relevant standards can be obtained.

Section 134.11 of the Code of Federal Regulations requires that jewelry be marked with country of origin. Small items of jewelry do not lend themselves to marking and can only be embossed with great difficulty. Some USDA quarantine regulations are so restrictive as to allow no access from certain countries such as European potatoes, (these are not allowed into the United States ostensibly to prevent the introduction of golden nematodes, although nematodes can apparently be found in certain potato growing areas of the United States) and a large variety of plants from the Netherlands, Belgium and Denmark, where sterile growing media (such as rock-wool) are used.

The United States insists on zero residue levels for substance which have not been approved for use in the United States even if there is negligible health risk (e.g., the 1990 case of residues of a fungicide procymidone found in wines imported from EC). USDA does not recognize the certifications provided by EC states, and insists that its own requirements are fulfilled.

Korea's Allegations Against the United States

The FDA quarantine requirements take more than one month to clear Korean pears and instant noodles, and more than three months for Korean

seaweeds. The FDA supervises the growing processes of pears in Korea, and prohibits their importation if there is "any" residue of insecticides. Oysters are allowed to be imported only if they were produced by the specified producers at the specified area in Korea. FDA demands all the components of instant noodle (amounting to about 30 items) be printed on the wrapping paper (see KFTA, 1990: 22-23).

Government Procurement

U.S. Allegations Against Korea

The Korean government's procurement agency has revised its procurement regulations to remove explicit localization requirements. However, U.S. companies continue to report that bids including offsets and local procurement are encouraged. Korea also has a policy of requiring 30 to 50 percent offsets for major military procurements, with emphasis on technology transfer. On June 30, 1990, Korea formally submitted its offer to join the GATT Government Procurement Code, including telecommunications procurement contracts. It is planned to open up the government procurement market by January 1993.

EC Allegations Against the United States

The 1988 Trade Act stipulates that the U.S. government should deny the public procurement of goods from foreign countries which discriminate against U.S. products or services in government procurement. National Security Act of 1947 and the Defense Production Act of 1950 impose restrictions on foreign supplies in order to preserve the domestic mobilization base and the over all preparedness posture of the United States.

Based on restrictive interpretation of national security concept, the U.S. Department of Defense is prohibited from purchasing certain products from foreign sources or, alternatively, must give some kind of preferences to U.S. products. Affected products include: specialty metals; forging items; machine tools; coal and coke; carbon fibers; synthetic fibers; precursor fibers; textile articles; stainless steel flatware; ship propulsion shafts; valves; welded shipboard anchor chains and mooring chains; automotive forging items; administrative vehicles; and ball and roller bearings. The United States enacted a law in 1986 that requires machine tools used in any government-owned facility or property under the control of the Department of Defense to have been manufactured in the United States or Canada. The Department of Defense issued in August 1988 an interim regulation (amendment to Federal

Acquisition Regulations), essentially prohibiting the purchase of imported bearings and products containing imported bearings.

The Buy American Act applies to government supply and construction contracts. It requires federal agencies to procure manufactured goods with more than 50% domestic content and procure only domestic materials used in construction and public works. It is further required to reject foreign bids either for national interest reasons or national security reasons and to set aside procurement for small business and firms in labor surplus areas. The Buy American Act allows an executive agency to procure foreign materials only when items are for use outside the United States, domestic items are not available, procurement of domestic items is inconsistent with the public interest and cost of domestic items is unreasonably high (i.e., cost differential greater than 6% of the bid price including duty and all costs after the arrival in the United States or a 50% price differential exclusive of duty and post-arrival costs). Legislation in at least 40 States also provides for Buy American restrictions on their procurement.

Services Barriers

U.S. Allegations Against Korea

Korea continues to maintain restrictions on some services sectors through a "negative list." In these sectors foreign investment is prohibited or severely circumscribed through equity participation or other restrictions. Those sectors of greatest interest to U.S. investors and service providers include professional services (such as accounting, legal and financial services), interpretation-translation services, maritime, retailing, transportation and telecommunications services.

Many of these services vitally support the overseas commercial presence of U.S. companies. The ability of a U.S. company to ship, transfer, distribute and advertise a product with the company of its own choice and have a direct link to the home office is crucial to penetrating overseas markets successfully.

Wholesale distribution is restricted in 26 sectors. Also, unpublished guidelines issued by the MTI prohibit investment in retail industry. In those service sectors where foreign investment is allowed, cumbersome and arbitrary regulations often limit the scope of activities to a small number of well established domestic competitors. Korea is gradually opening its services market by removing sectors from the negative list. The U.S. maritime carriers cite many remaining restrictions on their operations, including an inability to own corporate container terminal facilities and equipment,

establish their own trucking services, or contract for retail services.

EC Allegations Against the United States

The U.S. Telecommunication Trade Act of 1988 is analogous to 1989-90 Super 301 in that it is based on identification of priority countries for the threat of unilateral action if the U.S. objectives are not met. The stated objects are to correct imbalances in market opportunities and to increase U.S. exports. The problem is the unilateral determination by the United States of what constitutes a barrier or an imbalance in market opportunities.

Public procurement of telecommunication equipments in the United States is dominated by American companies. Network specifications are based on the requirements of the network established by AT & T and GTE. Since they are still manufactures of equipment, as well as a provider of services, they are better placed than outside companies to supply their own network. The Federal Government's recent network upgrade (FTS 2000) was open for procurement contracts only to U.S. companies.

In the financial services sector the most significant obstacles to provision of services by foreign financial institutions derive from regulations which, for instance, prohibit banks from entering certain securities businesses (Glass Steagall Act), or restrict interstate banking (McFadden Act), and the fact that the regulation of insurance is the exclusive competence of the states, with the ensuing requirement to obtain a license in each state. Most of the regulations adversely affecting foreign financial institutions are to be found at the state level. In certain states, foreign banks cannot receive deposits from the public administration; some states do not admit the establishment of branches of non-U.S. insurers. Directors of foreign banks' subsidiaries incorporated in the United States must be U.S. citizens, although under approval of the Comptroller of the Currency up to half the number of directors may be foreign.

Federal contracts for consulting services require U.S. citizenship or 51% U.S. ownership. Certain types of government-financed cargoes are required to be carried on U.S.-flag commercial vessels. The Communications Act of 1934 imposes limitations on foreign investments in radio communications. No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license may be held by foreign governments, aliens, or corporations which are controlled by corporations in which any officer or more than 25% of the directors are aliens, or of which more than 25% on the capital stock is owned by an alien.

Investment Barriers

U.S. Allegations Against Korea

Korea has made progress in gradually opening its market to foreign investment. As of January 1991, 79 percent of the sectors in Korea's standard industrial classification system are open to foreign equity investment. About 98 percent of the industrial sectors and 61 percent of the service sectors are open to foreign investment.

Individual laws including Phonogram and Videotape Manufacturing Law, the Fisheries Law, and the Environmental Preservation Law continue to provide Korean ministries with the authority to impose local equity requirements or effectively block the establishment of foreign investment.[8]

All U.S. investment applications filed after January 1, 1989 are subject to "going public" policy. This policy can require local and foreign-invested firms established for three or more years and identified by the Korean Securities and Exchange Commission to sell at least 30% of their stock in public. The United States continues to urge Korea to abolish its "going public" policy.

Certain U.S. states assess state corporate income tax for foreign-owned companies operating within their state borders on the basis of an arbitrarily calculated proportion of the total worldwide turnover of the company. This proportion of total worldwide earnings is assessed in such a way that a company may have to pay tax on income arising outside the state, giving rise to double taxation. A company may also face heavy compliance costs in furnishing details of its worldwide operations. A more basic objection is that extensive discretionary tax powers continue to be granted to state tax authorities.

According to the 1988 Exon-Florio amendment of Trade Act, the President can suspend or prohibit (or order divestment of assets) any mergers, acquisitions and takeovers which could result in foreign control of persons engaged in interstate commerce if he decides that such transactions threaten broadly defined national security (that encompasses America's economic security). This implies that a very significant number of foreign acquisitions will be subject to prescreening and notification.[9]

[8]Korea has agreed to take appropriate steps to phase out all local equity requirements in individual laws on an expeditious basis, except for local equity requirements imposed for reasons of land acquisition, exploitation of land or other resources or national security.

[9]It is interesting to observe present-day Americans who seem to believe that they

The Federal Aviation Act requires that the President of an U.S.-registered airline and two-thirds of its board of directors and other management must be U.S. citizens and that 75% of the voting stock in the airline must be owned by U.S. citizens. Foreigners are virtually precluded from offering common carrier (telephone, telex, etc.) services in the United States using radio communications. The 1990 Omnibus Budget Reconciliation Act imposed reporting requirements on foreign companies, applicable retroactively. Foreign ownership has been restricted in some sectors such as shipping, broadcasting, energy, and telecommunications.

Intellectual Property Protection

U.S. Allegations Against Korea

Korea has not yet amended its 1987 law to provide improved protection for U.S. pharmaceutical manufacturers. Currently, the lack of bioequivalency testing for drugs registered before 1989 allows Korean companies to register and sell drugs originally produced by other companies. Korea still lacks protection for the designs of U.S. manufactured semiconductor chips. The United States still has some concerns about Korea's intellectual property rights laws in the areas of video and textbook piracy and continues to encourage Korea to adopt international standards.

EC Allegations Against the United States

Section 337 of the Tariff Act of 1930 puts a powerful weapon in the hands of U.S. industry which can be abused for protectionist ends. Under the Section, as amended by the Omnibus Trade Act of 1988, complainants may choose to petition the International Trade Commission (ITC) for the issuance of an order excluding entry of products which allegedly violate U.S. patents. ITC procedures entail a number of elements which accord imported products challenged as infringing U.S. patents treatment less favorable than that accorded to products of U.S. origin similarly challenged. There are also several other features of the Section 337 procedure which constitute discriminatory treatment of imported products, in particular, the limitations

should promote foreigners undertaking "greenfield site" investment that establishes new plants and creates new jobs, but should somehow discourage foreigners taking over American companies that is simply to acquire experienced staff and existing production and distribution facilities, to extract technology and profits, and to take them back home.

on the ability of defendants to counterclaim, the possibility of general exclusion orders and the possibility of double proceedings before the ITC and in federal district courts. As a result, foreign exporters may be led to withdraw from the U.S. market rather than incur the heavy costs of a contestation.

In the United States it is only when the international application has been published that it is treated as forming part of the state of the art. Thus, a U.S. inventor may on the basis of inventive activity carried out after the date of application prevent the granting of a U.S. patent to a foreign inventor.

Subsidies and Dumping

U.S. Allegations Against Korea

The Korean government provides subsidies to its shipbuilding sector in the form of equity infusions, preferential loans, and tax exemptions (e.g., in rescuing the Dae-woo Shipbuilding Corporation). Korea Development Bank offers preferential loans to shipbuilders and shipowner purchasing Korean-built vessels. The Korean EXIM Bank also provides subsidized export credits.

The Korean government provides assistance to coal industry in the form of investment aid (for greater mechanization) and direct operation grants to the small producers. Only one government-owned coal corporation is authorized to import anthracite, thereby ensuring a market for domestically produced anthracite.

EC Allegations Against the United States

The Food Security Act of 1985 (the Farm Bill) required the United States Department of Agriculture (USDA) to use Commodity Credit Corporation stocks worth $1 billion over a three-year period to subsidize exports of U.S. farm products, with the option of going up to $1.5 billion. Both ceilings were reached a long time ago, and the program is still in operation. This program was intended to support wheat exports but is now used for a wide range of commodities (mainly wheat, wheat flour, barley, feed grains, poultry, eggs and dairy cattle). The 1990 Farm Bill reinforced the program, providing for the continuation of it without specified program limits. Marketing loans were provided for the Farm Act of 1985, on a discretionary basis for feed grains, wheat and soybeans but on a mandatory basis for rice and upland cotton.

The Food Security Act of 1985 established a new program, entitled Targeted Export Assistance (renamed to Market Promotion Program in 1990)

in order to promote the exports of high value agricultural products such as wine, fruits, vegetables, dried fruits and citrus, mostly to Europe and the Far East. Under this program, the Secretary of Agriculture had to provide assistance specifically to offset the adverse effect of subsidies, import quotas, or other unfair trade practices abroad. For these purposes, the term "subsidy" includes an export subsidy, tax rebate on exports, financial assistance on preferential terms, financing for operating losses, assumption of costs of expenses of production, processing or distribution, a differential export tax or duty exemption, a domestic consumption quota, or any other method of furnishing or ensuring the availability of raw materials at artificially low prices. The 1985 Act authorized priority assistance to producers of those agricultural commodities that have been found under Section 301 of the Trade Act of 1974 to suffer from unfair trade practices, but consideration came to be given to other commodity groups as well.

The Unites States supports its agriculture by commodity loans which guarantee the farmer a minimum price (loan rate) if he can not sell his products above this price on the open market and by deficiency payments which are calculated as the difference between a government-established target-price and the higher of the market price and the loan rate. Two thirds of the deficiency payments in the case of wheat production are assistance to exports. The largest U.S. agricultural export promotion program is the Export Credit Guarantee Program which guarantees repayment of private credit up to 10 years (or up to 40 years in case of PL 480).[10] Farmers in California also enjoy heavily-subsidized water supply.

The U.S. firms were allowed to defer payment of corporate taxation on export earnings. The United States converted the tax deferment into a definitive tax remission. An illustrative example is the tax remission benefit of $397 million which Boeing realized, according to its 1985 annual report, and the $422 million of additional benefits to General Electric during the second quarter of 1984, according to press reports. McDonnell Douglas has benefitted from $300 million of tax remission.

The U.S. Government heavily funds R&D activities, particularly for defense purposes. Such support represents an indirect subsidization of commercial production, such as aircraft manufacturing for civil aviation. Furthermore, the access by U.S.-based, but foreign-owned, firms to research consortia funded by the U.S. Government is becoming an issue. For example,

[10]According to GATT (1991: 186-187), the U.S. Eximbank can provide credits, guarantees and insurance to promote exports. In 1988, Eximbank utilized $690 million in loan authority and $5.7 billion in guarantee and insurance authority.

participation in SEMATECH has been limited to U.S. companies.[11] U.S. Government provides guarantees to U.S. shipowner to obtain commercial loans for construction of vessels (up to 75% of cost), provided that the vessels are entirely assembled in the United States using all the components of the hull and superstructure fabricated in the United States.

As far as other countries are concerned, the United States considers that a subsidy exists wherever an economic benefit is conferred on an industry, regardless of whether there has been state intervention or if a financial contribution has been made by a government. In the area of dumping, the United States maintains a statutory minimum profit of at least 8 percent to be added in constructed value calculation. EC also voiced its concern over the large volume of data required by the DOC within a deadline shorter than that laid down by GATT Anti-dumping Code recommendations. In addition, it pointed out that some of the information required was company-secret and irrelevant to an anti-dumping investigation and that excessive detail was required on other matters.

THE U.S. ENFORCEMENT MECHANISM

U.S. officials have learnt through the SII (Structural Impediments Initiative) talks how Japan would use various techniques—informal barriers, administrative regulations, private understandings—to restrain foreign competition. They are convinced that Korea had adopted the same practices and has a bias against foreign products and companies in Korea. U.S. officials are determined to confront these attitudes (i.e., not to allow the repeat of the Japanese model) even if it means animosity and Korean resentment over intrusion into their internal affairs. Virtually all U.S. officials still predict continued, sharpened frictions with Korea.

By the late 1980s, nearly one-third of Korea's exports went to the U.S. market and nearly one million workers were employed directly and indirectly for their production activities (see BOK, 1988: 27). Koreans would therefore

[11]A consortium of U.S. semi-conductor producers, equipment suppliers, and users (SEMATECH) was established in 1987 with a view to developing the next generation of process technology. It is partially supported with Federal Funds, with the Department of Defense authorized to provide $100 million of support in FY 1989. In 1986, the National Center for Manufacturing Sciences was established to advance R & D of manufacturing technologies, including those for machine and tools. The Center receives about $5 million a year form the U.S. Department of Defense (see GATT, 1991: 219-220).

suffer extreme hardships if Korea's access to the U.S. market is suddenly denied, but Americans would not suffer much even if trade with Korea suddenly ceases. The Korean government hence does not have any alternative but to yield to the U.S. pressure to open up and liberalize.

The American Chamber of Commerce in Korea (AmCham) routinely catalogues all kind of accusations and complaints raised by the American businessmen in and out of Korea and transmits the list to the USTR and the U.S. Congress, which in turn enforce prompt and effective redress of actions by the Korean government through the irresistible threats of unilateral sanctions and retaliations.

The following is the summary of the latest AmCham list published in March 1991: (1) AmCham-Korea believes strongly that the discriminatory policies used and the damage caused to imports by the highly publicized "frugality" campaign should be reversed; (2) The reduction in funding swaps for foreign banks should be accompanied by the introduction of viable alternatives to meet their need for local currency; (3) Capital requirements for foreign securities firms should be the same as for local firms, and that foreign firms be permitted to become members of the Korea Stock Exchange; (4) The Ministry of Transportation and the Korea Maritime and Ports Administration should issue a timetable for full liberalization of trucking services; (5) Phytosanitary regulations prohibiting the importation of strawberries, papayas, walnuts, pine lumber, and frozen and processed foods be revised to allow importation of these items (many aspects of the current regulations contradict sound scientific analysis); (6) The new Accumulated Earnings Tax (imposed on unlisted companies) should provide an exemption for accumulations of earnings that will be used for reinvestment or other reasonable needs of the corporation (such as modernization, expansion, etc.); (7) Korea should conclude a new bilateral civil aviation agreement with the United States which guarantees that U.S. carriers are treated on an equal basis with Korean carriers in Korea and also gives greater U.S. access to Korean air carriers market; (8) The ceiling on goods eligible for importation on a deferred payment basis should be raised to include those with a 15 percent tariff rate or less. Under current regulations, foreign goods cannot be imported on credit (i.e., on a deferred payment basis) unless their tariff rate is 10 percent or less. Ministry of Finance officials maintain that the problem will solve itself through Korea's tariff reduction program. But most non-raw materials will remain ineligible for deferred payment importation until 1994; (9) The New Drug Registration procedures should be revised so that the local clinical testing requirement is dropped entirely. Proof of registration and sale from acknowledged leaders in health care such as the United States, U.K.,

Germany, France, Italy and Japan should be recognized by the Korean Government; (10) Visas granted by the Korean government to foreign CPAs should allow the foreign CPAs to provide all services for which they have expertise; (11) Permitted uses of capital by the American securities companies that participate in the Korean stock market should include overseas investment; (12) Certification requirements for working in telecommunication or information processing should be eliminated. Remaining prohibitions on foreign investment in value added services should be eliminated; (13) Regarding transfer pricing regulations, the Korean government should establish limits on the types of documents it request for analysis only to information that will not jeopardize corporate confidentiality; (14) Korean government should educate the inspectors and working-level officials at the Customs Administration about the benefits of free and fair trade; and (15) U.S. banks should be allowed to establish branches whenever and wherever their commercial judgement leads them to do so.

The USTR made a statement that it had no differences with the content of the AmCham Report which was widely distributed in Washington, D.C. USTR praised the Report for its cataloguing of the state of trade relationship and accuracy in its description of trade complaints. Encouraged, AmCham reports that U.S. business no longer wants to address just specific issues or products, but also the structural impediments to trade such as the marketing system, industrial targeting and industrial policy. USTR admits that it has so far been pursuing issue-by-issue trade negotiations to maintain consistent pressure for liberalization and confirms that it will from now on turn its focus on such long-term structural issues. U.S. Treasury and USTR want to develop long-term U.S.-Korea joint action plans, setting forth a timeframe, specific steps and goals to progress toward Korea's (not America's) continued trade and financial liberalization. The United States will likely urge Korea to join the OECD as a means of securing its commitment to further liberalization and of curbing its steel and shipbuilding sectors.

CONCLUDING REMARKS

The United States has significantly contributed to the rapid growth of Korean economy during the past 30-year period by providing a large market for Korea's export expansion. Many Koreans believe that Korea should reciprocate by opening as much of its domestic market as possible to the U.S. exporters and thereby contribute to the growth of the U.S. economy. The most important aspect of continued expansion of U.S.-Korea trade is the fact that it will, on the one hand, set a good example for other OECD advanced

countries and, on the other hand, enhance the hope for possible outward-looking rapid growth in more than hundred developing countries in the world, including the newly emancipated East European countries. In order to achieve a sustained trade expansion between the United States and Korea, however, people in both countries have to try to minimize unnecessary frictions in their trade relations.

The U.S. government and congress should try to convince the Korean people that they really are pursuing a more liberal world trade environment instead of simply forcing import liberalization on countries like Korea while building up its own protectionist wall in form of unilateral sanctions or retaliatory measures such as arbitrary anti-dumping duties, countervailing duties, Section 337 of the U.S. Tariff Act (violation of intellectual property right), USITC Exclusion Order (prohibition of imports and sales), and Super 301 clause dealing with allegedly *unfair trade practices*.

The United States is strongly pressuring the Korean government to completely open up its agricultural imports, rapidly reducing the existing agricultural subsidies within a short span of time. By maintaining all kinds of protection-cum-subsidy measures for agriculture, the United States could build up a solid *infrastructural foundation* for its agricultural industry. On the other hand, very few developing countries could build up an adequate *basic infrastructure* for agriculture. In handling the Uruguay Round on agricultural products, the United States should allow developing countries to build up a proper infrastructure for agricultural industry so that they can compete on an equal footing with the U.S. farmers.

In dealing with the liberalization of service trade, the United States should try not to give the impression that it is resorting to a kind of power politics. First of all, the United States should demonstrate its willingness to renounce all it has acquired through *unequal* treaties of old days. For example, the United States is enforcing upon Korea an unequal treaty on airline services on the basis of the 1957 Treaty; a treaty that was imposed on Korea when its per capita income amounted to around $80 in current dollar prices. U.S. airlines presently enjoy an “unlimited” access to the Korean market (unlimited aircraft-landing right) while allowing an extremely limited access of the U.S. market to Korean airlines.

The United States should try not to give the impression that it is pursuing technological blockade in the name of intellectual property right (through the abuse of the Section 337 of the U.S. Tariff Act and the U.S. ITC Exclusion Order). It should instead try to consider a more positive approach of combining the U.S. ability in original R & D and the Korean ability of manufacturing.

The U.S. Trade Act of 1988 makes it much more likely that unilateral actions will be taken to redress allegedly unfair trade practices. Korea suffers mainly from the uncertainties arising from the arbitrary and unilateral nature of much of the U.S. trade legislation. The United States should try to minimize the element of unilateralism in its legislative provisions. Unilateral sanctions or retaliatory measures do not foster multilateral cooperation. Many Koreans believe that no other country on the earth has ever been subject to such a unilateral dictation by the United States on trade and industrial policy matters and also that Korea has yet no alternative but to surrender to the United States whenever and whatever demand is made by the United States. Such a feeling does not foster a rational approach to bilateral cooperation.

In handling the Uruguay Round, the United States should try not to give the impression that it is trying to minimize the speed and extent of liberalization of commodities produced by its own declining industries such as textiles, while trying to maximize the rate of liberalization of agricultural trade that will hurt a relatively far larger number of people in countries like Korea. There is a limit in the transitional cost of human suffering the United States is willing to (or prepared to) accept in structural adjustment following the Uruguay Round. The United States should understand that there is also a limit in the cost a country like Korea can possibly bear.

The American public should always be reminded of the fact that Korea is not yet an advanced economy and that, among the more than a hundred developing countries, there is no country which has so rapidly and so comprehensively opened up and liberalized its economy within such a short period of time.[12] Many Koreans are shocked (or even feel insulted) to learn that "U.S. agencies including USTR and U.S. Congress can grant no real credit for these liberalization measures, they are suspicious of Korea pursuing mercantilistic policies, there is lack of confidence in Korea's credibility, and USTR is frustrated over bilateral trade issues with Korea, etc."

As a whole, opening up and liberalization will contribute positively to the long-run growth of the Korean economy although, at the micro-level, some sectors will obviously face painful adjustment problems. Perhaps quite unintentionally, the United States has made an invaluable contribution by persistently putting irresistible pressures for structural adjustment on Korea.

[12]It is said that the U. S. Treasury will not give any special consideration to Korea regarding the *free movement of capital because Korea is considered an advance economy*. Korea's restrictive capital controls are seen as influencing the exchange rate.

Since Korea can not reciprocate such pressures on the United States, the advantage of forced structural adjustment is not likely to be symmetric. This might be the inherent problem for the lone superpower in the world. The really unfortunate aspect seems to be the apparent deterioration in friendly feelings between the Korean and American people. This seems to be due to the carelessness of the policymakers in both countries and their lack of, what Adam Smith, in *The Theory of Moral Sentiments*, calls the capacity for acts of imaginative sympathy, i.e., visualizing how one would have behaved or felt in similar circumstances.

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"Fairness, like beauty, exists in the eyes of the beholder, and hence it can never provide an objective criterion for judgement."
"And why do you notice the splinter in your brother's eye without being at all aware of the beam in your own eye?" Luke 6:41