Korea-China FTA :
Legal Prospects and Jurisprudence

■Date: June 23, 2015
■Time: 9:00a.m. - 6:00p.m.
■Venue: Qunxian Building 2,
Xiamen University, China

CSIEL 中国国际经济法学会 CHINESE SOCIETY OF INTERNATIONAL ECONOMIC LAW

KOREAN SOCIETY OF INTERNATIONAL ECONOMIC LAW

KLRI KOREA LEGISLATION RESEARCH INSTITUTE

Korea-China FTA: Legal Prospects and Jurisprudence

Date: **June 23, 2015**
Time: **8:30 a.m. – 6:00 p.m.**
Venue: **Qunxian Building 2, Xiamen University, China**
Host: **CSIEL, KSIEL & KLRI**

Sessions Overview

Session	Moderator or Chair	Speaker and Discussant
08:30- 09:00 am Registration and group photo		
09:00- 09:30 am **Opening Ceremony**	Moderator: Prof. CHEN Huiping (Deputy Secretary-General, CSIEL)	● Prof. LIAO Yixin (Vice President of Chinese Society of International Economic Law) ● Mr. LEE Won (President of Korea Legislation Research Institute) ● Prof. ZHU Yansheng (Vice Dean of Xiamen Law School) ● Prof. CHUNG Chanmo (President of Korean Society of International Economic Law)
09:30- 11:00 am **Session 1**	Chair: Prof. CHUNG Chanmo (Inha University)	1. THE NEW DEVELOPMENT OF CHINESE FTAS: A PERSPECTIVE OF CHINA-KOREA FTA ● Speaker: Prof. WANG Heng (Southwest University of Political Science & Law) ● Discussant: Prof. OH Sunyoung (Soongsil University)
		2. ANALYSIS OF THE KOREA-CHINA FTA: FOCUSING ON TRADE REMEDIES PROVISION ● Speaker: Prof. SOHN Kiyoun (Incheon National University) ● Discussant: Prof. Xiao Bing (Southeast University)
		3. RULES OF ORIGIN IN THE CHINA-KOREA FTA ● Prof. MA Guang (Zhejiang University) ● Discussant: Dr. KIM Hyunggun (Korea Legislation Research Institute)
		Comments and Q&A
11:00-11:15 Coffee break		
11:15- 12:15 pm **Session 2**	Chair: Prof. SHI Jingxia (University of International Business & Economics)	1. AN ANALYSIS OF THE SCHEDULES OF COMMITMENTS ON SERVICES AND INVESTMENT IN THE KOREA-CHINA FTA ● Speaker: Dr. LEE Kipyeong (Korea Legislation Research Institute) ● Discussant: Prof. LI Wanqiang (Xi'an Jiaotong University)
		2. OVERLAPPED AND MULTI-LAYEERED INVESTMENT RULES BETWEEN CHINA AND KOREA ● Speaker: Dr. KONG Sujin (Korea University) ● Discussant: Prof. HAN Xiuli (Xiamen University)
		Comments and Q&A
12:15- 14:00 Lunch		
14:00- 16:00 pm **Session 3**	Chair: Prof. KIM Daewon (University of Seoul)	1. THE DISPUTE SETTLEMENT MECHANISM OF THE CHINA-KOREA FTA ● Speaker: Prof. CHOI Songza (Kyungnam University) ● Discussant: Prof. LI Wanqiang (Xi'an Jiaotong University)
		2. THE INVESTOR-STATE DISPUTE SETTLEMENT PROVISIONS IN THE CHINA-KOREA INVESTMENT AGREEMENTS: COMMENTS ARISING FROM THE ANSUNG CASE ● Speaker: Prof. HAN Xiuli (Xiamen University) ● Discussants: Prof. YOO Joonkoo (Korea National Diplomatic Academy)
		3. THE INSTITUTIONAL MECHANISM IN CHINA-KOREA FTA AND THE INVESTOR-STATE DISPUTE SETTLEMENT: COMMENTS ON THE

		COMMITTEE ON INVESTMENT ● Speaker: Prof. CHEN Huiping (Xiamen University) ● Discussant: Dr. LEE Sangmo (Korea Legislation Research Institute)
		4. IS THERE A WAY IN THE LABYRINTH OF TREATY NORMS LEADING TO THE APPLICABLE RULE? TAKE THE EXAMPLE OF THE PROVISIONS REGARDING INVESTOR-STATE INVESTMENT SETTLEMENT IN CHINA-KOREA FTA, CHINA-JAPAN-KOREA BIT AND THE CHINA-KOREA BIT ● Speaker: Dr. Yu Li, on behalf of Prof. Kong Qingjiang (China University of Political Science and Law) Discussant: Prof. KIM Doosu (Hankuk University of Foreign Studies)
		Comments and Q&A
16:00- 16:15 pm Coffee Break		
16:15- 18:00 pm **Session 4**	Chair: Prof. Xiao Bing (Southeast University)	1. TRADE IN SERVICES IN CHINA-KOREA FTA: WHERE ARE WE NOW AND WHERE ARE WE HEADED NEXT? ● Speaker: Prof. SHI Jingxia (University of International Business & Economics) ● Discussant: Prof. LEE Seryon (Chonbuk National University)
		2. KOREA-CHINA FTA: ENVIRONMENT AND TRADE ● Speaker: Prof. PARK Deokyoung (Yonsei University) Discussant: Dr. Su Yu (Xiamen University)
		3. THE COMPETITION CHAPTER OF THE KOREA-CHINA FTA IN THE CONTEXT OF THE WTO'S COMPETITION DEVELOPMENTS: AN ANALYSIS ● Speaker: MS. LEE Jeehyung (Ewha Woman's University) ● Discussant: Dr. Zhang Huang (Xiamen University)
		Comments and Q&A
18:30- 20:00 pm Farewell Dinner		

Opening Ceremony

Prof. **LIAO Yixin**
(Vice President of Chinese Society of International Economic Law)

Mr. **LEE Won**
(President of Korea Legislation Research Institute)

Prof. **ZHU Yansheng**
(Vice Dean of Xiamen Law School)

Prof. **CHUNG Chanmo**
(President of Korean Society of International Economic Law)

祝　词

尊敬的各位来宾大家好。我是韩国法制研究院院长李源。

今天在中国十大最美校园之首的厦门大学，由中韩两国国际经济法学会以及韩国法制研究院共同举办学术研讨会。首先，向到场的各位嘉宾表示衷心的感谢。尤其向为成功举办本次研讨会而不辞劳苦的中国国际经济法学会曾华群会长，以及韩国国际经济法学会鄭燦模会长，还有将为我们带来精彩讨论的各位发表者和讨论者表示最衷心的感谢。

本次学术研讨会的主题是中韩自贸协定（FTA）。中韩自贸协定于去年11月完成实质性的谈判，并于今年6月1日经过两国政府正式签署协议，目前两国国内的批准程序正在进行当中。如果两国国内批准程序能够顺利结束，中韩自贸协定将有望在今年年内正式生效。在这样的时间点上，两国专家学者汇聚一堂，对当前中韩两国交流合作关系中最为重要的课题——中韩自贸协定进行交流探讨，我认为本次学术研讨会十分符合时宜，并意义深远。

中韩两国自1992年建交以来，通过紧密交流实现了飞跃式的发展。在两国关系发展成果的基础上签署的中韩自贸协定，将对两国间经济合作构建制度框架，并有望为两国经济发展带来新的动力。当然，对中韩自贸协定的观点不仅有充满希望的、积极的观点，不可否认也有一些忧虑的观点认为，自贸协定有可能对两国在对外开放方面的敏感产业带来严重的冲击。

正如天地万物有阴阳之分，中韩自贸协定可以被视为一枚硬币的正反两面。因此，在尽可能发挥中韩自贸协定的优势，为两国企业和个人提供更多机会的同时，为使有可能受到冲击的领域损失最小化而制定相应的对策，我认为这是目前有待解决的最为重要的课题。

韩国法制研究院是韩国唯一一所法制专门国家政策研究机构，为政府政策及决策提供实效性的立法应对方案，对世界各国法制相关信息进行收集和分析，并提供给政府机关、研究机构及企业。此外，我们也把韩国现行法律法规翻译成英文，登载于研究院网站，帮助国外的朋友们更好地理解韩国的法制及法律。

在此，我也希望通过本次研讨会，各位能对我们研究院的研究工作给予更多的关

心和支持。同时，也希望包括本次研讨会的主题——中韩自贸协定在内，今后能够在我们研究院进行研究的诸多领域继续保持密切的交流与合作。

2013年韩国朴槿惠总统访问中国时，习近平主席赠送给朴槿惠总统一幅书画作品《登鹳雀楼》。其中有脍炙人口的词句“欲穷千里目，更上一层楼”。这份礼物，表达的是对中韩两国关系进一步发展的期望。同样，预祝本次研讨会能够成为一个契机，使得中韩两国国际经济法学的发展与相互交流更上一层楼。最后，预祝本次研讨会圆满成功，并再次向到场的各位嘉宾表示感谢。谢谢。

2015年6月23日

韩国法制研究院

院长 李 源

축 사

존경하는 내외 귀빈 여러분 반갑습니다.

한국법제연구원 원장 이원입니다.

오늘 중국의 10대 아름다운 캠퍼스로 선정된 샤먼대학에서 한중 양국의 국제경제법학회와 저희 연구원이 공동으로 주최하는 학술회의에 참석해 주신 여러분께 진심으로 감사드립니다. 특히 이번 학술회의를 위해 애써주신 曾华群 중국 국제경제법학회 회장님과 정찬모 한국국제경제법학회 회장님, 그리고 소중한 발표와 열띤 토론을 해 주실 발표자와 토론자들께 깊은 감사의 말씀을 드립니다.

이번 학술회의의 주제인 한중 FTA는 작년 11월에 실질적인 협상 타결을 이루고 지난 6월 1일 양국 정부의 정식 서명을 거쳐 현재 양국에서 국내비준절차가 진행 중에 있습니다. 양국의 국내비준절차가 순조롭게 마무리된다면 한중 FTA는 올해 안에 발효될 것으로 기대되고 있습니다. 이러한 시점에서 양국의 전문가들이 한 자리에 모여 양국의 교류협력 관계에서 가장 중요한 현안인 한중 FTA에 관해 논의하는 이번 학술회의는 매우 시의적절하고 의미 있는 자리라고 생각합니다.

한중 양국의 관계는 지난 1992년의 수교 이래의 긴밀한 교류협력을 통해 비약적인 발전을 이루었습니다. 이러한 성과를 바탕으로 타결된 한중 FTA는 양국간 경제협력의 제도적인 틀을 마련하고 양국 경제 발전에 새로운 동력을 불어넣어 줄 수 있을 것으로 기대됩니다. 물론 한중 FTA에 대해서는 이와 같은 희망적인 전망뿐만 아니라 한중 양국이 모두 가지고 있는 대외개방 민감산업에 심각한 타격을 줄 것이라는 우려 섞인 전망도 늘 있어 왔던 것도 사실이라 하겠습니다.

천지만물에는 음양이 있듯이 한중 FTA에 있어서도 기회와 위기는 동전의 양면처럼 함께 할 것입니다. 따라서 한중 FTA의 장점을 최대화하여 양국의 기업과 개인에게 더 많은 기회를 제공하는 한편, 피해가 예상되는 분야에 대한 피해를 최소화하기 위한 대안을 마련하는 것이 현 시점에서 무엇보다 중요한 과제라고 할 것입니다.

한국법제연구원은 한국 유일의 법제전문 국책연구기관으로서 정부의 정책현안과 관련하여 실효성 있는 입법대안을 제시하고 있으며, 세계 각국의 법제에 관한 정보를 수집・분석하여 정부기관이나 연구기관・기업 등에게 제공하는 한편, 한국의 현행 법령을 영역하여 홈페이지에

공개함으로써 외국인이 한국의 법제를 이해하는 데에 도움이 되도록 하고 있습니다.

이번 회의를 계기로 향후에도 저희 연구원의 연구사업에 많은 관심과 지원을 보내주시고, 또한 오늘 회의의 주제인 FTA 분야를 포함하여 저희 연구원이 수행하고 있는 다양한 연구분야에서 지속적인 교류와 협력이 이루어지기를 기대합니다.

2013년 한국의 박근혜 대통령이 중국을 방문했을 때 習近平 주석께서 유명 서예가의 "欲窮千里目라는 작품을 박근혜 대통령에게 선물했다고 하는데, 그 함의는 중국에서 널리 인구에 膾炙되는 詩(登鸛雀樓)를 통해 양국관계의 발전에 대한 바램을 나타낸 것으로 이해됩니다만, 오늘 이 포럼이 한중 양국의 국제경제법학의 발전 및 상호교류와 협력에 있어서 更上一層樓하는 한 걸음이 되기를 기원합니다. 아무쪼록 즐겁고 유의미한 시간이 되시기를 바라고, 참석하신 모든 분들께 다시 한 번 감사드립니다.

2015. 6. 23.

한국법제연구원 원장

이 원

인사말씀

쨔오샹 하오!
한국국제경제법학회장 정찬모입니다.

먼저 한·중 FTA를 주제로 하여 제6차 한중국제경제법학자대회를 중국국제경제법학회, 한국법제연구원과 함께 개최하게 된 것을 기쁘게 생각하며 양 기관 및 셔먼대학교 법학원에 감사의 말씀을 드립니다.

한국국제경제법학회는 중국국제경제법학회보다 10여년 늦게 출범하였고 회원규모도 오분의 일 수준에 해당하는 100여명에 불과 합니다. 하지만 저희 학회는 연 4회 이상의 학술행사를 개최하는 등 활발한 학술행사를 하고 있습니다. 지난 5월에는 국내에서 국회입법조사처와 함께 바로 오늘의 주제에 대해서 토론회를 개최한 적이 있습니다.

한중FTA체결 이전에도 이미 한중간의 교역은 빠른 속도로 확대되어 왔습니다. 중국은 한국에 대해 가장 큰 교역상대국입니다. 따라서 금번 한중FTA의 체결을 한중간 교역의 추가적 확대를 도모한다는 점에만 주목해서는 그 의미를 충분히 파악하지 못할 것이라고 생각됩니다.

한중FTA는 한중간 통상환경에 법적 안정성을 부여함으로써 한중간의 교역 증대를 가져올 뿐만 아니라 동아시아 주변국들에게도 지역경제협력에 관한 긍정적 자극이 될 것으로 기대됩니다.

이와 같은 관점은 한중FTA 협정문에 남아있는 미비점을 후속 협상을 통하여 개선하는 데에 양국이 보다 적극적으로 임하여야 한다는 점을 시사합니다. 오늘 여러 참석자들의 논의가 한중FTA의 현재를 평가하고 미래를 기획하는 좋은 발판이 되기를 희망합니다.

셰셰.

Session 1

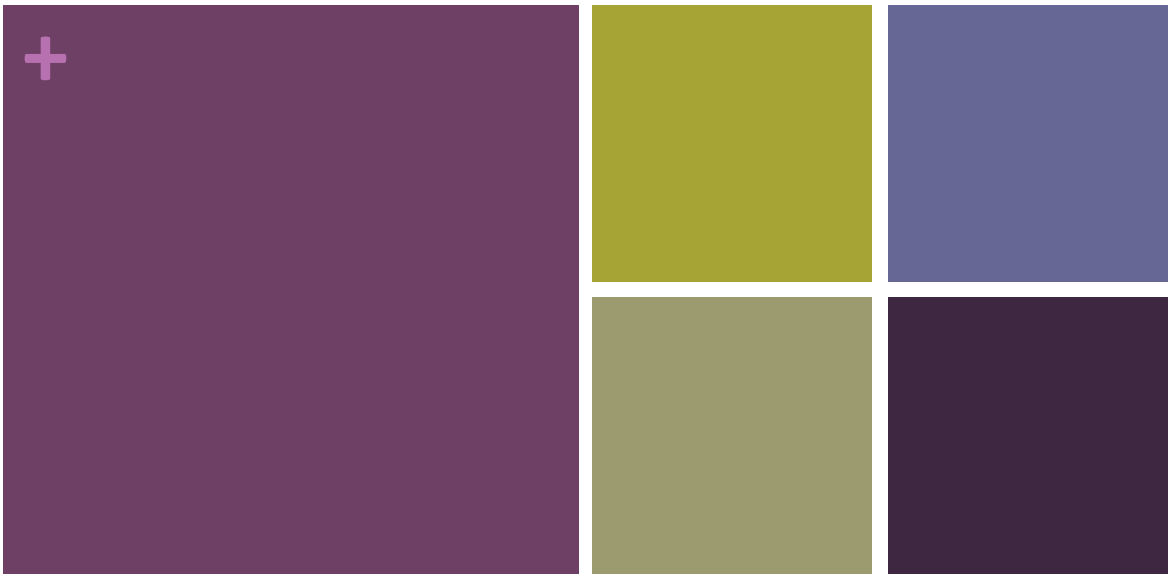
1. THE NEW DEVELOPMENT OF CHINESE FTAS: A PERSPECTIVE OF CHINA-KOREA FTA

Speaker:

Prof. **WANG Heng**
(Southwest University of Political Science & Law)

Discussant:

Prof. **OH Sunyoung**
(Soongsil University)



The New Development of Chinese FTAs: A Perspective of China-Korea FTA

Heng Wang
Southwest University of Political Science and Law

Outline

- What are the features of China-Korea FTA (ChKFTA) compared with previous FTAs of China?
- What are the challenges of ChKFTA?

Arguments

3

- WTO-covered areas is featured with WTO-plus obligations or further clarification of WTO rules. In WTO-extra areas (environment,competition…), they mainly call for regulatory cooperation and usually are not subject to dispute settlement (DS) of ChKFTA.
- In good governance,transparency is the key element.
- In non-trade concerns, environment and competition get special attention.
- In the interpretation, WTO jurisprudence, which one or both parties disagree, may be deviated in the implementation and interpretation of ChKFTA.

1. Features of ChKFTA

4

- 1.1 Upgraded rule system
  - Expanded coverage, new structural development , and higher requirements (i.e., WTO-plus obligations)
  - WTO-covered areas (goods, services, TRIPs): WTO-plus obligations or further clarification of WTO rules
  - WTO-extra areas (environment,competition…): call for regulatory cooperation and usually not subject to dispute settlement (DS) of ChKFTA

WTO-plus obligations

5

- ChKFTA 7.17: When determining individual margin pursuant to Art. 9.5 of Anti-Dumping Agreement (AD Agreement), no duty shall be imposed on exporters or producers in the exporting Party for which it is determined that the dumping margin is less than the *de-minimis* threshold set out in Art 5.8 of AD Agreement.
- ChKFTA 7.8.1: After receipt by investigation authorities (IA) of a anti-dumping application on imports, and before initiating an investigation, the Party shall provide ***written notification to the other Party of its receipt of the application***, and may afford a meeting regarding the application, consistent with the Party's law.
- Protection of utility model, genetic resources, traditional knowledge and folklore

WTO-plus obligations(cont.): Origin and customs procedures

6

- A Certificate of Origin shall…be in printed format, which is understood as a Certificate of Origin either manually or ***electronically*** signed and stamped by the authorized body (art.3.15.2(e))
- Exporter may choose record keeping in ***digital*** form(ChFTA art. 3.20.4)
- Customs authorities shall ***apply information technology*** to support customs operations (art. 4.12)
- Each party shall adopt or maintain procedures that provide for ***advance electronic submission and processing*** of information before the physical arrival of goods (art. 4.14.2(a))
- Customs procedures for express shipments shall allow submission of a single manifest covering all goods contained in an express shipment, through, if possible, ***electronic means*** (art.4.15.2(a))

1.2 Features of ChKFTA: Non-Trade Concerns

7

- 1.2 Highlighted non-trade concerns
  - Safety, health, environment, national security, consumer welfare, food security…
  - Environment and competition get special attention

1.3 Features:Enhanced good governance norms

8

- Transparency and public participation
  - e.g., participation in trade policy making through comments, consultation with industry)
- Efficiency
  - e.g., efficient post clearance audits, time limit for dispute settlement procedures, consequences of denial or late reply to origin verification visit request)
- Even-handedness
  - e.g., the non-discrimination provisions, the consistent application of trade measures)
- Rationality and fairness
  - e.g., identification of legal basis and fact findings in origin verification visit outcome, reasons of refusal of equivalence, reasons of detention)
- Rule of law and administrative due process
  - e.g., the right to challenge administrative actions and appeal, the review of administrative decisions, the chance to be heard in administrative and review proceedings, the right to receive a notice , the impartiality of tribunals)

1.3 Features:Enhanced good governance norms

9

- Some of good governance norms are repeatedly required, and good governance norms seem to be emphasized in areas such as trade remedies.
- Transparency is one of the key good governance requirements in China-Korea FTA.

2. Challenges

10

- 2.1 Rule development; Services and investment
- Inspired by the ChAFTA, the possible options for new services rules could include
- more market access
- improved mutual recognition of service qualifications
- streamlined regulatory requirements
- enhanced transparency
- regulatory decision-making, to name a few.

2.1 Rule development: Rules

11

- Three categories of TBT clauses in ChKFTA on the link to WTO law
- China-Korea FTA copies or confirms the counterpart of TBT Agreement, including the provision on standards that mandates the compliance with Annex 3 of TBT Agreement
- ChKFTA elaborates the TBT Agreement. Regarding the acceptance of results of conformity assessment procedures in the other member in TBT Agreement, it is explained to include acceptance by parties' agreement of those conducted by bodies in a party regarding specific technical regulations, and one party's recognition of those conducted in the other party.
- ChKFTA TBT-plus provisions
  - A new rule on consumer product safety
  - TBT-plus "best effort" provision to minimize marking and labeling requirements, among others.

2.2 Implementation and Interpretation

12

- The relationship among different rules of ChKFTA
- The relationship among ChKorea FTA, international law and domestic law
- The relationship between China-Korea FTA and the WTO

2.2 Implementation and Interpretation

13

- Customary rules of interpretation of international law, including those in the Vienna Convention on the Law of Treaties, is used by the panel to "consider" rather than "interpret" the FTA.
- What is the relationship among the WTO law, international law, and ChKFTA?
- Any difference in the interpretation of ChKFTA under the following situation?
  - "affirm" rights and obligations under the WTO Agreement and other existing agreements
  - incorporation of WTO rules
  - reference to WTO provisions (application of WTO rules)
  - use of WTO language…

2.2 Implementation and Interpretation

14

- Can WTO jurisprudence NOT be followed in the implementation and interpretation of ChKFTA?
  - WTO jurisprudence that both parties disagree
    - E.g., evolutionary interpretation of service schedule as in China-Publications?
  - WTO jurisprudence that only one party disagree

- China-Korea FTA seems to be based on previous FTAs and trilateral and bilateral BITs, and take into account future FTAs and investment agreements including the ongoing China-US and China-EU investment negotiations. China-Korea FTA, for instance, perhaps copied the MFN clause of China-Japan-Korea Investment Agreement.

- Does the increasing number of China FTAs lead to more convergence or divergence?

Session 1

2. ANALYSIS OF THE KOREA-CHINA FTA: FOCUSING ON TRADE REMEDIES PROVISION

Speaker:

Prof. **SOHN Kiyoun**
(Incheon National University)

Discussant:

Prof. **Xiao Bing**
(Southeast University)

Analysis of the Korea-China FTA: Focusing on Trade Remedies Provisions (한중 FTA 무역구제규정 분석)

SOHN Kiyoun 孫 基 允

(仁川大學校 무역학부)

Anti-dumping Measures (반덤핑조치 현황)

- 1995.1.1-2014.12.31 (WTO)
- Main user countries (AD 사용국가)
  - India, U.S.
- Main target countries (AD 규제대상국)
  - China, Korea
- Bilateral trade issue (양자 무역이슈)
  - Korea: China's leading AD target
  - China: Korea's AD investigations

K-C FTA: Safeguard Rules (세이프가드 규정)

- Bilateral SG (양자세이프가드, BSG)
- Conditions for BSG application (발동요건)
- Applicable measures (적용가능한 조치)
- Provisional BSG (잠정양자세이프가드)
- Investigations (조사관련 규정)
- Duration (적용기간)
- Non-application period (유예기간)

K-C FTA: Safeguard Rules (세이프가드 규정)

- Global safeguard measure (글로벌 세이프가드, GSG)
- Notification (통지)
  - 조사개시, 예비판정 및 최종판정
  - all pertinent information

K-C FTA: AD & CVD Rules (반덤핑관세 & 상계관세규정)

- Rules on the disclosure
  (판정결과 공개 등)
- Notification & consultation
  (통지 및 양자협의)
- Undertakings
  (가격인상약속 등)

Assessment (평가)

- BSG
  - lack of procedural rules
    (절차규정 부족)
- AD & CVD
  - prohibition of zeroing
    (제로잉 금지)

Policy recommendations (정책과제)

- China's FTAs
- Korea's FTAs
- Sunset review rules (일몰재심규정)
  - 조사절차규정 명확화 보완 필요
- Lesser duty rule (최소부과원칙)
  - mandatory (의무규정)
- Public interest
  - specific rules (구체적인 규정 필요)

Analysis of the Korea-China FTA: Focusing on Trade Remedies Provisions*

Kiyoun Sohn**

I. Introduction

During the period of January 1, 1995 to December 31, 2014, the WTO Members have taken total 3,058 anti-dumping measures on imports from Member countries.[1] During the period, China is the top target country of the anti-dumping duties by the WTO member countries. Korea follows as the second target country.[2] At the bilateral level, Korea and China have been one of the leading target countries of anti-dumping measures by each other. In particular, during the last 20 years, Korea has taken anti-dumping measures on 21 Chinese products, which leads to China as the most target country of Korea's anti-dumping measures.[3] Also, Korea has been one of the leading target countries of China's anti-dumping duties.

Trade remedies, mainly the anti-dumping duties, are issues of interest to both Korea and China. Thus, they seek for improved anti-dumping rules at both multilateral and bilateral forum. At the multilateral dimension, the WTO Member countries have already embarked on the rules negotiations pursuant to the Doha Development Agenda (DDA) mandate. China and Korea have participated actively in the rules

---

* This paper is prepared for the conference jointly organized by the Chinese Society of International Economic Law and the Korean Society of International Economic Law to be held in Xiamen, China on June 23, 2015.

** Professor, Division of International Trade, Incheon National University, Korea and kysohn@inu.ac.kr.

1) According to the WTO, during the last 20 years, India is the most frequent user of anti-dumping measures, followed by the United States.

2) While Chinese products have been 759 anti-dumping measures, Korean products have been 213 anti-dumping measures.

3) During the period of 1995 to 2014, China has imposed 179 anti-dumping measures. American, Japanese and Korean products have been subject to 33, 29 and 27 anti-dumping measures, respectively.

negotiations by presenting a number of proposals mainly because their exports have been deemed to be subject to unreasonable anti-dumping rules or the seemingly disguised protectionist policies.

Besides the WTO negotiations, Korea and China have made efforts to clarify and improve trade remedies rules through the free trade agreements. In particular, Korea has attached importance to the trade remedies rules during its FTA negotiations. Korea had concluded FTAs with some tangible outcome, including China-Korea FTA/Korea-China FTA. Korea-China FTA contains provisions on anti-dumping and countervailing duties, and safeguard measures. It is notable that the Korea-China FTA trade remedies provisions introduce certain rules which the related WTO Agreements do not specify. Recognizing the increasing importance of trade remedies rules for the bilateral trade relationship, we analyze trade remedies provisions of the Korea-China FTA with a view to contributing to the more effective implementation of the FTA.

Several studies analyze the trade remedies provisions of FTA. They include Sohn (2008 and 2010). Thus, it is important to analyze the rules of new FTAs. Recognizing the importance of Korea-China FTA, we analyze its trade remedies provisions with a vew to exploring the guidance for the effective implementation. This paper is organized as follows. In sections II and III we examine the safeguard rules, and the anti-dumping and countervailing duties rules, respectively. In section IV, we analyze the trade remedies rules in comparison with the related WTO Agreements. We assess whether certain trade remedies provisions are consistent with the relevant WTO Agreements and whether they are "WTO plus" or not. Also we compare the Korea-China FTA's trade remedies rules with the trade remedies provisions of other Korea's and/or China's FTAs, if appropriate. Finally, in Section V, we conclude with policy recommendations with a view to achieving the effective implementation of the Korea-China FTA.

II. Key Features of Safeguard Rules

When countries include safeguard provisions in their free trade agreements, they distinguish two types of safeguard measures, the bilateral safeguard measures (BSG) and the global safeguard measures (GSG). The bilateral safeguard measures may be applied because of the tariff reduction or tariff elimination as a result of the free trade agreements. On the other hand, the global safeguard measures could be imposed in accordance with the WTO Agreement on Safeguards (hereinafter, "SG Agreement"). The Korea-China FTA contains provisions on both the bilateral and global safeguard measures, though it touches upon the bilateral safeguard rules comprehensively.

1. Bilateral safeguard measures

(a) Conditions for BSG measures

A Party may apply a bilateral safeguard measure in the event of when three conditions are satisfied.[4] First, there shall be an increase in imports[5] from the other Party. In this case, the first condition is satisfied only when the import has increased as a result of reduction or elimination of a customs duty under the Korea-China FTA.

The second condition for the BSG is a serious injury or threat thereof to the domestic industry. The domestic industry shall produce like or directly competitive goods of the increased imports. Finally, the investigating authorities shall demonstrate that the serious injury to the domestic industry was caused or is threatened by the increased imports.

(b) Applicable measures

When it is found that the above mentioned three conditions are met, a Party may apply a BSG in one of two of forms. The first applicable

4) Article 7.1 of Korea-China FTA.
5) The increase in imports means the absolute increase or the increase relative to domestic production.

measure is suspension of the further reduction of any tariff rate on the good provided for the Korea-China FTA.[6]

The second form of BSG measure is the tariff increase to a certain maximum level. The maximum tariff rate level shall be the lesser duty rate of two duty rates: (i) the MFN applied rate of the duty on the good in the effect on the date when the BSG is applied, and (ii) the base tariff rate specified in the Schedules included in Annex 2-A[7] pursuant to Article 2.4 of Korea-China FTA.[8]

(c) Provisional BSG

A Party may apply a provisional BSG measure in critical circumstances. In the event of where delay would cause damage that would be difficult to repair, a Party may apply a provisional safeguard measure on the basis of a preliminary affirmative determination[9]. The importing Party may impose the BSG for up to 200 days.[10] The maximum period of 200 days is the same as that of the provisional global safeguard measure.[11]

There are procedural rules concerning the provisional BSG measure. Before applying a BSG measure on a provisional basis, the applying Party is required to notify the other Party. Moreover, after applying the provisional BSG, the applying Party shall initiate consultation.[12]

(d) Investigations

There are a number of procedural rules, depending upon the investigation stages. When the applying Party initiates a safeguard investigation, it shall notify the other Party of its initiation in writing.

---

6) Article 7.1(a) of Korea-China FTA.
7) Annex 2-A to Korea-China FTA specifies reduction or elimination of customs duties.
8) Article 7.1(b) of Korea-China FTA.
9) The preliminary determination shall demonstrate that the domestic industry suffered a serious injury or is threatened to suffer a serious injury by the increased imports which result from the reduction or elimination of a tariff under Korea-China FTA.
10) Article 7.3(3) of Korea-China FTA.
11) Article 6 of the SG Agreement.
12) Article 7.3(2) of Korea-China FTA.

When the applying Party decides to apply a BSG measure, it shall consult with the other Party prior to the application of BSG. At the consultation, the Parties review the information arising from the investigation and exchange views on the proposed BSG measure.[13)]

The BSG investigations shall be conducted in accordance with the investigation rules of the WTO SG Agreement.[14)] The rules include those for public notice, public hearings, and treatment of confidential information submitted.[15)] Concerning the criteria for determination of serious injury and causality, the Parties shall apply the relevant rules of the SG Agreement[16),17)] The investigation shall be concluded within one year after initiation.

(c) Duration

A Party may impose a BSG for up to two years. Then, it may extend by up to two years if it determines that the BSG continues to be necessary to prevent or remedy serious injury and to facilitate adjustment and that there is evidence that the industry is adjusting.[18)] A Party may apply a BSG after the expiration of the transition period[19)], only if the other Party contends.[20)]

When the applying Party is expected to apply the BSG for more than one year, the Party is required to progressively liberalize the definitive BSG at regular intervals.[21)] It is notable that a Party is subject to the grace period. In particular, a Party is not permitted to apply a BSG on the import of a good which has been subject to such a measure for a period of time equal to that during which such measure had been previously applied, provided that the period of non-application is at least

13) Article 7.2(1) of Korea-China FTA.
14) Article 7.2(2) of Korea-China FTA.
15) Articles 3 and 4.2(c) of the SG Agreement.
16) The rules are Articles 4.2(a) and 4.2(b).
17) Article 7.2(3) of Korea-China FTA.
18) Article 7.2(5)(b) of Korea-China FTA.
19) The transition period means the ten-year period following the entry date of Korea-China FTA, except that a longer period applies to the good whose tariff is scheduled to be eliminated over more than ten years.
20) Article 7.2(5)(c) of Korea-China FTA.
21) Article 7.2(7) of Korea-China FTA.

two years.[22]

2. Global safeguard measure

In contrast to a BSG which is applied only to the imports from the other Party of the FTA, a global safeguard measure (GSG) is the measure which is applied to a product being imported irrespective of its source[23]. While some FTAs contain special rules on the application of GSG,[24] other FTAs do not. Korea-China FTA falls into the latter group.[25]

Concerning the application of GSG, Korea-China FTA follows in general the SG Agreement and Article XIX of GATT 1994. Korea-China FTA stipulates procedural rules which the SG Agreement does not specify. Upon the other Party's request, a Party is required to notify the other Party of all pertinent information on the initiation of a safeguard investigation, the preliminary determination and the final determination.[26]

III. Ant-Dumping and Countervailing Duties

Korea-China FTA has relatively limited provisions on anti-dumping and countervailing duties in comparison with other Korea's FTAs. While some provisions stipulate more detailed rules than those of the related WTO Agreements, other provisions introduce new rules.

We start with the substantive rules. China and Korea agreed two important extra rules on the anti-dumping investigation. They are confirmation of non-use of surrogate value of a third country[27] and of prohibiting zeroing practice[28].

---

22) Article 7.2(6) of Korea-China FTA.
23) Article 2.2 of the SG Agreement.
24) Typical extra rule is the exclusion of imports from the FTA member countries from the application of a GSG.
25) Some of Korea's FTAs fall into the former group.
26) Article 7.5(2) of Korea-China FTA.
27) Article 7.7(4) of Korea-China FTA.
28) Article 7.7(5) of Korea-China FTA.

Korea-China FTA introduces the detailed rules on the disclosure. After the imposition of provisional measures and before the final determination, it is necessary for a Party to disclose fully all essential facts and considerations which were the basis for the decision. In addition, the disclosure shall be made in writing and with a sufficient time such that the interested parties are allowed to make comments.[29)]

China and Korea also agreed to stipulate the practical rules on notification and consultations. In the event of receiving an anti-dumping application from the domestic industry regarding imports from the other Party, a Party shall notify its receipt to the other Party no later than seven days before the initiation of an investigation in writing. Also the importing Party may provide the opportunity of consultation for the other Party.[30)] The notification and consultations rules for the countervailing duties are a little different from those for the anti-dumping duties. The FTA fails to specify the timing of notification of the receipt of countervailing duty application on imports from the other Party. In addition, the Parties shall[31)] have consultations before the initiation.

Korea-China FTA includes additional rules on the undertakings. Parties are required to provide information on their undertaking procedures.[32)] In addition, the Party shall afford due consideration and opportunity for meetings for the exporters, and the other Party.[33)]

---

29) Article 7.7(2) of Korea-China FTA.

30) Article 7.8(1) of Korea-China FTA.

31) In the anti-dumping duty case, the importing Party *may* provide a consultation opportunity for the exporting Party. The reason for the different rule is that pursuant to Article 13 of the WTO Agreement of Subsidies and Countervailing Measures (ASCM), the importing WTO Member country shall hold a consultation with the government of the exporting country prior to the initiation decision.

32) Article 7.9(1) of Korea-China FTA.

33) Articles 7.8(2) and 7.8(3) of Korea-China FTA. In the case of anti-dumping investigation, the Party shall afford the opportunity to the exporters of the other Party. In the countervailing duty investigation, the Party shall afford the opportunity to the other Party as well as the exporters of the other Party.

IV. Assessment

1. Assessment

Besides the bilateral safeguard rules, Korea-China FTA contains relatively limited number of trade remedies provisions. With respect to the BSG, the FTA fails to specify substantive procedural rules such as the timing of initiation decision and preliminary determination.

Also there are a number of provisions to be clarified for the effective implementation. First, with respect to the notification of information on global safeguard investigation, a Party is required to provide "all pertinent information" in writing. For the better implementation, there is a need to exchange views on the content of pertinent information to be included in the notification. Similarly, it is useful to clarify "the essential facts" to be disclosed after respective investigation stages pursuant to Article 7.7(2) of Korea-China FTA.

On the other hand, there are also a number of notable and meaningful provisions which the related WTO Agrements do not contain. They include the information notification requirements with respect to the global safeguard investigations, specific timeline of the notice of receipt of anti-dumping application, and allowing the room for consultation concerning the anti-dumping application. More importantly, the two countries support explicitly the prohibition of zeroing, while the WTO Anti-dumping Agreement does not. Based on the new and improved rules, we can conclude that the trade remedies provisions of Korea-China FTA are deemed to be 'WTO plus'. Thus, after Korea-China FTA comes into force, its trade remedies provisions are expected to contribute to bilateral trade between China and Korea.

2. Policy recommendations

Despite the positive assessment of the trade remedies provisions, we may consider some areas to be clarified and improved with a view to

utilizing Korea-China FTA to the full extent. They include the more specific rules for sunset review under Article 11.3 of the WTO Anti-dumping Agreement and Article 21.3 of ASCM, making the lesser duty rule mandatory,[34] and introduction of specific public interest rule[35].

One of the most controversial issues on anti-dumping investigations is which provisions shall be applied to the sunset review investigations. China's Anti-dumping Regulations (AD Regulations) does not specify clearly either. Rather, it simply provides that the review proceedings shall be conducted with reference to the relevant provisions of the China AD Regulations.[36]

IV. Concluding remarks

We analyze the trade remedies provisions of Korea-China FTA with a view to exploring the guidance for its effective implementation. It is quite desirable for two countries to discuss and exchange views on the exiting rules and the consequent limitations at the Committee on Trade Remedies[37].

The analysis will also provide a useful guidance for the ongoing and perspective regional trade agreement negotiations, including China-Japan-Korea FTA (CJK FTA), Regional Comprehensive Economic Partnership (RCEP) and Asia-Pacific Free Trade Area (APFTA) negotiations.

34) Korea-Singapore FTA, Korea-EFTA FTA, Korea-India FTA, Korea-EU FTA and Korea-Turkey FTA provide the mandatory lesser duty rule.
35) Korea-EU FTA and Korea-Canada FTA include the public interest rule, with some variations.
36) Sohn (2006, 155)
37) Article 7.15 of Korea-China FTA provides its mandate for the Committee.

References

Bagwell, Kyle W., George A. Bermann, and Petros C. Mavroidis, eds., 2010, *Law and Economics of Contingent Protection in International Trade,* New York: Cambridge University Press.

Huang, Thomas W., 2003, *Trade Remedies: Laws of Dumping, Subsidies and Safeguards in China*, The Hague: Kluwer Law International.

Korean Association of International Economic Law, 2013, *International Economic Law*, Seoul: Pakyoung Book.

Luo, Yan, 2010, *Anti-Dumping in the WTO, the EU and China: The Rise of Legalization in the Trade Regime and its Consequences*, Austin: Wolters Kluwer.

Mavroidis, Petros C. and George A. Bermann and Mark Wu, 2010, *The Law of the World Trade Organization (WTO): Documents, Cases & Analysis*, St. Paul, MN: West.

Sohn, Kiyoun, 2006, "Analysis of China's Anti-Dumping System," *International Trade Law*, No. 72, 140-159.

Sohn, Kiyoun, 2008, "Korea-EU FTA Negotiations: Trade Remedies," *Yonsei Law Journal*, Vol. 18, No. 4, 409-428.

Sohn, Kiyoun. 2010, "China-Specific Trade Remedies Rules and Practices," *China Study*, No. 9, 305-334.

Sykes, Alan O., 2006, *The WTO Agreement on Safeguards: A Commentary*, Oxford: Oxford University Press.

Van den Bossche, Peter and Werner Zdouc, 2013, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (3rd ed), Cambridge: Cambridge University Press.

Vermulst, Edwin, 2005, *The WTO Anti-Dumping Agreement: A Commentary*, Oxford: Oxford University Press.

World Trade Organization, 2006, *WTO Appellate Body Repertory of Reports and Awards 1995-2005*, Cambridge: Cambridge University Press.

Session 1

3. RULES OF ORIGIN IN THE CHINA-KOREA FTA

Speaker:

Prof. **MA Guang**
(Zhejiang University)

Discussant:

Dr. **KIM Hyunggun**
(Korea Legislation Research Institute)

中韩FTA中的原产地规则

马光
浙江大学光华法学院

一、中韩FTA签署过程与学者交流

- 2006年11月，同意于2007年初启动联合可行性研究
- 2010年5月，宣布结束联合研究，并签署谅解备忘录
- 2012年5月，宣布正式启动谈判
- 2012年5月-2014年11月，共召开十四次谈判
- 2014年11月，结束实质性谈判
- 2015年2月，草签
- 2015年6月1日，签署
- 何时生效？

2005年，首尔(高丽大学)

3

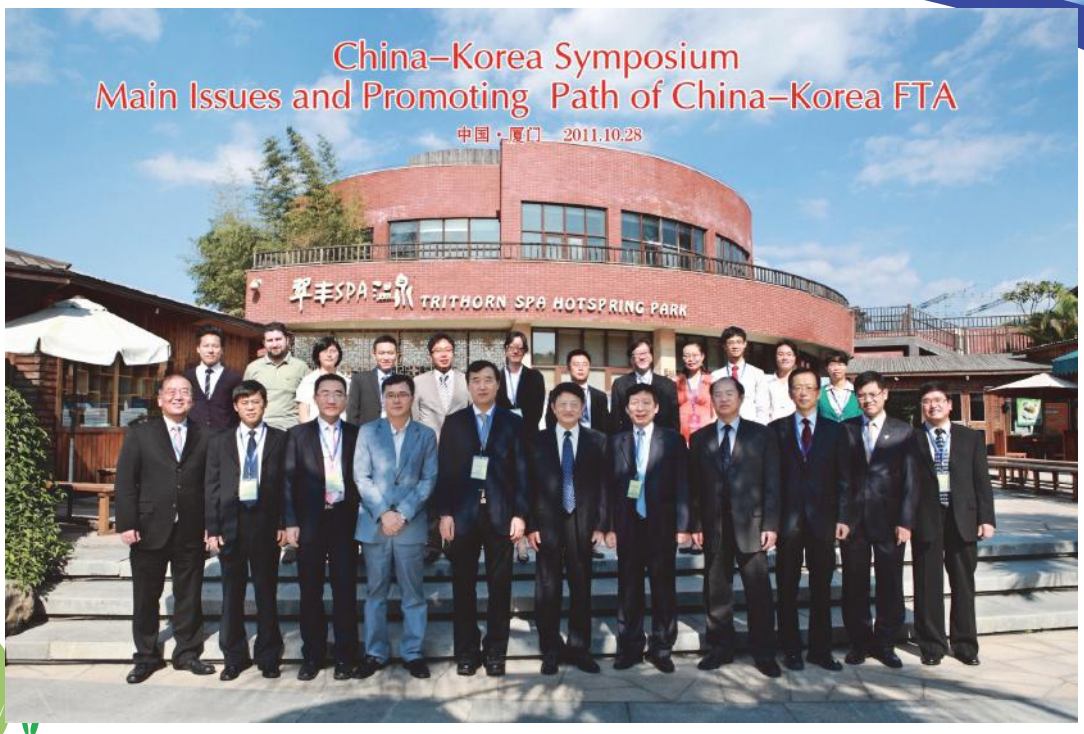
2008年，天津(南开大学)

4

2010年，首尔(成均馆大学)

5

2011年，厦门(厦门大学)



6

2013年，首尔(梨花女大)

7

2015年，厦门(厦门大学)

- Korea-China Trade Relations in Ten Years of the WTO
- The WTO Regime and Regional Trading Blocs: Laws and Practices of the Free Trade Agreements in China and Korea
- Korea-China FTA - Seeking Ways to Reduce Trade Barriers for the Special Partnership
- Main Issues and Promoting Path of China-Korea FTA
- Korea-China FTA: Prospects and Jurisprudence
- China-Korea FTA: Legal Prospects and Jurisprudence

8

二、何时生效？

- 中韩FTA 第22.4条 生效和终止
- 一、本协定的生效取决于各缔约方完成各自国内必需的法律程序。
- 二、缔约双方应通过外交途径相互书面通知已完成国内法律程序。本协定自后一份通知书发出之日起60日后或缔约双方均同意并在书面通知中确认的其他期限后生效。

二、何时生效？

- 缔结条约程序法 第7条
- 条约和重要协定的批准由全国人民代表大会常务委员会决定。前款规定的条约和重要协定是指：

（一）友好合作条约、和平条约等政治性条约；

（二）有关领土和划定边界的条约、协定；

（三）有关司法协助、引渡的条约、协定；

（四）同中华人民共和国法律有不同规定的条约、协定；

（五）缔约各方议定须经批准的条约、协定；

（六）其他须经批准的条约、协定。

二、何时生效？

- 缔结条约程序法 第8条
- 本法第七条第二款所列范围以外的国务院规定须经核准或者缔约各方议定须经核准的协定和其他具有条约性质的文件签署后，由外交部或者国务院有关部门会同外交部，报请国务院核准。

二、何时生效？

- 韩国宪法 第60(1)条
- **The National Assembly shall have the right to consent to the conclusion and ratification of treaties pertaining to mutual assistance or mutual security; treaties concerning important international organizations; treaties of friendship, trade and navigation; treaties pertaining to any restriction in sovereignty; peace treaties; treaties which will burden the State or people with an important financial obligation; or treaties related to legislative matters.**

二、何时生效？

- 中国国务院核准
- 韩国国会批准
- 关键在于韩国国会能何时批准

13

三、境外加工问题

- 中韩FTA 第3.3条 特定货物处理
- 一、尽管有第3.2条的规定，对于附件3-B所列货物使用一缔约方的出口材料在缔约方领土之外的地域(以下简称“境外加工区”)上完成加工，并在完成加工后再复出口至该缔约方用于向另一缔约方出口的货物(就本章而言，缔约双方同意，本条所述的货物加工区域仅限于本协定签署前在朝鲜半岛上的已运行的工业区)，如符合下列条件应被视为该缔约方原产：

  （一）非原产材料的总价值不超过申明获得原产资格最终货物FOB价格的40%；以及

  （二）货物生产中使用的一缔约方出口的原产材料价值不低于全部材料价值的60%。

14

三、境外加工问题

◆二、缔约双方应在联合委员会项下建立境外加工区委员会，以完成下述职责：

（一）监控本条第一款的实施；

（二）向联合委员会汇报工作情况并在必要时提供建议；

（三）审议和指定现有境外加工区的扩大及其他的境外加工区(就本款而言，境外加工区应指位于朝鲜半岛的工业区。缔约双方主管当局应讨论并就指定其他境外加工区及境外加工区的扩大事宜达成一致)；以及

（四）讨论联合委员会指定的其他议题。

三、境外加工问题

◆附件3-B 货物清单

◆一、第3.3条适用于本附件清单所列的货物。本清单包括310个6位税号。

◆二、在缔约双方一致同意的情况下，可每年对本货物清单进行修订。

三、境外加工区问题

- 货物清单数量
  - （一）韩-东盟(100)
  - （二）韩-EFTA(276)
  - （三）韩-秘鲁(100)
  - （四）韩-印度(108)
- 除了中-新加坡FTA，中-韩FTA最多，新加坡几乎没有关税，中-新加坡FTA不具有可比性

三、境外加工区问题

- 韩-印度、秘鲁、东盟FTA(修订、保障措施、5年后撤回权)
- 韩-EFTA(三年后可修订)
- 韩-美、欧盟FTA规定日后协商
- 中-韩FTA(预留扩大境外加工区可能性)

四、原产货物

◆第3.2条 原产货物

◆除本章另有规定外，符合下列情况的货物应当视为原产于一缔约方：

（一）该货物是根据本章第3.4条的规定，在一缔约方完全获得或者生产；

（二）该货物在生产中全部使用原产材料，并完全在一缔约方生产；或者（中国-冰岛：一方或双方，下同）

（三）该货物在生产中使用了非原产材料，并完全在一缔约方生产，且货物符合附件3-A。

五、原产地标准

◆完全获得或生产标准（第3.4条，附件3A）

（一）EEZ内捕鱼采用船旗国加注册国主义

（二）中-瑞FTA采用沿岸国主义

（三）中-秘FTA采用船旗国主义

（四）中-台FTA采用注册国主义

（五）中-新加坡FTA采用船旗国或注册国主义

（六）在一缔约方出生并饲养的活动物中获得的产品

（七）韩-美FTA：在一缔约方或双方领域内活动物中获得的产品；在宇宙取得的产品

五、原产地标准

◆ 实质性改变标准

（一）区域价值成分标准（第3.5条，附件3A）

（二）税则归类改变标准（附件3A）

五、原产地标准

◆ 微小含量标准（第3.8条，附件3A）

◆ 微小加工处理（第3.7条）

（一）包括动物屠宰

（二）中-澳FTA排除动物屠宰

◆ 直接运输中的临时存储（第3.14条）

（一）3个月，不可抗力6个月

（二）中-澳FTA：12个月

（三）中-新西兰FTA：6个月

（四）中-秘鲁、新加坡、哥斯达黎加：3个月

六、原产地证书的电子化和补发

- 第3.15条 原产地证书
- 二、原产地证书应当：
- （五）为打印格式，即原产地证书的签名和盖章由授权机构手工完成，或者原产地证书的签名和盖章为授权机构使用的电子格式。一份原产地证书正本仅能打印一次。
- 四、如因不可抗力，非故意的错误、疏忽，或者其他合理原因（中国-冰岛：被盗、遗失或损毁），导致原产地证书未能在货物装运前、装运时或装运后7个工作日内签发的，原产地证书可以在货物装船之日起1年内补发。补发的原产地证书应当注明“补发”字样。（中国-瑞士、冰岛有类似规定）

七、提交原产地证书义务的免除

- 第3.19条 提交原产地证书义务的免除
- 一、一缔约方应对完税价格不超过700美元或该缔约方币值等额的一批次原产货物（中国-瑞士、冰岛FTA是可以对不超过600美元或……韩国-美国、加拿大等多数FTA为1000美元）免予要求提交原产地证书，并给予本章规定的优惠关税待遇。

八、原产地核查

◆第3.23条 原产地核查（中国-瑞士、冰岛有类似规定）

九、原产地规则分委员会

◆第3.28条 原产地规则分委员会（中国-瑞士也有）

◆一、缔约双方特此设立一个原产地规则分委员会(以下简称“分委员会”)，该分委员会由缔约双方海关组成并应向第19.4条(委员会和其他机构)定义的海关委员会报告。

◆二、各缔约方海关可对本章实施中引起的任何事项提出磋商请求。被请求的海关应在10日内确认接收请求并在60日内回复。为此，各方海关应指定联络点。（此款特色）

十、产品(5205个)特定原产地规则

◆ 农产品和水产品

（一）新鲜-完全获得

（二）加工-品目改变

◆ 工业品-品目改变为主，区域价值成份为辅

Session 2

1. AN ANALYSIS OF THE SCHEDULES OF COMMITMENTS ON SERVICES AND INVESTMENT IN THE KOREA-CHINA FTA

Speaker:

Dr. **LEE Kipyeong**
(Korea Legislation Research Institute)

Discussant: Prof. **LI Wanqiang**
(Xi'an Jiaotong University)

An Analysis of the Schedules of Commitments on Services and investment in the Korea-China FTA

李基坪(LEE Ki-Pyeong)
韩国法制研究院(KLRI)
Email： leejp75@klri.re.kr
Mobile: 82-10-8631-1598

Contents

1. Introduction

1. 1 The Structure of the Korea-China FTA Service Chapter

Chapter	Content
Chap. 8 **Trade in Services**	○ Body text: Definitions(Art. 8.1), Scope(8.2), Market Access(8.3), National Treatment(8.4), Additional Commitments(8.5), Schedule of Specific Commitments(8.6).....Contact Point(8.16).
	○ Annex 8 - Annex 8-A-1 KOREA Schedule of Specific Commitments - Annex 8-A-2 CHINA Schedule of Specific Commitments - Annex 8-B Co-Production on Film - Annex 8-C Co-Production on TV Drama, Documentary and Animation for Broadcasting Purposes
Chap. 9 **Financial Services**	○ Body text: Scope and Coverage(Art. 9.1).....NT(9.2), MA for Financial Institutions(9.3), ..., Specific Commitments(9.9).....Definitions(9.14). - NT(9.2) and MA(9.3)=Chap. 8 NT(8.4), MA(8.3), No additional provisions on the commitments on financial services, which is included in Annex 8–A. ○ Annex 9-A Specific commitments: Supervisory Cooperation, Financial Services Committee, Government Sponsored Policy Implementing Entities is not a financial service provider. Favourable Treatment(Guarantee on prompt handling on the application by financial service providers and additional benefits from capital market access)
Chap. 10 **Telecommunications**	○ Body text: Scope(10.1), Relation to other Chapters(10.2), Access and Use(10.3).....Definitions(10.18). - Scope(10.1) 4: Telecommunication Services commitments on Annex 8 (Nothing in this Chapter shall be interpreted as creating additional commitments other than those under Annex 8-A (Schedule of Specific Commitments) of Chapter 8 (Trade in Services).).
Chap. 11 **Movement of Natural Persons**	○ Body text: Definitions(11.1), General Principles(11.2), General Obligations(11.3).....Relation to Other Chapters(11.9). - Guarantee the movement of business persons of both countries in relation to product service trade and investment. ○ Annex - Annex 11-A Korea and China's Specific Commitments - Appendix 11-A-1 List of Contractual Service Suppliers - Annex 11-B Visa Facilitation: Commit to solve visa issues between two countries. - Annex 11-C Preferential Arrangement for Investment Facilitation: Provisions on future investment and the facilitation for the movement of labor are included.
Chap. 11 **Investment**	○ Investment chapter applies to non-service investment (agriculture, manufacturing industry etc.) and service investment (Mode 3 services. Both the Investment Chapter and Service Chapter applies to investment in service. ○ The recent Korea-China FTA will not make a schedule of commitments on non-service investment. An integrated schedule of commitments on service and investment based on negative list approach will be made in the following supplementary negotiations.

1. 2 Approach of Service Commitments

- Positive list approach

  - Meaning: The voluntary inclusion of a designated number of sectors in a national schedule indicating what type of access and what type of treatment for each sector and for each mode of supply a country is prepared to contractually offer service suppliers from other countries.

  - ex) WTO GATS, Korea-China FTA

- Negative list approach

  - Meaning: The comprehensive inclusion of all service sectors, unless otherwise specified in the list of reservations, under the specific disciplines of the services chapter and the general disciplines of the trade agreement.

  - A negative list approach requires that discriminatory measures affecting all included sectors be liberalized unless specific measures are set out in the list of reservations.

  - ex) KOR-US FTA

1.2.1 Sample Schedule - Positive list approach

THE PEOPLE'S REPUBLIC OF CHINA - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: (1) Cross-border supply	(2) Consumption abroad	(3) Commercial presence	(4) Presence of natural persons
Sector or sub-sector	Limitations on market access	Limitation on national treatment	Additional commitments
I. HORIZONTAL COMMITMENTS			
ALL SECTORS INCLUDED IN THIS SCHEDULE	(3)[1] In China, foreign invested enterprises include foreign capital enterprises (also referred to as wholly foreign-owned enterprises) and joint venture enterprises and there are two types of joint venture enterprises: equity joint ventures and contractual joint ventures.[2] The proportion of foreign investment in an equity joint venture shall be no less than 25 per cent of the registered capital of the joint venture. The establishment of branches by Korean enterprises is unbound, unless otherwise indicated in specific sub-sectors, as the laws and regulations on branches of foreign enterprises are under formulation. Representative offices of Korean enterprises are permitted to be established in China, but they shall not engage in any profit-making activities except for the representative offices under CPC 861, 862, 863, 865 in the sectoral specific commitments.	(3) Unbound for all the existing subsidies to domestic services suppliers in the sectors of audio-visual, aviation and medical services. Unbound for all the subsidies to domestic services suppliers in any new sector and sub-sector scheduled after China's Accession to the WTO.	

Modes of supply: (1) Cross-border supply	(2) Consumption abroad	(3) Commercial presence	(4) Presence of natural persons
Sector or sub-sector	Limitations on market access	Limitation on national treatment	Additional commitments
II. SPECIFIC COMMITMENTS			
A. Professional Services (a) Legal Services (CPC 861, excluding Chinese law practice)	(1) None (2) None (3) Korean law firms can provide legal services only in the form of representative offices. Representative offices can engage in profit-making activities. Korean law firms which has representative offices in China can provide legal services with Chinese law firms in the form of joint operation in Shanghai Pilot Free Trade Zone. During the period of joint operation, both parties' legal status, names and financial status are independent, each of the said parties bears its own civil liabilities. The clients of the joint operation are not limited to Shanghai. Korean lawyers in the joint operation are not allowed to deal with the Chinese legal affairs. Korean law firms which has representative offices in Shanghai Pilot Free Trade Zone and Chinese law firms can send lawyers to each other as legal consultants.	(1) None (2) None (3) All representatives shall be resident in China no less than six months each year. The representative office shall not employ Chinese national registered lawyers.	

What is Service?

- GATT Secretariat classification(twelve broad sectors):
  1. Business
  2. Communication
  3. Construction and Engineering
  4. Distribution
  5. Education
  6. Environment
  7. Financial
  8. Health
  9. Tourism and Travel
  10. Recreation, Cultural, and Sporting
  11. Transport
  12. Other

1.2.2 Sample Schedule - Negative list approach

Annex Ⅰ

ANNEX I
SCHEDULE OF KOREA

Sector:	Construction Services
Obligations Concerned:	Local Presence (Article 12.5)
Measures:	*Framework Act on the Construction Industry* (Law No. 7796, December 29, 2005), Articles 9 and 10
	Enforcement Decree of the Framework Act on the Construction Industry (Presidential Decree No. 19513, June 12, 2006), Article 13
	Enforcement Regulations of the Framework Act on the Construction Industry (Ordinance of the Ministry of Construction and Transportation No. 530, August 7, 2006), Articles 2 and 3
	Information and Communication Construction Business Act (Law No. 7817, December 30, 2005), Article 14
	Fire Fighting System Installation Business Act (Law No. 7982, September 22, 2006), Articles 4 and 5
	Enforcement Decree of the Fire Fighting System Installation Business Act (Presidential Decree No. 19846, January 24, 2007), Article 2 (Table 1)
	Enforcement Regulations of the Fire Fighting System Installation Business Act (Ordinance of Ministry of Government Administration and Home Affairs No. 368, January 9, 2007), Article 2
Description:	Cross-Border Trade in Services
	A person that supplies construction services in Korea must, prior to the signing of the first contract related to such services, establish an office in Korea.
	A compulsory subcontract system is applied to contractors registered as general contractors. Such compulsory subcontract system will be abolished from January 1, 2008.

Annex Ⅱ

ANNEX II
SCHEDULE OF THE UNITED STATES

Sector:	Communications
Obligations Concerned:	Most-Favored-Nation Treatment (Articles 11.4 and 12.3)
Description:	Cross-Border Services and Investment
	The United States reserves the right to adopt or maintain any measure that accords differential treatment to persons of other countries due to application of reciprocity measures* or through international agreements involving sharing of the radio spectrum, guaranteeing market access, or national treatment with respect to the one-way satellite transmission of direct-to-home (DTH) and direct broadcasting satellite (DBS) television services and digital audio services.

* In applying such a reciprocity measure, the FCC determines whether another country accords effective competitive opportunities to U.S. service suppliers. In making that determination the FCC considers whether that country accords no less favorable treatment to U.S. service suppliers than domestic service suppliers and does not limit the number of service suppliers in its market, among other factors.

2. Korea-China FTA's Opening Service Sectors

2. 1 Overview

	Korea	China
Horizontal commitments	○ Restriction on the acquisition of outstanding stocks in energy and aviation sectors. ○ Restriction on the foreign investment in newly privatized companies ○ Requirements for land acquisition by foreign persons	○ Type of foreign investment enterprises, the proportion of investment, the establishment of representative office, land acquirement and term limitations (Common limitations of the previous FTAs that China has made.)
Specific commitments	- Sectors: 10(except health services) - Sub-Sectors: 35	- Sectors: 10(except health services) - Sub-Sectors: 37

Korea-China FTA's Opening Sectors

1. Business
2. Communication
3. Construction and Engineering
4. Distribution
5. Education
6. Environment
7. Financial
~~8. Health~~
9. Tourism and Travel
10. Recreation, Cultural, and Sporting
11. Transport
~~12. Other~~

2. 2 Comparison of Opening Sectors between Korea and China (1)

1. BUSINESS SERVICES	KOREA(6)	CHINA(4)	Remarks
A. Professional Services	- O - 8, Including Veterinary services(CPC 932) , except CPC 9312	- O - 8, Including Medical and dental services(CPC 9312), except CPC 932	Kor: Same as the Kor-EU FTA
B. Computer and Related Services	O	O	
C. Research and Development Services	- O - Social sciences and humanities	X	Kor: Same as the Kor-EU FTA
D. Real Estate Services	- O - Brokerage, Appraisal services	- O - Brokerage, Rental/Leasing Services	
E. Rental/Leasing Services without Operators	O	X	
F. Other Business Services	O	O	

2. 2 Comparison of Opening Sectors between Korea and China (2)

2. COMMUNICATION SERVICES	KOREA(3)	CHINA(3)	Remarks
~~A. Postal services CPC 7511~~	X	X	
B. Courier Services(速递服务)	O	O(Similar level to that of WTO commitments)	
C. Telecommunication Services	O(more restriction than K-US, EU)	O	
D. Audiovisual Services	O - Motion picture and video tape production and distribution services Excluding those services for cable TV broadcasting -Record production and distribution services(Sound recording)	O - Videos, including entertainment software and (CPC 83202), distribution services - Sound recording distribution services - Cinema Theatre Services	

2. 2 Comparison of Opening Sectors between Korea and China (3)

3. CONSTRUCTION SERVICES (CPC 511-518)	**3. CONSTRUCTION AND RELATED ENGINEERING SERVICES** **Kor: 1** **Chi: 1**	**3. CONSTRUCTION AND RELATED ENGINEERING SERVICES (CPC 511, 512, 5134, 514, 515, 516, 517, 5185)**	Kor: K-EU(CPC 511 only)
A. Commission Agents' Services	**4. DISTRIBUTION SERVICES** **Kor: 4** **Chi: 5**	A. Commission Agents' Services	
B. Wholesale Trade Services		B. Wholesale Trade Services	
C. Retailing Services		C. Retailing Services	Chi: Similar level to that of the 2nd WTO DDA commitments
		D. Franchising	
D. Franchising		E. Wholesale or retail trade services away from a fixed location.	Chi: including E.
X			
X	**5. EDUCATIONAL SERVICES** **Kor: 2** **Chi: 5**	A. Primary education services	- Kor 〈 Chi(A, B, E) Kor: comprehensive reservation for future Kor: similar level to that of K-US, EU
X		B. Secondary education services	
C. Higher Education Services		C. Higher education services	
D. Adult Education Services		D. Adult education services	
X		E. Other education services	

2. 2 Comparison of Opening Sectors between Korea and China (4)

A. Sewage Services (CPC 9401)	**6. ENVIRONMENTAL SERVICES** Kor: 6 Chi: 7	A. Sewage Services (CPC 9401)	- both similar - Kor 〈 Chi (G.)
B. Refuse Disposal Services (CPC 9402)		B. Solid Waste Disposal Services (CPC 9402)	
D. Other Cleaning services of exhaust gases and noise abatement services(CPC 9404*, 9405*) Environment testing and assessment services (CPC 9406*, 9409*)		C. Cleaning Services of Exhaust Gases (CPC 9404)	
		D. Noise Abatement Services(CPC 9405)	
		G. Sanitation Services (CPC 9403)	
		E. Nature and Landscape Protection Services (CPC 9406 excluding the construction and operation of Natural Reserves and Ramsar Sites)	
		F. Other Environmental Protection Services (CPC 9409)	
A. Insurance and Insurance-related Services	**7. FINANCIAL SERVICES** Kor: 2 Chi: 2	A. All Insurance and Insurance-Related Services	
B. Banking and Other Financial Services		B. Banking and Other Financial Services (excluding insurance and securities)	

2. 2 Comparison of Opening Sectors between Korea and China (5)

~~X~~	~~**8. HEALTH**~~ - **Hospital Services(CPC 9311)** - **Medical and dental services (CPC 9312)** - **Other human health services(CPC 9319)** - **Veterinary services (CPC 932)**	~~X~~ Health-related and Social Services has never been included in the commitments of China's previous FTAs. No commitment on this has made in the Korea-China FTA.	- Some are included in Professional Services Kor-Eu FTA No commitment (Only commit on Veterinary services(CPC 932) Kor-US FTA: Retail distribution of pharmaceuticals is permitted (No more than 1 pharmacy to be established. Not in the form of a corporation), medical devices: market access to rent, retailing and lease of medical devices. Medical services: comprehensive reservation for the future)
A. Hotels and Restaurants	**9. TOURISM AND TRAVEL RELATED SERVICES** Kor: 3 Chi: 2	A. Hotels (including apartment buildings) and Restaurants(CPC 641-643)	Kor 〉 Chi
B. Travel Agencies and Tour Operators Services		B. Travel Agency and Tour Operator(CPC 7471)	
C. Tourist Guides Services		X	
A. Entertainment Services(CPC 96191, 96192)	**10. RECREATIONAL, CULTURAL AND SPORTING SERVICES** Kor: 1 Chi: 2	A. Other entertainment services (Only limited to CPC 96191, 96192)	Kor 〈 Chi
X		D. Sporting and other recreational services(Only limited to CPC 96411~96413, excluding golf & E-Sports)	

2. 2 Comparison of Opening Sectors between Korea and China (6)

A. Maritime Transport Services	**11. TRANSPORT SERVICES** **Kor: 7** **Chi: 6**	A. Maritime Transport Services	Kor: the similar level to that of Kor-EU FTA Chi: the similar level to that of WTO DDA ※ WTO DDA: - Kor: A, C, F, H, I(5) - Chi: A, B, C, E, F, H(6)
H. Maritime Auxiliary Services		H. Auxiliary Services	
X		B. Internal Waterways Transport (b) Freight transport(CPC 7222)	
C. Air Transport Services		C. Air Transport Services	
~~D. Space transport:X~~		~~D. Space transport:X~~	
E. Rail Transport Services		E. Rail Transport Services	
F. Road Transport Services		F. Road Transport Services	
G. Pipeline Transport		X	
H. Services Auxiliary to all Modes of Transport		H. Services Auxiliary to all Modes of Transport	
I. Other Transport Services		X	

3. China's Schedules of Specific Commitments: MA and NT

3. 1 Horizontal Commitments

MA	NT
○ Type of foreign enterprises and the proportion of investment, the establishment of representative office, land acquirement and term limitations (Common provisions of the previous FTAs that China has completed.) ○ Requirements of entry: - Type of foreign-investment companies: wholly foreign-owned companies and joint ventures (Equity joint ventures and Contract joint ventures) - The proportion of foreign investment in an equity joint ventures : no less than 25% of the registered capital of the joint venture. - The establishment of branches: Korean enterprises are unbounded unless otherwise indicated in specific sub-sectors as the relevant Chinses laws and regulations are under formulation. - The establishment of representative office in China: It is permitted but profit-making activities can only be allowed in legal service, accounting· audit· bookkeeping services, taxation, business management consulting service (CPC 861, 862, 863, 865). - The conditions of ownership, operation and scope of activities, as set out in the respective contractual or shareholder agreement or in a license establishing or authorizing the operation or supply of services by an existing Korean service supplier, will not be made more restrictive than they exist as of the date of China's accession to the WTO. ○ Any new sector and sub-sector scheduled after China's accession to the WTO shall not be subject to the preceding sentence. The same commitments were introduced in China's WTO DDA Revised Offer, 2005; China-Singapore FTA the 2nd Service Commitments Schedule (July 2011) 1. 7). ○ Use of land: the land in China is state-owned. And it specifies maximum term limitations. - 70 years for residential purposes - 50 years for industrial purposes - 50 years for the purpose of education, science, culture, public health and physical education. - 40 years for commercial, tourist and recreational purposes	○ Unbound for all the existing subsidies to domestic services suppliers in the sectors of audio-visual, aviation and medical services. (No national treatment is granted.) ○ Unbound for all the subsidies to domestic services suppliers in any new sector and sub-sector scheduled after China's Accession to the WTO. (This limitation is the same as that of China's WTO DDA Revised Offer, 2005)

3.2 Sectoral Key Issues

- 3.2.1 Legal Services
- 3.2.2 Architectural Services & Engineering Services
- 3.2.3 Construction & Related Engineering Services
- 3.2.4 Distribution Services
- 3.2.5 Education Services
- 3.2.6 Environment Services
- 3.2.7 Entertainment Services
- 3.2.8 Tourism and Travel Related Services

3.2.1 Legal Services(Mode 3)

MA	NT
○ Korean law firms can provide legal services only in the form of representative offices. ○ Korean law firms which has representative offices in China can provide legal services with Chinese law firms in the form of joint operation in Shanghai Pilot Free Trade Zone. - During the joint operation, both parties' legal status, names and financial status are independent, each of the parties bears its own civil liabilities. - The clients of the joint operation are not limited to Shanghai. - Korean lawyers in the joint operation are not allowed to deal with the Chinese legal affairs. ○ Korean law firms which has representative offices in Shanghai Pilot Free Trade Zone and Chinese law firms can send lawyers to each other as legal consultants. ○ Business scope of Korean representative offices: - to provide consultancy on the legislation of the country/region of the lawyers and on international conventions and practices - to handle, when entrusted by clients or Chinese law firms, legal affairs of the country/region of the lawyers - to entrust, on behalf of foreign clients, Chinese law firms to deal with the Chinese legal affairs - to enter into contracts to maintain long-term entrustment relations with Chinese law firms for legal affairs - to provide information on the impact of the Chinese legal environment. ○ Entrustment allows the Korean representative office to directly instruct lawyers in the entrusted Chinese law firm, as agreed between both parties. ○ Qualification of the representatives and the chief representatives of a Korean law firm: - Representative: practitioner lawyers who are members of the bar or law society in a WTO member and have practiced for no less than two years outside of China. - Chief representative: a partner or equivalent (e.g., member of a law firm of a limited liability corporation) of a Korean law firm and have practiced for no less than three years outside of China.	○ All representatives shall be resident in China no less than six months each year. ○ The representative office shall not employ Chinese national registered lawyers.

3.2.2 Architectural services & Engineering services(Mode 3)

MA	NT	AC
○ Joint ventures, with foreign majority ownership, and wholly foreign-owned enterprises are permitted.	○ Foreign service suppliers shall be registered architects/engineers, or enterprises engaged in architectural/engineering/urban planning services, in their home country.	○ The contract performance of the engineering design enterprises established in China by Korean service suppliers both in China and outside China shall be taken into account in assessing the qualification of the enterprise in China. - The performance of a Korean engineering design enterprise established in China in and outside Korea can be taken into account in assessing the qualification of the enterprise in China.

※ Engineering refers to the construction planning of plant and SOC, feasibility study, design, procurement, test, inspection, construction supervision, and maintenance.

3.2.3 Construction & Related Engineering Services

MA	NT	AC
○ Joint ventures, with foreign majority ownership, and wholly foreign-owned enterprises are permitted. ○ The only five types of construction projects that wholly foreign-owned enterprises can undertake: - Construction projects wholly financed by foreign investment and/or grants. - Construction projects financed by loans of international financial institutions and awarded through international tendering according to the terms of loans. - Chinese-foreign jointly constructed projects with foreign investment equal to or more than 50 per cent; and Chinese-foreign jointly constructed projects with foreign investment less than 50 per cent but technically difficult to be implemented by Chinese construction enterprises alone. - Chinese invested construction projects which are difficult to be implemented by Chinese construction enterprises alone can be jointly undertaken by Chinese and foreign construction enterprises with the approval of provincial government. - Construction enterprises established by Korean service suppliers in Shanghai Pilot Free Trade Zone undertaking the Chinese-foreign jointly constructed projects located in Shanghai are not restricted by the requirement for foreign investment ownership.	○ No Limitation.	○ The contract performance of the engineering design enterprises established in China by Korean service suppliers both in China and outside China shall be taken into account in assessing the qualification of the enterprise in China. - The performance of a Korean engineering design enterprise established in China in and outside Korea can be taken into account in assessing the qualification of the enterprise in China.

3.2.4 Distribution Services: Commission Agents' Services, Wholesale Trade Services, Retailing Services, Franchising, Wholesale or Retail Trade Services Away From a Fixed Location

MA	NT	AC	Remarks
(1) Commission Agents' Services (excl. salt, tobacco) ○ Wholly foreign-owned enterprises are allowed in principle. (2) Wholesale Trade Services (excl. tobacco) ○ Foreign majority ownership are not permitted for the following retailing services: - Chain stores which sell products of different types and brands from multiple suppliers with more than 30 outlets. - those chain stores with more than 30 outlets shall not distribute newspapers, magazines, pharmaceutical products, pesticides, mulching films, processed oil, chemical fertilizers and products listed in Annex 2a of the Protocol of China's WTO Accession. ○ The Korean chain store operators will have the freedom of choice of any partner, legally established in China according to China's laws and regulations.	No Limitations	(1) Commission agents' services & Wholesale trade services ○ Foreign-invested enterprises are permitted to provide distribution of their products manufactured in China, resale of such products, inventory management, assembly, classification, delivery, cold storage, and warehouse. - Korean distribution companies which entered China in accordance with the above may distribute their products manufactured in China. ○ Foreign service suppliers are permitted to provide services including maintenance and repair, after sales services, and training services. (2) Retailing Services ○ Foreign-invested enterprises may distribute their products manufactured in China, including those excepted products as listed in the market access or sector or sub-sector column, and provide subordinate services as defined in Annex 2. ○ Korean service suppliers are permitted to provide full range of related subordinate services, including after sales services, as defined in Annex 2, for the products they distribute.	Similar level of commitments to those of China-Chile, China-NZ FTAs.

3.2.5 Education Services (Mode 3, 4)

	MA	NT
Mode 3	Joint schools may be established, with foreign majority ownership permitted.	Unbound
Mode 4	Horizontal commitments and the following commitments were made: Korean individual education service suppliers may enter into China to provide education services when invited or employed by Chinese schools and other education institutions.	Qualifications are : - possession of Bachelor's degree or above; - an appropriate professional title or certificate, with two years' professional experiences. (similar to China-Singapore the 2nd Commitments (July 2011); China-ASEAN the 2nd Commitments (Nov. 2011)).

3.2.6 Environment Services

(excluding environmental quality monitoring and pollution source inspection)

	MA	NT
Mode 3	○ Five Services(Sewage Services, Solid Waste Disposal Services, Cleaning Services of Exhaust Gases, Noise Abatement Services, and Sanitation Services): Wholly foreign-owned enterprises are allowed. ○ Nature and Landscape Protection Services (excluding the construction and operation of Natural Reserves and Ramsar Sites) and Other environmental protection services: Permitted only in the form of joint ventures with foreign majority ownership.	No Limitations

3.2.7 Audiovisual / Entertainment Services

Sector	MA	NT	AC
Videos including entertainment software and Sound recording distribution services	Foreign services suppliers are permitted to establish contractual joint ventures with Chinese partners to engage in the distribution of audiovisual products, excluding motion pictures.	No limitations	
Cinema theater services	Allowed with the condition of foreign investment no more than 49 per cent. (China-ASEAN, China-Chile, and previous FTAs of China also allow this.)	No limitations	The importation of motion pictures for theatrical release on a revenue-sharing basis is allowed and the number of such imports shall be 20 on an annual basis. - Cf) the number of such imports of China-NZ FTA is 30.
Entertainment Services (Services provided by performance producers, singers, musical bands, orchestra entertainment services; play writers, composers, sculptors, entertainers and other individual artists)	○ Theatre agency and theatre business are permitted to Korea-China joint ventures or Korea-China contract joint ventures. ○ Korean partner is permitted to hold up to 49% of the shares of the joint venture. ○ The Chinses partner of Korea-China joint ventures holds a right to make a decision. ➔The commitment was made in the Korea-China FTA for the first time.	No limitations	

3.2.8 Tourism and Travel Related Services

Sub-Sector	Mode	MA	NT
(1) Hotels (incl. apartment buildings) and Restaurants	Mode 3	Korean services suppliers, in the form of wholly-owned enterprise, may construct, renovate and operate hotel and restaurant establishments in China. ➔ Same as the WTO DDA commitments, and some previous FTAs	No limitations
	Mode 4	Korean managers, specialists including chefs and senior executives who have signed contracts with joint venture hotels and restaurants in China shall be permitted to provide services in China. ➔ Same as the WTO DDA	Unbound, except as indicated in horizontal commitments.
(2) Travel Agency and Tour Operator (excluding Tour guides services)	Mode 3	No limitations. ➔ The limitations of "over 40 million dollars of global sales revenues per year, over 2.5million RMB of the registered capital" stipulated in China's WTO DDA and China-NZ FTA were lifted.	No limitations except that joint ventures or wholly-owned travel agencies and tour operators are not permitted to engage in the activities of Chinese travelling abroad and to Hong Kong China, Macao China and Chinese Taipei.
		*Same commitments as that of China-Pakistan, Peru, and Costa Rica FTA.	
	Mode 4	Unbound, except as indicated in horizontal commitments.	Unbound, except as indicated in horizontal commitments.

3.2.9 Transport Services

		MA	NT	Remarks
Maritime Transport	International Transport (Freight and passengers)	- The establishment of joint venture shipping companies is permitted. - The proportion of foreign investment shall not exceed 49% of the total registered capital of the joint venture. - The Chinese side shall appoint the chairman of board of directors and the general manager of the joint venture.	No limitations	The similar level of market access to those of China-Chile FTA and China-NZ FTA.
	Internal Waterways Transport (Freight transport)	- M1(Cross-border services) Only international shipping in ports open to foreign vessels shall be permitted. - M3(Commercial Presence): unbound	M1: Limitations indicated under MA column. M2: Unbound	
Land Transport	Road Transport Services	- Road and rail freight transport: wholly foreign-owned subsidiaries are permitted. - Road and rail passenger transport: only the form of joint ventures with foreign-investment no more than 49% are permitted. Economic need test is required.	M3: No limitations	
	Rail Transport Services		M3: No limitations	
Air Transport	Aircraft Repair and Maintenance Services	- The establishment of joint venture aircraft repair and maintenance enterprises in China is permitted. - The Chinese side shall hold controlling shares or be in a dominant position.	The joint ventures have the obligation to undertake business in the international market.	
	Computer Reservation System(CRS) Services	- The establishment of joint ventures in China with Chinese CRS providers is permitted. - The Chinese side shall hold controlling shares or be in a dominant position. - Licenses for the establishment of joint ventures are subject to economic needs test.		

4. Korea's Schedule of Specific Commitments: MA and NT

4. 1 Horizontal Commitments

MA	NT	Remarks
○ Commercial presence - The acquisition of outstanding stocks of existing domestic companies in such areas as energy and aviation by natural person or juridical persons of China may be restricted. - The foreign investment in newly privatized companies may be restricted. ○ Presence of natural persons - Unbound except as per the commitments in the Chapter on Movement of Natural Persons.	○ Commercial presence: commitments on land acquisition • The acquisition of land by companies which are not deemed as foreign under the Foreigner's Land Acquisition Act is permitted. • The requirements of the land acquisition by companies which are deemed as foreign under the Foreigner's Land Acquisition Act and branches of foreign company: - Approval or notification in accordance with the Foreigner's Land Acquisition Act, - Land used for supplying services during the course of normal business activities - land used for housing senior company personnel - land used for fulfilling land-holding requirements stipulated by pertinent laws. • Eligibility for subsidies, including tax benefits, may be limited to companies which are established in Korea. • Unbound for R&D subsidies. ○ Presence of natural persons The acquisition of land is unbound except that the lease hold right of land is permitted. • Eligibility for subsidies, including tax benefits, may be limited to residents.	• Similar level to that of the KOR-EU FTA

4.2 Sectoral Key Issues

- 4.2.1 Legal Services
- 4.2.2 Communication Services
- 4.2.3 Education Services

4.2.1 Legal Services (Mode 3)

MA	NT	AC	Remarks
○ Scope: Advisory services only on Chines law and public international law is permitted. ○ Commercial presence - Only in the form of representative office - Association with or employment of Korean lawyers is not permitted. ○ Commercial presence is required. ○ Additional limitations - To practice law as a foreign legal consultant in Korea must be approved by the Minister of Justice. - At least 3 year of practice in law in the jurisdiction of his/her qualification. - The chief of the representative office: must have practiced law for at least 7 years, including 3 years in the jurisdiction of his/her qualification. - A representative office can conduct profit-making activities - Only the law firm which is headquartered in China can establish its representative office in Korea. - And other comprehensive commitments on legal services are stipulated.	○ Commercial presence - Foreign legal consultants are required to stay in Korea not less than 180 days per year.	○ Representation in international commercial arbitration is permitted, provided that the applicable procedural and substantive laws in the arbitration are the laws which the foreign legal consultant is qualified to practice in Korea. (e.g. Chinese law and public international law) ○ Use of firm name is permitted, provided that it is used with reference to "Foreign legal consultants office" in Korean.	○ The level of commitments on legal services is very low compared to those of KORUS FTA and KOREU FTA which open up the Korean legal market in phase.

4.2.2 Communication Services(Mode 3)

MA	NT	Remarks
○ Commercial presence - A license for facilities-based public telecommunications services or a registration for non-facilities based public telecommunications services shall be granted only to a juridical person organized under Korean law. - A foreign person may not obtain or hold a radio station license. - A license for facilities-based public telecommunications services shall only be granted to a juridical person organized under Korean law in which a foreign person (foreign government, foreign person, a deemed foreign person) holds in the aggregate less than 49 percent. - "Deemed foreign person" : a juridical person organized under Korean law in which a foreign government or a foreign person (including a "specially related person" under relevant Korean law) holds 80 percent (15 percent, if the largest shareholder is a foreign government or a foreign person) or more of that juridical person's total voting shares. - A foreign government, a foreign person, or a deemed foreign person may not in the aggregate hold more than 49 percent of the total voting shares of a facilities-based supplier of public telecommunications services. - A foreign government, a foreign person, or a deemed foreign person may not be the largest shareholder of KT Corporation(KT). - Definition: • "Facilities-based supplier" : a supplier that owns transmission facilities. • "Non-facilities-based supplier" : a supplier that does not own transmission facilities (but may own a switch, router or multiplexer) and supplies its public telecommunications services through transmission facilities of a licensed facilities-based supplier. "	○ No limitations	○ Similar to those of KOR-US FTA and KOR-EU FTA ○ Differences: - KORUS FTA and KOREU FTA stipulate that "a deemed foreign persons" is permitted to hold up to 100% of share of Korean facilities-based public telecommunications service providers, which exclude KT and SK Telecom, no later than two years after the effective date of each FTA. Korea-China FTA does not include this commitment. - KORUS FTA and KOREU FTA stipulate a condition that allows a foreign company to be a majority shareholder of KT if the proportion of share is no more than 5 %. Korea-China FTA does not have such condition, which can work against Chinses investors compared to American or EU investors. Korea's 'Foreign Investment Promotion Act" has a provision on the 5% as KORUS FTA and KOREU FTA do. Chinese investors can receive the same treatment as American and EU investors if this Act is applied.

4.2.3 Education Services: Higher Education Services, Adult Education Services

	MA	NT	Remarks
Higher Education Services Access to higher education services provided by private higher educational institutions for the purpose of conferring degrees. Excluding; - Health- and medicine-related higher education - Higher education for prospective pre-primary, primary and secondary teachers - Professional graduate education in law, universities via broadcasting and communications, and cyber universities	○ Only those school juridical persons, established under the approval by the Minister of Education may establish educational institutions under the Minister's authorization ○ Restriction on region: Any new establishment, extension, or transfer of a higher education institution may be restricted in the Seoul Metropolitan Area (Seoul, Incheon, Gyeonggi). ○ Operation of joint educational programs between foreign-invested universities in Korea and foreign universities (which obtained accreditation by foreign public accreditation bodies or which acquired recognition or recommendation by their governments). ○ Credits acquired from foreign higher educational institutions are acknowledged to the extent that such acknowledged credits do not exceed half of the total credits required for graduation. ○ The Minister of Education may restrict The total number of students per year in the fields of medicine, pharmacology, veterinary medicine, traditional Asian medicine, medical technicians, and higher education for pre-primary, primary, and secondary teachers, and the total number of higher education institutions in the Metropolitan area may be restricted.	○ Unbound	○ The level of commitments is similar to that of KOREU FTA, but national treatment for the establishment of universities in Korea in the Korea-China FTA is less favorable than that of KOREU FTA. - ex) Korea-China FTA does not make any commitments on NT, whereas KOREU FTA commits that at least 50% of the board of directors of a private higher education institution must be Korean nationals. If a foreign person contributes at least 50% of the basic property of a higher education institution, less than 2/3 of the board of directors of such an institution may be foreign nationals.

5. Conclusion

- Service/Investment commitments of the Korea-China FTA are at the similar level to those of WTO agreements and previous FTAs that both countries have made. Additional commitments to market access were not made.
  - China: at the similar level to those of WTO DDA modified commitments, China-NZ FTA and other previous FTAs and local laws.
  - Korea: at the similar level to that of KOR-EU FTA. Some services including legal services and Facilities-based supplier has lower level of market access.

- The negotiation for the FTA was closed without the negotiation on service/investment commitments had not been completed due to several reasons. That affects the lower level of commitments on service/investment sector by both countries.
  - No commitments on non-service investment (agriculture, manufacturing). Service/investment sector will have new negotiation which will include all chapters related to service/investment and an integrated plan of commitments based on negative list approach within a couple of years after the effective date of the FTA under the “Guideline on follow up (Annex 22-Ga)”.

- The new schedule of commitments on service/investment is expected to be very different from the current one.
  - For the negotiation on the service/investment sector of the Korea-China FTA, China is likely to take a stance based on the result of China-US FTA which is expected to be completed within the year. The result of the China-US FTA is worth to look at for Korean government.

Session 2

2. OVERLAPPED AND MULTI-LAYEERED INVESTMENT RULES BETWEEN CHINA AND KOREA

Speaker:

Dr. **KONG Sujin**
(Korea University)

Discussant:

Prof. **HAN Xiuli**
(Xiamen University)

Overlapped and Multi-layered Investment Rules between China and Korea

Kong Su jin
Asiatic Research Institute, Korea univ.

Content

I. Introduction

- Another layer of investment rules : China-Korea FTA (CK FTA)
  - Signed on 1 June 2015
- Existing two layers between China and Korea
  - China-Korea Bilateral Treaty (CK BIT, 2007)
  - China-Japan-Korea Trilateral Investment Treaty(CJK TIT, 2012)
- Typical provisions from the BITs included in each Agreement
- Overlapped investment rules between the same Parties
  - Current status, problems and prospects?

II. Overview on the 3 Layered Investment Rules between China and Korea

1. Relationship between overlapped investment rules (1)

- CJK TIT Art. 25

  Nothing in this Agreement shall affect the rights and obligations of a Contracting Party, including those relating to treatment accorded to investors of another Contracting Party, under any bilateral investment agreement between those two Contracting Parties existing on the date of entry into force of this Agreement, so long as such a bilateral agreement is in force.

  Note : It is confirmed that, when an issue arises between an investor of a Contracting Party and another Contracting Party, nothing in this Agreement shall be construed so as to prevent the investor from relying on the bilateral investment agreement between those two Contracting Parties which is considered by the investor to be more favorable than this Agreement.

II. Overview on the 3 Layered Investment Rules between China and Korea

1. Relationship between overlapped investment rules (2)

- CK FTA Art. 1.3

  The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other existing agreements to which both Parties are party.

- CK BIT Art. 10.1

  If the legislation of either Contracting Party or international obligations existing at present or established hereafter between the Contracting Parties result in a position entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the Agreement, such position shall not be affected by this Agreement.

II. Overview on the 3 Layered Investment Rules between China and Korea

2. Comparison of the main substantive provisions

- Typical provisions included in each agreement
  - Overlap of Provisions (p. 75)
- Tendency of specification in later agreements
  - Umbrella clause (p. 76)
  - Minimum standard of treatment (p. 77)

III. Problems and Prospects of the Overlapped Investment Rules

1. Scope and coverage

- Definitions : Investment /Investors
- Investment activities

	Investment Activities		Relevant Articles
CK BIT	Investment & business activities	Expansion, management, operation, maintenance, use, enjoyment and sale or other disposal of investments	NT, MFN, Entry of Personnel
CJK TIT	Investment activities	Management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments	NT, MFN, Transparency, (Entry of Personnel,)* Special Formalities and Information Requirements
CK FTA			

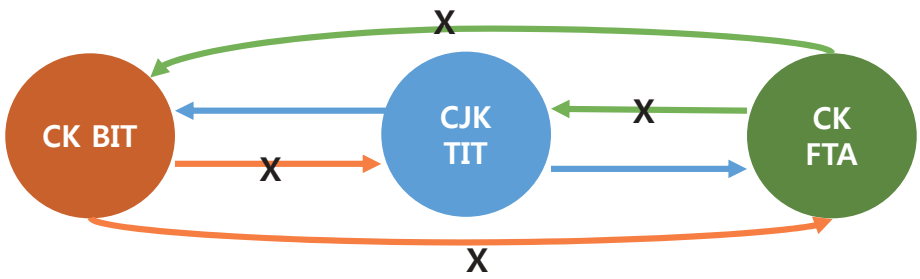
III. Problems and Prospects of the Overlapped Investment Rules

2. Application of MFN Treatment

- Principle

  Each Party accords to the investors and investments of the other party under no less favourable treatment than that it accords in like circumstances to investors and investment of the non-Party (or another party).
- Exceptions :
  - Regional economic cooperation agreements (e.g. free trade area)
  - Agreement or arrangement for facilitating small scale trade in border areas
  - Agreements involving aviation, fishery and maritime matters
- Restrictions
  - *ejusdem generis* rules
  - Core issues as an exception in *Tecmed v. Mexico*

III. Problems and Prospects of the Overlapped Investment Rules



IV. Conclusion

- Legal uncertainty and complexity
  - Forum shopping
  - Rule shopping
- More layers to be added : CJK FTA and RCEP
- Possible coordination in hand?
  - *Res judicata* or *lis pendens* for parallel proceedings
  - MFN along with exceptions and restrictions
- More coordination required but how?
  - Further negotiation under the CK FTA

Overlapped and Multilayered Investment Rules between China and Korea[1]

KONG, Su Jin
(HK Research Professor, Asiatic Research Institute, Korea Univ.)

I. Introduction

On the first day of June 2015, Korea and China signed an Free Trade Agreement. This FTA between Korea and China (hereinafter "CK FTA") includes an investment Chapter which imposes one more layer of investment rules on two countries. There already exist two investment agreements between them. One is the "Agreement between the Government of the Republic of Korea and the Government of the People's of Republic of China on Promotion and Protection of Investment"(hereinafter "CK BIT") in 2007 and another is the "Agreement among the Government of the Republic of Korea, the Government of the People's Republic of China and the Government of Japan for Promotion, Facilitation and Protection of Investment" (hereinafter "CJK TIT") in 2012. Both of them entered into effect in 2007 and 2014 respectively. Once the CK FTA becomes effective, three agreements become applicable to Korea and China raising legal uncertainty and complexity.

The layers of investment rules are overlapped because each agreement includes typical provisions in the bilateral investment agreements (hereinafter "BITs") and recent FTAs tend to embrace those investment provisions. This kind of overlap seems to bring a challenge to the international law scholarship which have focused on the 'overlap between the different investment related agreements such as BITs and GATS.[2] The similarly worded agreements between the same parties are very likely to cause legal complexities unless they are coordinated. In this sense, the three investment related agreements between China and Korea are making a good example of such overlapped rules and probable complexities without coordination. This study aims at reviewing the status and prospects of the overlapped investment rules between China and Korea through comparing and analyzing the relationship among the three agreements and their main provisions.

II. Overview on the Three-layered Investment Rules between China and Korea

1. Relationship between overlapped investment rules

Generally, a treaty is considered as terminated when the parties to it conclude a later treaty to the same-subject matter.[3] Thus, the BIT between China and Korea in 1992 was terminated when

[1] This paper is in progress and it is requested that this paper not be quoted or referred to in public without the authorization of the author.
[2] Wolfgang Alschner, “Regionalism and Overlap in Investment Treaty Law: Towards Consolidation or Contradiction?” Journal of International Economic Law, 2014, p.274.
[3] Art. 59 of the Vienna Convention on Law of Treaties.

the new CK BIT entered into effect in 2007. This is stipulated in Article 14.1 of the CK BIT. However, the CJK TIT chooses to co-exist with the earlier BITs.[4] It seems that the CJK TIT affirms explicitly the existence of overlapping treaties by re-affirming the existing BITs in parallel. The BITs including the CK BIT of 2007 were neither terminated nor replaced by the CJK TIT.

The CJK TIT stipulates the relationship only between bilateral and trilateral investment agreements and does not prescribe the relation with other agreement. However, it ensures that the preferential treatment from the membership to the regional trade agreements not be extended to each other through the most-favoured nation principle(hereinafter "MFN").[5] Under the CJK TIT, the regional trade agreements covers not only those between the Contracting Parties but also those with non-Contracting Parties. In other words, the Contracting Parties' agreement seems to be excluded from the obligation of the MFN treatment. Thus, any benefit under the CK FTA would not be extended to Japan under the CJK TIT.

The CK FTA does not provide specifically its relation with the earlier investment agreements but rather affirms the existing rights and obligations under the WTO and other agreements to which both are parties.[6] Accordingly, the rights and obligations under the CK BIT and CJK TIT are not affected by the CK FTA. In sum, those three agreements co-exist in parallel and they look like legal layers accumulated on the same subject matter.

2. Comparison of the Main Substantive Provisions in Agreements between China and Korea

Once the CK FTA enters into effect, there will be three layers of investment rules between two countries. Given that BITs tend to have typical provisions for investment protection, it is very likely that three agreements are composed of substantive provisions from BITs. As provided in Table 1, three agreements share the similar composition of provisions with some differences. Given the overall composition of provisions, the CJK TIT seems to modernize the CK BIT. While both agreements have the same kind of provisions such as admission, investment protection, etc., but the CJK TIT provides more provisions in relation with exceptions and environment.

Meanwhile, the CK FTA takes the same composition of provisions to that of the CJK TIT except umbrella clause. As the CK FTA is a comprehensive agreement, some of the provisions are not necessarily stipulated in the Investment Chapter. If there are relevant Chapters such as intellectual property right, those provisions are placed under those Chapters. Regarding the CK FTA, it should

---

[4] Article 25 of the CJK TIT : Nothing in this Agreement shall affect the rights and obligations of a Contracting Party, including those relating to treatment accorded to investors of another Contracting Party, under any bilateral investment agreement between those two Contracting Parties existing on the date of entry into force of this Agreement, so long as such a bilateral agreement is in force.

[5] Article 4.2 of the CJK TIT: Paragraph 1 shall not be construed so as to oblige a Contracting Party to extend to investors of another Contracting Party and to their investments any preferential treatment resulting from its membership of: (a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation [...]

[6] Article 1.3 of the CK FTA: The Parties affirm their existing rights and obligations with respect to each other under the WTO Agreement and other existing agreements to which both Parties are party.

be noted that further negotiations is prescribed within two years after entry into force and more provisions and market access may be added later.

Table 1. Substantive Provisions of Investment Agreements and FTA

Provisions			CK BIT (2007)	CJK TIT (2012)	CK FTA (2015)*
Definition/ Scope	Asset based	Open list	+	+	+
		Closed List			
	Investment	Direct	+	+	+
		Indirect	+	+	+
Umbrella Clause			+	+	
Admission (Post only)	National Treatment with NCMs		+	+	+
	Most Favoured Treatment		+	+	+
	Performance Requirement		+	+	+
Investment Protection	Standard of Treatment	Fair and Equitable Treatment	+	+	+
		Full protection and security	+	+	+
	Transfer		+	+	+
	Expropriation	Direct	+	+	+
		Indirect	+	+	+
Entry of Personnel			+	+	*
Transparency			+	+	+
Exceptions	Economic integration agreement		+	+	+
	General exceptions				
	Security exceptions			+	+
	Prudential measures			+	*
	Denial of Benefits			+	+
Taxation			+	+	+
Environment				+	+
Intellectual Property Rights			+	+	*
Relation to other agreement			+	+	*

*Provided in other Chapters

Even if the agreements provide the same kind of provisions as seen in Table 1, the text or content of each provision can vary. Some of them are identical or at least very similar while others are more specified or simply added with different phrases. For example, the CK FTA have the almost identical provisions of transparency and expropriation with the CJK TIT. Although the provisions under the CK BIT is almost identical with them, a few different words are used without an additional annex on the indirect expropriation.

In cases of investment protection and umbrella clause, there is a tendency that later treaties provide more specified provisions than the earlier treaty. For example, a umbrella clause in the CK BIT is less specified than that of the CJK TIT. A umbrella clause provides additional protection to investors by making a commitment/agreement concluded between investor and host countries to

be under the jurisdiction of a treaty-based arbitration. While both provisions under the CK BIT and CJK TIT are very similar as demonstrated below, there is a different phrase about form of commitment. While the CK BIT provides "any commitments" made between the investor and the host country, the CJK TIT specified that the commitments are to be "written" and "in form of an agreement or contract".

Table 2. Umbrella Clauses in the CK BIT and the CJK TIT

CK BIT Art. 10.2	CJK TIT Art. 5.2
Each Contracting Party shall observe *any commitments* it may have entered into with the investors of the other Contracting Party as regards to their investments.	Each Contracting Party shall observe *any written commitments in the form of an agreement or contract* it may have entered into with regard to investments of investors of another Contracting Party.

Another examples is a standard of treatment which provides 'fair and equitable treatment' and 'full protection and security'. This provision become more specified in later agreements as shown below in Table 3. The CK BIT simply ensure the 'fair and equitable treatment' and 'full and constant protection and security'. Later, the CJK TIT adds an interpretative clause which is very similar to the binding interpretation issued by the NAFTA Free Trade Commission in 2001. It seems that the CK FTA tries to avoid an expansive interpretation by the arbitral tribunal by making this provision more specific than the CJK TIT. When compared with the CJK TIT, the CK FTA makes it clear that the treatment under this provision is the minimum standard of treatment under the customary international law and adds a separate annex on the Parties' understanding on customary international law.

Table 3. Standards of Treatment in agreements between China and Korea

CK BIT Art. 2.2	CJK TIT Art.5.1	CK FTA Art. 12.5
Each Contracting Party shall accord to investments in its territory of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.	Each Contracting Party shall accord to investments of investors of another Contracting Party fair and equitable treatment and full protection and security.	Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
	The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond any reasonable and appropriate standard of treatment accorded in accordance with generally accepted rules of international law.	For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) “fair and equitable treatment”* includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law; and (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

CK BIT Art. 2.2	CJK TIT Art.5.1	CK FTA Art. 12.5
		* Determination on fair and equitable treatment shall be based on adequate proof.
	A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not *ipso facto* establish that there has been a breach of this paragraph.	A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.
		The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 12.5 results from a general and consistent practice of states that they follow from a sense of legal obligation. With regard to Article 12.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

When a successive treaty relating to the same subject-matter is concluded, its application depends on the relationship between the earlier and the later treaties. When the same parties to the treaty decides not to terminate the earlier treaty, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty.[7] Thus, if the provisions of the CK BIT are not compatible with those under the CJK TIT or the CK FTA, the latter treaty is supposed to be applied under the Vienna Convention on Law of Treaties. At the same time, however, each agreement provides that it would not affect the existing rights and obligations under the earlier agreements. It seems that the application of these overlapped provisions becomes more complex and controversial because there is no clear answer so far. In addition, while the overlap seems less likely to cause compatibility issues due to the similarity between the provisions, it will bring more issues on the scope of application and the MFN treatment because of the tendency of specification or restrictiveness in later agreements.

III. Problems and Prospects of the Overlapped Investment Rules between China and Korea

1. Scope and coverage

As there are absent an explicit scope and coverage article in each of the agreement except the CK BIT, the scope and coverage can be determined by the objects and the measures which apply to those objects. However, each agreement follows a broad approach as other BITs do. As shown in Table 1, three agreements choose a broad asset-based definition investments covering investments directly or indirectly controlled by investors of either Party. In addition, each agreement provides an open and inclusive list of investments which practically covers major form of investments. Likewise, they opt for a broad definition of investor, including both nationals and

[7] Art. 30.3 of the Vienna Convention on Law of Treaties.

enterprises of the Parties. As broadly defined with an open and inclusive list, investments or investors are highly likely to be within scope and coverage of each agreements.

Also, three agreements share the quite similar scope of application by applying to investments made prior to or after each agreement's entry into force. However, the CK FTA has a different requirement in that the investment is to be in existence at the date of its entry into force or established, acquired or expanded thereafter, while the CK BIT and CJK TIT requires that investment was made or acquired in accordance with the applicable laws and regulations of the host country. It seems that the CK FTA's requirement focuses on the existence of investments and makes it clear to apply to investments in post-establishment stage.

The scope and coverage can be determined also by 'investment activities' which some articles are related to. As shown in Table 4, three agreements define 'investment activities' which include identical activities of investments except for expansion in the CK BIT and conduct in the CJK TIT and the CK FTA. There can be a controversy over expansion in that the expansion may include the activities of pre-establishment stage. Given the scope of application mentioned above, however, it can be determined by the applicable laws of the Party because investments are required to be made in accordance with the laws and regulations of the Party under the CK BIT.

Table 4. Meaning of Investment Activities

Agreements	Investment Activities		Relevant Articles
CK BIT	investment and business activities	expansion, management, operation, maintenance, use, enjoyment, and sale or other disposal of investments	NT, MFN, Entry of Personnel
CJK TIT	investment activities	management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments	NT, MFN, Transparency, Entry of Personnel, Special Formalities and Information Requirements
CK FTA			NT, MFN, Transparency, Special Formalities and Information Requirements

In sum, it seems that the scope and coverage is overlapped with a few exceptions and thus it is highly likely that the same kind of substantive articles apply to the same subject-matter. At this point, there will be a forum-shopping among three fora provided by three agreements in case of dispute settlement. However, this will be touched upon by other studies on dispute settlements.

2. Application of MFN Treatment

Most-Favoured Nation Treatment is one of the fundamental standards in both investment and trade agreements. All three agreements stipulate that MFN treatment principle under which each Party accords to the investors and investments of the other Party no less favourable treatment than that it accords in like circumstances to investors and investment of the non-Party. MFN provisions in three agreements are worded identically except the investment activities as shown in Table 4 above. Basically, the MFN principle obliges the Parties to extend to the beneficiary Party

the treatment accorded to the non-Party. However, there are exceptions and restrictions to the MFN treatment. Three agreements made common exceptions toward regional trade agreements. It means that benefits from future RTAs to which China or Korea is a Party are excluded but if there is more benefit from other BITs, it is not to be excluded from the MFN treatment. Between Korea and China, the MFN principle may not be applied because they are the same Parties to three agreements. Theoretically, however, the CK BIT or the CK FTA can imports more favourable treatment from the CJK TIT under the MFN principle because the CJK TIT includes Japan which is a non-Party to the CK BIT or the CK FTA. In addition, the CJK TIT and CK FTA make it clear that the MFN treatment is not to be extended to the investor-state dispute settlement.[8]

It should be noted that there are other restrictions even if MFN clause is applicable. Most of all, the operation of the MFN clause is limited by *ejusdem generis* rule according to which the MFN clause "can only attract matters belonging to the same category of subject as that to which the clause itself relates."[9] In other words, the MFN clause may not extend beyond the scope of application of each agreement.

Bearing those exceptions and restrictions in mind, the MFN clause may be used to import more favourable conditions from third country BITs.[10] For example, in MTD v. Chile, the investor was allowed to incorporate the more favourable rights in the Chile-Croatia and Chile-Danish BITs through a MFN clause in the Chile-Malaysia BIT. Substantive clauses may be invoked through the MFN clause and thus, BITs with other countries should be considered.

IV. Conclusion

It is uncontested that having various treaties on the same subject-matter by the same Parties may cause legal uncertainty and complexity unless those treaties are coordinated. As explained above, the agreements between Korea and China choose to co-exist in parallel. Furthermore, as those investment rules are not identical but similar with different text, legal uncertainty and complexity is unavoidable. Although this study excludes procedural issues relating to dispute settlement, parallel proceedings are not explicitly prohibited. In other words, investors from Korea or China may choose a proceeding under the CK BIT, CJK TIT, or CK FTA but the finality of the choice is not explicitly provided in those agreements. To avoid such parallel proceedings, the international law principles of *res judicata* or *lis pendens* can be considered.

The bilateral investment rules between Korea and China are already overlapped and become multi-layered due to the surge of regionalism. More layers of investment rules will be added by a trilateral FTA among China, Japan and Korea and the Regional Comprehensive Economic Partnership (RCEP). If those regional agreements opt for another parallelism in relation with

[8] CJK TIT Art. 4.3 & CK FTA Art. 12.4.3.
[9] Ambatielos Claim (*Greece v. United Kingdom*) Award, Mar. 6 1956, U.N.R.I.A.A., vol. XII. p.107.
[10] Stephan W. Schill, The Multilateralization of International Investment Law, Cambridge University Press, 2009, p.140.

existing trade and investment agreements, the overlapped rules are multi-layered without coordination, which will lead investors to more forum shopping and also rule shopping. Furthermore, the investment sector will be renegotiated within 2 years under the CK FTA and it will make more dynamic the interplay of investment rules between Korea and China because the probable result will contain more rules and market access based on the negative list approach. Thus, from now on, how to coordinate those rules becomes a challenge to the international economic law scholarship.

<국문요약>

한국과 중국간 FTA 가 발효되면 양국간 적용될 수 있는 국제투자규범은 3 개 협정이 될 전망이다. 즉, 기존에 체결된 바 있는 한중 투자보장협정과 한중일 투자보장협정이 병존하고 있으며, 한중 FTA 도 함께 공존할 것으로 보인다. 따라서 양국간 3 겹의 투자규범이 공존하고 있는바, 규범이 중첩되면서 법적 불확실성과 복잡성이 증가하고 있다. 본 연구는 유사한 규범간의 비교와 검토를 시도하고자 한다. 즉, 투자협정에 포함된 조항들과 FTA 에 포함된 투자조항들은 공통적으로 전형적인 규범들을 포함하고 있어 다른 종류의 협정간의 비교를 중심으로 해온 기존 연구와는 차별성이 있을 것으로 예상된다.

먼저 한중 BIT, 한중일 TIT 및 한중 FTA 간의 관계는 명시적으로 병존하도록 규정되어 있다. 즉, 한중일 TIT 는 기존 양자협정들과 명시적으로 병존하도록 규정하고 있고, FTA 도 기체결된 협정상의 권리와 의무에 영향을 미치지 않는다고 규정하고 있다. 그러나 3 개 협정에 포함된 조항들을 비교해보면 전형적인 투자협정의 조항들이 모두 포함되어 있다. 다만, 한중일 TIT 와 한중 FTA 의 조항들은 우산조항을 제외하면 거의 동일한 구조로 구성되어 있고, 한중 BIT 는 일부 조항이 제외되어 있는 정도이다. 또한, 시간의 흐름에 따라 한중 BIT 보다 한중일 TIT 가, 한중일 TIT 보다 한중 FTA 가 더욱 구체적으로 조항을 규정하고 있다. 예컨대, 최소기준대우의 경우 한중 BIT 의 간략한 형태에서, 한중일 TIT 에서는 NAFTA 해석선언을 포함시켰으며, 한중 FTA 에서는 더욱 구체적으로 규정하면서 국제관습법을 포함하였다. 전반적으로 조항의 구성과 텍스트의 측면에서 유사하면서도 여전히 다른 점이 존재하고 있어 향후 법적 혼잡성이 예상되나, 동일한 종류의 조항간 유사도가 높아 협정의 양립성 문제의 발생 가능성은 생각보다는 낮을 것으로 예측된다. 그러나, 최근으로 올 수록 조항이 구체화되고 더 제한적으로 규정되어 협정간 관계에 대한 면밀한 검토가 필요한 것으로 생각된다.

한-중간 3 개 협정에서의 투자 및 투자자의 범위는 협정간 완전히 동일하지 않으나, 넓게 정의되어 있어 사실상 중첩되고 있다. 따라서, 중첩된 규정들이 동일한 대상에게 적용되고 있으며, 3 개 협정이 모두 최혜국대우 원칙을 포함하고 있어 다른 협정의 우호적인 대우를 원용할 여지를 갖고 있다. 물론 최혜국대우는 지역무역협정이나 투자자-국가 분쟁해결제도의 절차규정은 예외로 하고 있으며, 원용시 *ejusdem generis* 원칙과 같은 제한이 따르므로 제한적이다. 무엇보다, 양국간에는 동일한 국가를 대상으로 하므로 제 3 국가에 대한 혜택을 확대시켜주는 최혜국대우는 3 개 협정간에는 적용되지 아니하지만, 한중 BIT 와 한중 FTA 는 MFN 을 통해 한중일 TIT 의 유리한 조항을 원용할 수 있을 것으로 보인다.

또한, 한중간 3 겹의 국제투자규범은 지역주의로 인해 다층적 구조로 변화해나갈 것이다. 현재 협상이 진행 중인 한중일 FTA, 역내포괄적경제동반자협정(RCEP) 내에 투자규범이 포함되고 또 기존 협정과 병존하게 되면 향후 포럼쇼핑은 물론 규범쇼핑은 더 심화될 것으로 전망된다. 또한, 한중 FTA 는 발효후 2 년내 투자분야의 시장자유화를 포함한 후속협상이 포함되어 있는바, 양국간 투자규범간 조화로운 관계에 대한 해결방안이 논의되고 마련되지 않으면 양국간 투자규범의 법적 불안정성과 혼란을 가중될 것이다.

주제어 : 한중 투자보장협정, 한중일 투자보장협정, 한중 자유무역협정, 최혜국대우, 포럼

Session 3

1. THE DISPUTE SETTLEMENT MECHANISM OF THE CHINA-KOREA FTA

Speaker:

Prof. **CHOI Songza**
(Kyungnam University)

Discussant:

Prof. **LI Wanqiang**
(Xi'an Jiaotong University)

韩中FTA争端解决机制

韩国 庆南大学 崔松子教授

Ⅰ. 序论

韩中两国在自由贸易协定第20章规定了FTA项下的争端解决机制。该争端解决机制由第20.1条(合作)，第20.2条(范围)，第20.3条(场所选择)，第20.4条(磋商)，第20.5条(斡旋、调停和调解)，第20.6条(专家组设立)，第20.7条(专家组组成)，第20.8条(专家组职能)，第20.9条(程序规则)，第20.10条(专家组程序的中止或终止)，第20.11条(专家组报告)，第20.12条(最终报告的执行)，第20.13条(合理期限)，第20.14条(一致性审查)，第20.15条(中止减让或其他义务)， 第20.16条(中止后程序)， 第20.17条(私人权利)组成。此外，附件20-A规定了《程序规则》， 附件20-B规定了《专家组成员与调解员行为守则》。

与中国签定FTA之前，韩国已与智利、新加坡、EFTA(4个国家)、东盟(10个国家)、印度、EU(28个国家)、秘鲁、美国、土耳其、澳大利亚、加拿大、哥伦比亚、新西兰、越南等53个国家签署了14件FTA。中国也除了韩国以外，与香港、澳门、东盟(10个国家)、智利、巴基斯坦、新西兰、新加坡、秘鲁、哥斯达黎加、台湾、冰岛、瑞士等21个国家和地区签署了12件FTA。其中，韩中两国都签署FTA的国家和地区有智利、东盟、新加坡、新西兰和秘鲁。

韩中两国签署的FTA绝大部分将争端解决机制作为核心议题来做规定。[1] 与东盟签署的FTA采取了独立的单独协定的方式，除此之外其他FTA均将争端解决机制作为FTA基本协定或贸易协定的一部分来规定。

本论文试图通过韩中FTA争端解决机制和韩国以及中国签署的FTA争端解决机制之比较，找出在日后的磋商以及具体操作过程中可能遇到的问题。

Ⅱ. 适用范围

韩中FTA在20.2条规定了争端解决机制的适用范围。除非协定另有规定或缔约双方另外达成一致，韩中FTA争端解决机制适用于解决缔约双方关于本协定的解释和适用的所有争端，或者解决一缔约方认为另一缔约方的措施与本协定项下的义务不一致或者另一缔约方未能履行本协定项下的义务的争端。[2]

1) 中国与香港、澳门签署的CEFA以及与台湾签署的ECFA除外。
2) FTA争端解决机制不适用于SPS、TBT、竞争、经济合作、环境等领域。

关于适用范围，有可能提起以下2个问题。

1. 纷争的种类

韩中FTA将纷争限制在被诉方不履行或不完全履行FTA协定项下的义务。所以只有违反之诉才能成为适用对象，非违反之诉被排除在外。

这对第20.5条第4款引进的调解程序是一种限制。第20.5条第4款规定，缔约双方被鼓励进入调解程序，尤其是在一缔约方认为某一非关税措施对缔约双方的贸易带来负面影响，且该措施与本协定中货物市场准入事项相关并受本章节约束时，除非缔约双方另有约定。对此，韩国的官方说明材料解释为:不管违法与否，只要对贸易产生负面影响，就可以进入调解程序，调解程序不着重于判断是非，而着重于找出双方都满意的解决方案。在这里，对非关税措施进行广义上的解释，这里包括非违反之诉。

非违反之诉是在GATT体制下为补充贸易规范的不足而引进的，自WTO成立至今只提起过3件。但是适用率低是否能成为将非违反之诉排除在FTA争端解决机制外的理由，这是值得我们思考的问题。

至今韩国签署了15件FTA，中国则签署了12件FTA。在两国利用FTA争端解决机制解决纠纷的例子几乎没有。在世界范围内也一样。不过没有一个国家因此主张应将争端解决机制从FTA体制中排除。

争端解决机制最终目的就是预先防止纠纷的发生。好的争端解决机制就是其存在本身能起到抑制纠纷发生的作用。我们两国都是从10年前才开始签定FTA的，往后还有漫长的路要走。FTA争端解决程序里并不仅仅是仲裁，还有双方当事国间的磋商，也有斡旋、调停和调解等方式。特别是韩中FTA对调解程序显示出浓厚的兴趣。因此没有必要对争端解决机制的适用范围做缩小解释。

看来，韩中FTA下争端解决机制的适用范围的规定主要反映了中方的意见。至今中国所签FTA都将非违反之诉排除在FTA争端解决机制外。而韩国同智利、新加坡、印度、美国、澳大利亚、加拿大、哥伦比亚、新西兰签署的FTA均将非违反之诉包括在内。不过大部分的FTA将非违反之诉限定在一定的范围。(参照表1)

在FTA具体操作过程中实际发生纠纷最多的可能是虽不违反FTA协定，但带来根据FTA预期得到的利益的减损的非违反之诉。因此有必要限制性地将部分非违反之诉引进FTA争端解决机制的范畴。

〈表1〉韩国签署的FTA争端解决机制可适用非违反之诉分类

FTA 구분	FTA争端解决机制可适用非违反之诉分类
韩-智利	商品贸易，边境服务贸易，政府采购
韩-新加坡	无限制
韩-新西兰	对商品的市场接近，原产地规则及程序， 通过海关程序及贸易顺畅化，边境服务贸易，政府采购

韩-印度	商品贸易，原产地规则，服务市场
韩-美国	对商品的国民待遇及市场接近，农业，纤维及服装，原产地规则及程序
韩-澳大利亚	商品贸易，原产地规则及程序，关税行政及贸易顺畅化，边境服务贸易，政府采购
韩-加拿大	无限制
韩-哥伦比亚	对商品的国民待遇及市场接近，原产地规则及程序，边境服务贸易，政府采购

2. 措施的类型

韩中FTA将作为纷争的对象措施定义为"当事国的措施"，从而将接受政府委托的非政府机关的措施排除在外。因此，类似中国的国有企业、韩国的公共企业的非政府机关在任何情况下都不能成为韩中FTA争端解决机制的对象。

在履行FTA协定的过程中，有可能发生非政府机关受政府委托代政府为一定行为的事情。因此，我们可以考虑在FTA争端解决机制中在一定的条件下将部分有确凿证据的非政府机关的措施也包括在内。

不过在实际操作过程中，两国间在具体判断的问题上可能有很大的分歧。这时如果能启动国际上公认的调解员或专家程序的话，事情也许可能得到圆满的解决。

韩国与东盟、印度签署的FTA规定，受政府委托的非政府机关的措施也属于对象范畴。

Ⅲ. 货物分类

韩中FTA并未对争端解决机制的对象物品进行分类。因此，韩中FTA第20章没有关于对紧急事项包括易腐物品的特别关照。与此相反，韩国和中国签署的FTA大部分在争端解决程序的每一个阶段规定有对特殊产品的特别规定。

1. 磋商阶段

韩中FTA在第20.4条和第20.6条规定磋商期限。任一缔约方可以以递交书面通知的方式向另一方请求磋商。在磋商请求做出后，被请求方应当在收到请求后的10日内以书面形式进行答复。磋商应当在收到磋商请求后30日内、以达成双方满意的解决方案为目的善意地进行。如被请求方未在自收到磋商请求之日起10日内答复或未在自收到磋商请求之日起30日内进行磋商，或磋商未能在收到磋商请求后60日内或其他双方达成一致的时间内解决争端，起诉方可以向另一缔约方递交设立专家组的书面请求。韩中FTA在磋商阶段未区分紧急事项和普通事项，而对期限作出统一的规定。

但在韩国和中国签署的大部分的FTA对紧急事项[3]特别是对易腐货物有特别规定。具体体现在磋商开始期限和磋商期限上。前者指被诉方自受到磋商邀请之日起应开始磋商的期限，后者指自磋商开始到终了的期限。

〈表2〉韩中两国既签FTA下磋商开始期及磋商期

FTA	磋商开始期		磋商期		FTA	磋商开始期		磋商期	
	紧急	普通	紧急	普通		紧急	普通	紧急	普通
韩-智利	15天	30天	30天	45天	中-智利	15天	60天	30天	70天
韩-东盟	10天	30天	20天	30天	中-东盟	10天	30天	20天	30天
韩-新加坡	-	20天	-	45天	中-新加坡	10天	30天	20天	60天
韩-新西兰	15天	30天	30天	60天	中-新西兰	15天	30天	30天	60天
韩-秘鲁	15天	30天	25天	60天	中-秘鲁	35天	40天	50天	60天
韩-EFTA	15天	30天	30天	60天	中-香港	-	-	-	-
韩-印度	-	30天	-	45天	中-澳门	-	-	-	-
韩-EU	15天	30天	15天	30天	中-巴基斯坦	15天	30天	30天	60天
韩-美国	-	-	20天	60天	中-哥斯达黎加	15天	30天	20天	45天
韩-土耳其	-	30天	-	30天	中-台湾	-	-	-	-
韩-澳大利亚	-	-	-	60天	中-冰岛	-	30天	-	60天
韩-加拿大	10天	30天	10天	35天	中-瑞士	15天	30天	30天	60天
韩-哥伦比亚	-	-	20天	45天					
韩-越南	15天	30天	30天	60天					

2. 专家组报告提出阶段

韩中FTA在第20.11条规定专家组报告提出有关事项。除非缔约双方另有约定，专家组应当在指定最后一名专家组成员后120日内向缔约双方提交中期报告。除非缔约双方另有约定，专家组应当在提交中期报告的45日内向缔约双方提交最终报告。韩中FTA在专家组报告提出方面未区分货物的种类。

不过，韩国和中国签署的FTA大部分在提出初步报告和最终报告阶段区分紧急事项和普通事项区别对待。初步报告提出时限是指从最后选定专家组成员之日起到正式提出初步报告的期限。最终报告提出时限区分两种情况，一是从初步报告提出之日起到最终报告提出之日的期限，另一种是指从最后选定专家组成员之日起到正式提出最终报告的期限[4]

〈表3〉 韩中两国既签FTA下报告提出期限

FTA	初步报告		最终报告		FTA	初步报告		最终报告	
	紧急	普通	紧急	普通		紧急	普通	紧急	普通
韩-智利	-	90天	-	30天	中-智利	60天	120天	-	30天

3) 这里包括易腐的农产品、水产品以及季节性货物还有在近期内其贸易价值的相当部分将消失的商品。
4) 〈表3〉里'*'表示最终报告提出时限从最后选定专家组成员之日起算。

韩-东盟	-	90天	90天	30天	中-东盟	-	-	60天	120天*
韩-新加坡	-	90天	-	30天	中-新加坡	-	-	60天	120天*
韩-新西兰	45天	90天	30天	30天	中-新西兰	-	90天	-	30天
韩-秘鲁	-	-	80天	120天*	中-秘鲁	-	-	90天	120天*
韩-EFTA	-	90天	-	120天*	中-香港	-	-	-	-
韩-印度	-	90天	-	30天	中-澳门	-	-	-	-
韩-EU	45天	90天	60天	120天*	中-巴基斯坦	60天	90天	-	30天
韩-美国	-	180天	-	45天	中-哥斯达黎加	-	-	80天	120天*
韩-土耳其	45天	90天	60天	120天*	中-台湾	-	-	-	-
韩-澳大利亚	-	180天	-	45天	中-冰岛	-	90天	-	45天
韩-加拿大	50天	90天	17天	30天	中-瑞士	60天	90天	20天	30天
韩-哥伦比亚	-	90天	-	30天	-				
韩-越南	45天	90天	15天	30天	-				

3. 专家组成阶段

韩国同加拿大签署的FTA在专家组成上对汽车有关争端另有规定。各缔约方自受到专家组设立请求之日起30天内、涉及汽车时10天之内任命一名专家组成员。双方努力在接受专家组设立请求之日起60天内、涉及汽车时15天之内在被推荐的候选人当中协商确定主席。如在此期间内不能对主席达成一致，在追加的7天内、涉及汽车时4天内在各自当事国推荐的候选人当中通过抽签的方式确定主席。一方任命的成员不能履行职务或辞退、被辞退，则在30天内、涉及汽车案10天内，由推举该成员的当事国代为任命。

紧急事项特别是涉及易腐性强的农水产品、季节性货物等需要特别规定。韩中FTA在往后的协商过程中需要补充该内容。

Ⅳ. 斡旋、调停和调解

韩中FTA在第20.5条的第1,2,3款规定斡旋、调停和调解的争端解决方式。斡旋、调停和调解是在缔约双方同意的情况下自愿采取的程序。任一缔约方可随时请求进行斡旋、调停和调解。此程序可随时开始，可随时终止。如缔约双方同意，斡旋、调停和调解程序可以在专家组审理程序进行的同时继续进行。涉及斡旋、调停和调解的程序，尤其是缔约双方在这些程序中所采取的立场应当保密，且不得损害任一缔约方在任何进一步程序中的权利。

此外，韩中FTA在第20.5条的第4,5,6款对调解做了专门规定。缔约双方被鼓励进入调解程序，尤其是在一缔约方认为某一非关税措施对缔约双方的贸易带来负面影响，且该措施与协定中货物市场准入事项相关并受韩中FTA争端解决机制的约束时，除非缔约双方另有约定。缔约双方应当努力以快速的方式参与调解程序，以便在合理时期内、在双方协商一致指定或任命的调解员协助下，寻求双方满意的解决方案。当缔约双方已就解

决方案达成一致时，各方应当采取必要的措施以执行双方达成的解决方案。调解程序并不作为参与韩中FTA争端解决程序或任何一方作为当事方参与的其他协定争端解决程序的基础。

上述第20.5条的第1,2,3款规定的斡旋、调停和调解基本原则与韩国及中国签署的大部分的FTA基本相同。不过第20.5条的第4,5,6款对调解所做的规定则是在韩中FTA初次出现，是对FTA争端解决机制的一种贡献。

我们可以期待，在今后韩中间的争端解决程序中调解发挥越来越重要的作用。不过在具体的操作中有可能存在以下3个问题。

1. 具体的操作机关

当事人不能通过磋商解决纠纷而利用斡旋、调停和调解解决争端时，存在由哪个组织负责的问题。

韩国跟秘鲁签署的FTA明确规定共同委员会的介入。

2. 具体的操作规则

韩中FTA规定的调解机制尚处于比较原则性的阶段。与此相反，韩国与EU签署的FTA则以附件的方式详细规定了非关税措施的调解机制。

3. 非违反之诉的调解程序适用与否

有人可能要提出疑问，作为调解程序对象的非关税措施是不是必须是违反FTA协定措施的问题。

如在前面的适用范围所述，韩国在正式说明材料中阐明，不管是否违反规定，只要对贸易产生负面影响，就能对非关税措施提起调解之诉。这是违反韩中FTA的相关规定的。因此，在这个问题上需要两国认识上的统一。

Ⅴ. 专家组的设立

韩中FTA在第20.7条规定磋商不成时的专家组组成。除非缔约双方另有约定，专家组应当包括三名成员。各缔约方应当在专家组设立后15日内分别指定一名专家组成员。如果一缔约方未能在此期间内指定一名专家组成员，除缔约双方另有决定外，该专家组成

员应当由另一缔约方指定。缔约双方应当在专家组设立后30日内努力就担任主席的第三名专家组成员达成一致。如果缔约双方无法在专家组设立后30日内议定主席人选，应争端任一缔约方请求，WTO总干事应在此后的30日内指定主席人选。如果WTO总干事是任一缔约方的国民或者无法履行职责，则应当请求非任一缔约国国民的WTO副总干事履行职责。

与此相反，韩国和中国签署的FTA中专家组的组成如表4和表5。

〈表4〉韩国既签FTA专家组组成方式

FTA	专家组构成	专家任命	专家组主席任命	名单
韩-智利	3名成员	原则)各自任命 例外)抽签	原则)两国协商 例外)抽签	FTA生效6个月内制作15名名册
韩-东盟	原则)3名成员 例外)独任成员	各自任命	原则)两国协商 例外1)专家组成员共同选定 例外2)WTO总干事任命	-
韩-新加坡	原则)3名成员 例外)独任成员	各自任命	原则)两国协商 例外)抽签	双方不能对主席达成一致时，10天内相互交换各自推荐的4名非国内人组成的名册
韩-新西兰	3名成员	原则)各自任命 例外)抽签	原则)两国协商 例外)抽签	成立专家组邀请接受之日起30天内各自提供3名候选人
韩-秘鲁	3名成员	原则)各自任命 例外)对方任命	原则)两国协商 例外)抽签	双方不能对主席达成一致时，10天内相互交换各自推荐的4名非国内人组成的名册
韩-EFTA	3名成员	原则)各自任命 例外1)WTO总干事任命 例外2)抽签	原则)两国协商 例外1)WTO总干事任命 例外2)抽签	wto总干事不能任命时，相互交换各自4名候选人名册
韩-印度	原则)3名成员 例外)独任成员	各自任命	原则)两国协商 例外)抽签	双方不能对主席达成一致时，10天内相互交换各自推荐的4名非国内人组成的名册
韩-EU	3名成员	各自任命	原则)两国协商 例外)抽签	贸易委员会自FTA生效6个月内制作15名名册
韩-美国	3名成员	原则)各自任命 例外)抽签	原则)两国协商 例外)抽签	FTA生效180天内制作14名名册
韩-土耳其	3名成员	各自任命	原则)两国协商 例外)抽签	在共同委员会第一次会议制作10名名册
韩-澳大利亚	3名成员	原则)各自任命 例外)抽签	原则)两国协商 例外)抽签	成立专家组邀请之日起30天内各自提供3名候选人
韩-加拿大	3名成员	原则)各自任命 例外)抽签	原则)两国协商 例外)抽签	成立专家组邀请之日起30天或10天(汽车)内各自提供4名候选人
韩-哥伦比亚	3名成员	原则)各自任命 例外)对方任命	原则)两国协商 例外)抽签	双方不能对主席达成一致时，相互交换各自推荐的4名名册
韩-越南	3名成员	各自任命	原则)两国协商	成立专家组邀请接受之日起30

			例外)抽签	天内各自提供3名候选人

〈表5〉中国既签FTA专家组组成方式

FTA	专家组构成	专家任命	专家组主席任命
中-智利	3名成员	原则)各自任命 例外)WTO总干事任命	原则)双方协商 例外)WTO总干事任命
中-东盟	原则)3名成员 例外)独任成员	各自任命	原则)双方协商 例外)WTO总干事任命
中-新加坡	原则)3名成员 例外)独任成员	各自任命	原则)双方协商 例外)WTO总干事任命
中-新西兰	3名成员3	原则)各自任命 例外)WTO总干事任命	原则)双方协商 例外)WTO总干事任命
中-秘鲁	3名成员	原则)各自任命 例外)WTO总干事任命	原则)双方协商 例外)WTO总干事任命
中-香港	-	-	-
中-澳门	-	-	-
中-巴基斯坦	3名成员	原则)各自任命 例外)WTO总干事任命	原则)双方协商 例外)WTO总干事任命
中-哥斯达黎加	3名成员	原则)各自任命 例外)WTO总干事任命	原则)双方协商 例外)WTO总干事任命
中-台湾	-	-	-
中-冰岛	3名成员	原则)各自任命 例外)WTO总干事任命	原则)双方协商 例外)WTO总干事任命
中-瑞士	3名成员	原则)各自任命 例外)WTO总干事任命	原则)双方协商 例外)WTO总干事任命

韩中FTA专家组的设置，有可能引起以下4个方面的争论。

1. 专家组的组成

韩中FTA规定，除非双方另有规定，专家组由三名成员组成。该规定与韩国和中国既签FTA相同。两国签署的FTA均将三名成员为组成专家组的基本原则。

韩中FTA不承认例外。不过韩国同东盟、新加坡、印度签署的FTA以及中国与东盟、新加坡签署的FTA规定，当一方不能指定成员时，他方任命的成员为独任委员。

2. 专家任命

韩中FTA规定，各缔约方应当在专家组设立后15日内分别指定一名专家组成员。如果一缔约方未能在此期间内指定一名专家组成员，除缔约双方另有决定外，该专家组成员

应当由另一缔约方指定。

韩国和中国签署的FTA都规定，专家组成员由双方各指定1名。如一方不能选定时，采取在候选人名册中抽签、他方代为指定、WTO总干事指定等三种方式中的一种。

韩国与EFTA签署的FTA为例外，规定当一方不指定时首先由WTO总干事任命，WTO总干事不能任命时，在名册中抽签。

3. 专家组主席任命

韩中FTA规定，缔约双方应当在专家组设立后30日内努力就担任主席的第三名专家组成员达成一致。如果缔约双方无法在专家组设立后30日内议定主席人选，应争端任一缔约方请求，WTO总干事应在此后的30日内指定主席人选。如果WTO总干事是任一缔约方的国民或者无法履行职责，则应当请求非任一缔约国国民的WTO副总干事履行职责。

韩国和中国签署的FTA均规定双方当事国通过协商选出主席。协商不成时要么委托WTO总干事要么通过抽签在候选人名册中选择。

韩国签定的FTA在专家组主席指定上双方当事国协商为主、抽签为补。不过也有例外。韩国与东盟签署的FTA原则上两国协商，协商不成时专家组成员共同指定，专家组成员不能指定时由WTO总干事任命。韩国与EFTA签署的FTA规定，双方不能达成一致时由WTO总干事任命，WTO总干事不能任命时在专家候选人名册中通过抽签选定。

中国签署的FTA都规定，双方当事国协商不成时，由WTO总干事任命。

在选定主席问题上，韩中FTA采纳了中国的一贯做法。

3. 专家名册

韩中FTA没有规定制作专家名册。

韩国签定的FTA除了与东盟签署的之外，均要求制作专家名册。这里有FTA生效后预先制作专家名册的方法、专家组设置要求被采纳后准备专家名册的方法以及在组成专家组的过程中两国间对委员不能达成一致时制作名册等三种方法。

Ⅵ. 中止减让或其他义务

韩中FTA在第20.15条规定中止减让或其他义务相关事项。如果专家组认定，被诉方在合理期限内未能使被认定与协定不一致的措施符合专家组的建议，或者被诉方以书面形式表示其将不执行建议，或者没有任何执行措施存在，并且缔约双方未能在进入补偿谈判后20日内就补偿达成一致，起诉方可以对被诉方中止减让或其他义务。起诉方应当

在中止减让或其他义务前30日通知被诉方。通知应当表明中止减让或其他义务的水平和范围。考虑中止减让或其他义务时，起诉方应首先寻求对与专家组认定与本协定义务不符的措施所影响的部门相同的部门中止减让或其他义务。如起诉方认为对相同部门中止减让或其他义务不可行或无效，则可寻求中止其他部门的减让或其他义务。中止减让或其他义务的水平应当等于利益丧失或减损的水平。如果被诉方认为中止减让或其他义务的水平与利益丧失或减损并不等同，则应当向原专家组提出书面请求。对于被诉方的书面请求，原专家组应当裁定起诉方根据第四款中止减让或其他义务的水平是否过高。在专家组做出裁定前，起诉方可以不中止减让或其他义务。

韩中FTA下中止减让或其他义务方面，可以有以下三个方面的问题。

1. 被诉方向专家组提出请求期限

韩中FTA规定，当被诉方认为中止减让或其他义务的水平与利益丧失或减损并不等同，则应当向原专家组提出书面请求，但未规定请求期限。

与此相反，韩国与东盟、美国、EU、EFTA签署的FTA以及中国与瑞士、哥斯达黎加签署的FTA均规定有请求期限的限制。自受到中止减让或其他义务的通知之日起，韩国与东盟、美国、加拿大、哥伦比亚、新西兰签署的FTA以及中国与哥斯达黎加签署的FTA要在30天之内，韩国与EFTA、中国与瑞士签署的FTA要在15天之内，韩国与EU签署的FTA要在10天之内请求召集专家组。韩国与加拿大签署的FTA规定，汽车有关案件时，被诉方要在受到中止减让或其他义务的通知之日起7天内请求成立专家组。

被诉方成立专家组请求可以影响到起诉方的中止减让或其他义务的权利，为防止被诉方恶意滥用该制度或经济关系处于不稳定的状态，有必要适当限制被诉方的权利，最好限制在起诉方的中止措施尚未开始之前。

2. 起诉方的中止行为和专家组裁定关系

韩中FTA第20.15条第7款规定：The complaining Party may not suspend the application of concessions or other obligations before the issuance of the panel's determination pursuant to this Article. 对此，中方翻译成：在专家组根据本条做出裁定前，起诉方可以不中止减让或其他义务。但韩方翻译成："제소 당사국은 이 조에 따른 패널의 결정이 있기 전에 양허나 그 밖의 의무를 적용을 정지할 수 없다." 意思是：在专家组根据本条做出裁定前，起诉方不可以中止减让或其他义务。

3. 被中止的减让或其他义务的范畴

韩中FTA只规定起诉方对被诉方中止减让或其他义务的领域以及水平，但未规定该被中止的减让或其他义务必须派生于韩中FTA。

与此相反，韩国与印度、新加坡、秘鲁签署的FTA以及中国与新加坡、新西兰签定的FTA要求被中止的减让或其他义务必须是FTA项下赋予被诉方的权利。

韩中FTA争端解决程序中被中止的减让或其他义务也应限定在根据韩中FTA享有的权利。

Ⅶ. 结论

韩中两国在签署两国间的FTA之前各自已签定了15件FTA和12件FTA，因此两国在构建FTA争端解决机制方面有比较丰富的经验。

韩中FTA争端解决机制与两国已签署的FTA相比，在结构、内容方面大同小异，但在保障解决纠纷的迅速性、时效性方面有很大的进展。在解决争端的每一个阶段都规定有具体的时限，这有助于争端的迅速解决。为保证公正性，在每一个阶段允许专家组介入。特别是，在非关税措施特别规定调解程序的引进。

不过韩中FTA争端解决机制仍有一些问题。韩国至今致力于同美国、欧洲等西方经济发达国家间的的FTA，而中国则致力于同亚洲发展中国家间的的FTA。由于两国间法传统、法文化、惯例等的差异，在协调两国间的立场过程中似乎有一些不协调。

关于韩中FTA争端解决机制的适用范围，我们有必要探讨一下，是否将非违反之诉和受政府委托的非政府机关的措施包括在内。

有必要将FTA争端解决机制所适用的对象物品区分为一般物品和特殊物品且在争端解决程序中对两者区别对待。

从今往后，大部分的案件将通过调解程序解决。为此需要进行激活调解程序的努力。现行规定过于简单、原则，有必要参照韩国跟EU签定的FTA专门为调解程序制定附件。

专家组在FTA争端解决程序中起着举足轻重的作用。专家组除了对本案作出报告以外，在报告的履行阶段随时被召集。因此专家组的组成尤为重要。韩中FTA规定的专家组的组成方式采纳中国的模式，在指定专家方面有问题时，总采取委托WTO总干事的方式。也许最方便、最有效的方式为制作候选人名册，并从中抽签。

中止减让或义务方面，有必要对被诉方提出异议设置一定的时间限制，且将减让或义务限制在韩中FTA项下被诉方享有的权利。

尽管有一些争论的余地，不过韩中FTA争端解决机制仍不愧为韩国和中国往后与其他国家签定FTA时可参考的争端解决机制的典范。

한중 FTA 분쟁해결체제

한국 경남대학교 최송자 교수

Ⅰ. 서론

한중 FTA는 자유무역협정 제20장에서 분쟁해결체제를 구축하고 있다. 구체적으로, 제20.1조(협력), 제20.2조(적용범위), 제20.3조(분쟁해결 절차의 선택), 제20.4조(협의), 제20.5조(주선, 조정 또는 중개), 제20.6조(패널의 설치), 제20.7조(패널의 구성), 제20.8조(패널의 기능), 제20.9조(절차 규칙), 제20.10조(패널 절차의 정지 또는 종료), 제20.11조(패널 보고서), 제20.12조(패널의 최종보고서의 이행), 제20.13조(합리적인 기간), 제20.14조(이행검토), 제20.15조(양허 또는 그 밖의 의무의 정지), 제20.16조(정지 이후의 절차), 제20.17조(사적 권리)로 구성되어 있다. 이외에 부속서 20-가에서 '절차규칙'을, 부속서 20-나에서 '패널위원과 중개인에 대한 행동규범'을 두고 있다.

지금까지 한국은 중국 외에도 칠레, 싱가포르, EFTA(4개국), ASEAN(10개국), 인도, EU(28개국), 페루, 미국, 터키, 호주, 캐나다, 콜롬비아, 뉴질랜드, 베트남 등 53개 국가와 14건의 FTA를 체결하였고, 중국도 한국 외에도 홍콩, 마카오, ASEAN(10개국), 칠레, 파키스탄, 뉴질랜드, 싱가포르, 페루, 코스타리가, 대만, 아이슬랜드, 스위스 등 21개 국가/지역과 12건의 FTA를 체결하였다. 이 가운데서 양국 모두 FTA를 체결한 대상국가/지역에는 칠레, 아세안, 싱가포르, 뉴질랜드, 페루가 포함된다.

한중 양국이 체결한 FTA는 대부분 분쟁해결체제를 핵심 의제중의 하나로 규정하고 있다.[1] ASEAN과 체결한 FTA에서 유일무이하게 단독 협정의 형식을 취하고 있는 반면, 기타 FTA는 모두 분쟁해결체제를 FTA 기본협정 또는 무역협정의 일부분으로 규정하고 있다.

이 글은 한중 FTA 분쟁해결체제와 한국과 중국의 기체결 FTA 분쟁해결체제의 비교를 통해 추후 협상 또는 운영에서 쟁점이 될 수 있을 것으로 예상되는 몇 가지 이슈들을 살펴보기로 한다.

Ⅱ. 적용범위

한중 FTA는 제20.2조에서 분쟁해결체제의 적용범위에 대해 규정하고 있다. 한중

1) 중국이 홍콩, 마카오와 체결한 CEFA 그리고 대만과 체결한 ECFA는 예외이다.

FTA에서 달리 규정되거나[2] 양 당사국이 달리 합의하는 경우를 제외하고, 동 분쟁해결체제는 FTA 협정의 해석 및 적용에 관한 양 당사국 간의 모든 분쟁의 해결에 대하여, 또는 어느 당사국의 조치가 FTA 협정상의 의무와 불합치하거나 FTA 협정상의 자국의 의무를 달리 이행하지 못한 경우에 적용된다.

한중 FTA 분쟁해결체제의 적용범위와 관련하여 다음과 같은 2가지 이슈가 제기될 수 있다.

1. 분쟁의 유형

한중 FTA는 피소국이 FTA 협정상의 의무를 이행하지 않았거나 불완전하게 이행한 경우로 한정하고 있다. 따라서 위반분쟁만 한중 FTA 분쟁해결체제의 적용대상이 되고 비위반분쟁은 한중 FTA 분쟁해결절차 적용에서 배제된다는 결론에 다다르게 된다.

이것은 제20.5조4항에서 도입한 중개절차의 가동에 일정한 제약을 걸고 있다. 제20.5조 제4항에서는 특정 비관세조치가 양 당사국 간 무역에 부정적 영향을 미치고 그러한 조치가 이 협정의 상품에 대한 시장접근에 해당하는 사안에 관련되는 경우 제20장(FTA 분쟁해결)에 의해 분쟁해결절차의 적용대상이 된다고 믿을 때 중개절차 개시가 장려된다고 규정하고 있다. 이에 대해 한국은 공식적인 설명자료에서 "중개절차는 비관세조치에 대해 위법성 여부를 불문하고 무역에 부정적 영향이 있으면 제기될 수 있으며, 일률적으로 승패를 판정하는 것에 중점을 두지 않고 상호 만족스러운 합의점을 찾는 데 주력한다."고 비위반분쟁도 포함시켜 넓은 의미에서의 해석을 하고 있다.

비위반분쟁은 GATT 체제하에서 무역규범의 흠결을 보충하기 위해 도입된 것으로서, WTO 출범 이후에는 단 3건만 제기되고, 인용된 건수는 전무하다. 그러나 저조한 이용이 비위반분쟁을 FTA 분쟁해결체제에서 배제하는 이유가 될 수 있는지 의문이다.

지금까지 한국은 15건의 FTA를, 중국은 12건의 FTA를 체결하였다. 양국 모두 FTA 분쟁해결절차를 활용한 사건 처리 실적이 거의 전무하다. 세계적으로도 대부분의 FTA 분쟁해결절차는 실제 적용실적이 매우 미미할 것으로 추정된다. 그러나 우리는 이로부터 분쟁해결체제를 FTA에서 배제해야 한다는 결론을 내리지는 않는다.

분쟁해결체제는 사전예방에 그 최종목적을 두고 있다. 가장 이상적인 분쟁해결체제는 존재 그 자체만으로 분쟁의 발생에 억제력을 갖는 것이다. 우리 양국 모두 FTA를 체결하기 시작한 역사는 10년밖에 되지 않는다. 앞으로 가야 할 길은 멀고도 멀다. 그리고 FTA 분쟁해결절차에는 중재만 있는 것이 아니다. 양당사국 간의

2) SPS, TBT, 경쟁, 경제협력, 환경 등의 경우 FTA 분쟁해결챕터에 따른 절차 적용이 배제된다.

협상도 있고 주선, 조정, 중개 등 대체적 분쟁해결방식도 있다. 특히 한중 FTA는 중개절차에 대한 각별한 애정을 나타내고 있다. 따라서 FTA 분쟁해결절차 적용범위를 축소하여 해석할 필요가 존재하지 않는다고 본다.

한중 FTA에서의 적용범위에 대한 규정은 주요하게 중국측의 입장이 반영된 것으로 판단된다. 지금까지 중국이 체결한 FTA에서는 비위반분쟁을 적용범위에서 배제하고 있다. 반면, 한국이 칠레, 싱가포르, 인도, 미국, 호주, 캐나다, 콜롬비아, 뉴질랜드와 체결한 FTA에서는 FTA 협정에 위배되는 조치가 아니지만 혜택의 무효화 또는 침해를 초래하는 경우 FTA 분쟁해결절차가 적용된다고 규정하고 있다. 그러나 대부분의 FTA는 분쟁해결절차를 모든 비위반분쟁에 적용하는 것이 아니라 적용되는 비위반분쟁에 대해 일정한 제한을 두고 있다.(〈표1〉 참조)

FTA 운영과정에서 실제적으로 분쟁이 가장 많이 발생하는 것은 FTA 협정에 위배되지 않지만 FTA상 예기되던 혜택의 무효화 또는 침해를 초래하는 경우일 것이다. 따라서 분쟁이 가장 많이 발생할 것으로 판단되는 비위반분쟁의 일부 유형에 대해 제한적으로 FTA 분쟁해결절차를 적용할 필요성이 있다고 판단된다.

〈표1〉 한국의 기체결 FTA상 분쟁해결절차 적용가능 비위반분쟁 유형

FTA 구분	FTA 분쟁해결절차 적용가능 비위반분쟁 유형
한-칠레	상품무역, 국경간 서비스무역, 정부조달
한-싱가포르	제한 없음
한-뉴질랜드	상품에 대한 시장접근, 원산지 규정 및 원산지 절차, 통관 절차 및 무역원활화, 국경 간 서비스무역, 정부조달
한-인도	상품무역, 원산지규정, 서비스시장
한-미국	상품에 대한 내국민 대우 및 시장 접근, 농업, 섬유 및 의류, 원산지 규정 및 원산지 절차, 국경간 서비스무역, 정부조달, 지적재산권
한-호주	상품 무역, 원산지 규정 및 원산지 절차, 관세 행정 및 무역 원활화, 국경 간 서비스무역 또는 정부조달
한-캐나다	제한 없음
한-콜롬비아	상품에 대한 내국민 대우 및 시장 접근, 원산지 규정 및 원산지 절차, 국경 간 서비스무역, 정부조달

2. 조치의 유형

한중 FTA는 분쟁의 대상이 되는 조치를 '당사국의 조치'라고 규정함으로써 정부의 위임을 받은 비정부기관의 조치를 배제하고 있다. 따라서 중국의 경우 국유기업, 한국의 경우 공기업은 FTA 분쟁해결체제의 적용대상이 아니다.

FTA협정을 이행해 나가는 과정에서 비정부기관이 정부기관과 유사한 행위를 하는 것은 얼마든지 발생가능한 일이다. 따라서 FTA 분쟁해결절차에서 정부의 위임을 받은 비정부기관의 조치도 대상조치로 규정하는 것을 고려해 볼만하다.

다만, 실제적으로 분쟁 발생 시 양 당사국간의 의견 차이는 크게 발생할 것으로 판단된다. 이때 국제적으로 신망 높은 중개인에 의한 중개절차, 패널중재절차가 가동된다면 분쟁의 원만한 해결은 기대할 수 있을 것으로 판단된다.

한국-아세안 FTA와 한국-인도 FTA는 당국으로부터 위임을 받은 비정부기관의 조치도 대상범위에 속한다고 명문으로 규정하고 있다.

Ⅲ. 대상물품

한중 FTA는 분쟁해결절차의 대상품목에 대한 분류를 하고 있지 않다. 따라서 전반 분쟁해결절차에서 부패성 물품을 포함한 긴급사안에 대한 특별규정이 없다. 이와는 대조적으로, 한국과 중국의 기체결 FTA에서는 대부분 분쟁해결절차의 단계마다 특수성 물품에 대한 특별규정을 두고 있다.

1. 협의단계

한중 FTA는 제20.4조와 제20.6조에서 협의 시한 규정을 두고 있다. 어느 한쪽 당사국은 다른 쪽 당사국에게 서면통보를 하고 다른 쪽 당사국과의 협의를 요청할 수 있다. 협의 요청이 이루어지면 다른 쪽 당사국은 요청의 접수일 후 10일 내에 그 요청에 대하여 서면으로 응답한다. 협의는 요청의 접수일 후 30일 내에 개최된다. 협의가 협의 요청 접수일 후 60일 내에, 또는 양 당사국이 합의하는 그 밖의 기간 내에 사안을 해결하지 못한 경우, 제소 당사국은 패널을 설치하는 서면 요청을 다른 쪽 당사국에게 전달할 수 있다. 한중 FTA는 협의단계에서 대상물품을 구분하지 않고 통일된 규정을 두고 있다.

반면, 한국과 중국이 체결한 대부분의 FTA에서는 긴급사안[3] 특히 부패성 물품에 대한 특별규정을 두고 있다. 특별규정은 협의개시시한과 협의기간에서 나타난다. 협의개시시한은 피소국이 협의요청을 접수한 날로부터 협의를 개시해야 하는 기간을 의미하고, 협의기간은 협의를 개시해서부터 완료해야 하는 기간을 의미한다.

〈표2〉 한국과 중국의 기체결 FTA 협의개시시한 및 협의기간

FTA 구분	협의개시시한		협의기간		FTA 구분	협의개시시한		협의기간	
	긴급	일반	긴급	일반		긴급	일반	긴급	일반
한-칠레	15일	30일	30일	45일	**중-칠레**	15일	60일	30일	70일
한-아세안	10일	30일	20일	30일	**중-아세안**	10일	30일	20일	30일
한-싱가포르	-	20일	-	45일	**중-싱가포르**	10일	30일	20일	60일

3) 여기에는 부패하기 쉬운 농산물, 수산물 및 계절성 물품 그리고 가까운 미래의 특정일 이후에는 그 무역 가치의 상당한 부분을 상실하는 상품이 포함된다.

한-뉴질랜드	15일	30일	30일	60일	**중-뉴질랜드**	15일	30일	30일	60일
한-페루	15일	30일	25일	60일	**중-페루**	35일	40일	50일	60일
한-EFTA	15일	30일	30일	60일	**중-홍콩**	-	-	-	-
한-인도	-	30일	-	45일	**중-마카오**	-	-	-	-
한-EU	15일	30일	15일	30일	**중-파키스탄**	15일	30일	30일	60일
한-미국	-	-	20일	60일	**중-코스타리가**	15일	30일	20일	45일
한-터키	-	30일	-	30일	**중-대만**	-	-	-	-
한-호주	-	-	-	60일	**중-아이슬랜드**	-	30일	-	60일
한-캐나다	10일	30일	10일	35일	**중-스위스**	15일	30일	30일	60일
한-콜롬비아	-	-	20일	45일					
한-베트남	15일	30일	30일	60일					

2. 패널보고서 제출단계

패널보고서 제출과 관련하여, 한중 FTA는 제20.11조에서 규정하고 있다. 양 당사국이 달리 합의하지 아니하는 한, 패널은 최후의 패널위원이 임명된 후 120일 내에 잠정보고서를 양 당사국에게 제출한다. 양 당사국이 달리 합의하지 아니하는 한, 패널은 잠정보고서의 제출부터 45일내에 최종 보고서를 양 당사국에 제출한다. 한중 FTA는 패널보고서 제출시한과 관련하여 일반물품과 특수물품을 구분하지 않고 통일된 규정을 두고 있다.

반면, 한국과 중국의 기체결 FTA는 대부분 잠정보고서와 최종보고서 제출시한에 대한 규정에서 긴급사안과 일반사안을 구분하여 차별 규정한다. 잠정보고서 제출시한은 마지막 중재패널이 선정된 일자로부터 잠정보고서를 제출하는 일자까지의 기간을 말한다. 최종보고서 제출시한에는 2가지 경우가 포함된다. 하나는 잠정보고서 제출 일자로부터 최종보고서를 제출하는 일자까지의 기간을 말하며 다른 한 가지는 중재패널이 선정된 일자로부터 최종보고서를 제출하는 일자까지의 기간을 말한다.[4)]

〈표3〉 한국과 중국의 기체결 FTA 중재패널 보고서 제출시한

FTA 구분	최초보고서		최종보고서		FTA 구분	최초보고서		최종보고서	
	긴급	일반	긴급	일반		긴급	일반	긴급	일반
한-칠레	-	90일	-	30일	**중-칠레**	60일	120일	-	30일
한-아세안	-	90일	90일	30일	**중-아세안**	-	-	60일	120일*
한-싱가포르	-	90일	-	30일	**중-싱가포르**	-	-	60일	120일*
한-뉴질랜드	45일	90일	30	30일	**중-뉴질랜드**	-	90일	-	30일
한-페루	-	-	80일	120일*	**중-페루**	-	-	90일	120*
한-EFTA	-	90일	-	120일*	**중-홍콩**	-	-	-	-
한-인도	-	90일	-	30일	**중-마카오**	-	-	-	-
한-EU	45일	90일	60일	120일*	**중-파키스탄**	60일	90일	-	30일
한-미국	-	180일	-	45일	**중-코스타리가**	-	-	80일	120일*
한-터키	45일	90일	60일	120일*	**중-대만**	-	-	-	-
한-호주	-	180일	-	45일	**중-아이슬랜드**	-	90일	-	45일

4) 〈표3〉에서는 최종보고서 제출이 마지막 중재패널 선정으로부터 시작되는 경우 *표시를 한다.

한-캐나다	50일	90일	17일	30일	**중-스위스**	60일	90일	20일	30일
한-콜롬비아	-	90일	-	30일	-				
한-베트남	45일	90일	15일	30일	-				

3. 패널 구성 단계

한국-캐나다 FTA는 패널 구성과 관련하여 자동차관련 사안에 대한 특별 규정을 두고 있다. 각 당사국은 접수일부터 30일 이내 또는 자동차의 경우 10일 이내에 패널위원 1명을 임명한다. 양 당사국은 접수일 후 60일 이내에 또는 자동차의 경우 15일 이내에, 추천된 후보들 중에서 의장에 대하여 합의하고 임명하도록 노력한다. 이 기간 내에 양 당사국이 의장에 대하여 합의할 수 없는 경우, 추가적인 7일 이내에, 또는 자동차의 경우 추가적인 4일 이내에, 각 당사국에 의하여 추천된 후보자들 중에서 추첨을 통하여 의장이 선정된다. 한쪽 당사국에 의하여 임명된 패널위원이 직무를 수행할 수 없거나, 사임하거나 해임된 경우, 30일 이내 또는 자동차의 경우 10일 이내에 그 당사국에 의하여 대체자가 임명된다.

긴급사안 특히 부패성이 강한 농수산물, 계절성이 강한 물품에 대한 특별규정은 필요하다. 한중 FTA 차후 협상에서 이 부분은 보완해야 하는 내용이라고 판단된다.

Ⅳ. 주선, 조정 또는 중개

한중 FTA는 제20.5조의 제1,2,3항에서 주선, 조정 또는 중개의 대체적 분쟁해결 방식에 대해 일반적인 규정을 두고 있다. 주선, 조정 및 중개는 양 당사국이 합의하는 경우 자발적으로 행해지는 절차이다. 어느 쪽 당사국에 의하여도 언제든지 요청될 수 있으며 언제든지 개시될 수 있고, 언제든지 종료될 수 있다. 양 당사국이 합의하는 경우, 중재패널에서 분쟁이 해결을 위하여 진행되는 동안에 주선, 조정 또는 중개를 위한 절차는 계속될 수 있다. 주선, 조정 및 중개와 관련된 절차와 특히 그 절차에서 양 당사국이 취한 입장은 공개되지 아니하며, 어떠한 이후 절차에서도 어느 한쪽 당사국의 권리를 저해하지 아니한다.

이외에도 한중 FTA는 제20.5조의 제4,5,6항에서 중개절차 도입에 대한 구체적인 규정을 두고 있다. 양 당사국은 양 당사국이 달리 합의하지 아니하는 한, 특히 한쪽 당사국이 특정 비관세조치가 양 당사국 간 무역에 부정적 영향을 미치고 그러한 조치가 이 협정의 상품에 대한 시장접근에 해당하는 사안에 관련되며 이 장의 적용대상이 된다고 믿는 때에는 중개 절차를 개시할 것이 장려된다.(제4항) 양 당사국은 합의에 따라 양 당사국이 지정 또는 지명하는 중개인의 조력을 받아 신속한 방식으

로 그리고 합리적인 기간 내에 상호 합의된 해결에 도달할 목적으로 제4항에 규정된 중개 절차에 참여하도록 노력하여야 할 것이다. 양 당사국이 해결책에 합의한 경우 각 당사국은 상호 합의된 해결책을 이행하는 데 필요한 모든 조치를 하여야 할 것이다.(제5항) 제4항에 규정된 중개 절차는 이 협정 또는 양 당사국이 당사국으로 참가하는 다른 협정상 분쟁해결절차를 위한 근거로서 작용하도록 의도되지 아니한다.(제6항)

상술한 제20.5조의 1,2,3항에서 천명한 주선, 조정 및 중개관련 기본원칙은 한국과 중국이 체결한 대부분의 FTA와 동일하다. 반면, 중개절차관련 제20.5조의 4,5,6항에서 규정된 내용은 한중 FTA에서 새롭게 도입된 내용으로, 한국이 EU와 체결한 FTA에서만 관련 규정을 찾아볼 수 있다.

따라서 앞으로 한중 간의 분쟁해결절차에서 중개절차를 통한 분쟁해결이 활성화될 것으로 판단된다. 다만 여기에 3가지 문제가 존재할 수 있다.

1. 구체적인 운영기관

당사자 간에 협의를 통해 분쟁을 해결하지 못하고 알선, 조정, 중개의 분쟁해결절차를 이용 시 구체적으로 어느 기관을 활용하는가 하는 문제가 제기된다.

한국-페루 FTA의 경우 공동위원회의 개입을 공식화 하고 있다.

2. 구체적인 운영규칙

한중 FTA에서 규정한 중개 메커니즘은 아직 비교적 원칙적인 단계에 처해 있다. 반면, 한국-EU FTA에서는 부속서의 형식으로 “비관세조치에 대한 중개 메커니즘”에 대한 상세한 규정을 두고 있다.

3. 비위반조치의 중개절차 적용 여부

중개절차의 적용대상인 비관세조치는 반드시 FTA협정에 위배되는 조치여야 하는가 하는 문제가 제기될 수 있다.

앞의 적용범위에서 지적한 것과 같이 한국은 공식적인 설명자료에서 중개절차는 비관세조치에 대해 위법성 여부를 불문하고 무역에 부정적 영향이 있으면 제기될 수 있다고 해석하고 있다. 그러나 이것은 한중 FTA 협정의 적용범위에 대한 규정에 위배된다. 따라서 이 문제에 대한 양국 간의 통일된 인식이 필요하다.

Ⅴ. 패널의 구성

한중 FTA 제20.7조에서는 양 당사국 간의 협의가 타결되지 못한 경우의 패널 구성에 대해 규정하고 있다. 양 당사국이 달리 합의하지 아니하는 한, 패널은 3인의 위원으로 구성된다. 각 당사국은 패널 설치 후 15일 내에 각각 1인의 패널위원을 지명한다. 양 당사국이 달리 결정하지 아니하는 한, 한쪽 당사국이 그 기간 내에 패널위원을 지명하지 못하는 경우, 그 패널위원은 다른 쪽 당사국에 의하여 지명된다. 당사국은 패널 설치 후 30일 내에 의장 직무를 수행할 세 번째 패널위원에 대하여 합의하도록 노력한다. 양 당사국이 패널 설치 후 30일 내에 의장에 대하여 합의할 수 없는 경우, 분쟁의 어느 쪽 당사국이든 그 요청에 따라, 세계무역기구 사무총장이 30일의 추가 기간 내에 의장을 임명할 것이 기대된다. 세계무역기구 사무총장이 어느 한쪽 당사국의 국민이거나 이 임무를 수행할 수 없는 경우, 어느 한쪽 당사국의 국민이 아닌 세계무역기구 사무차장이 그러한 임무를 수행하도록 요청된다.

반면, 한국과 중국의 기체결 FTA 패널 구성 방식은 아래 〈표4〉,〈표5〉와 같다.

〈표4〉 한국 기체결 FTA 패널 구성 방식

FTA 구분	패널 구성	패널 임명	의장 임명	명부 작성
한-칠레	3명 위원	원칙)각자 임명 예외)명부 추첨	원칙) 양국 합의 예외) 명부 추첨	협정 발효 6개월 내 15인 명부 작성
한-아세안	원칙)3명 위원 예외)단독위원	각자 임명	원칙)양국 합의 예외1)패널위원 공동임명 예외2)WTO사무총장 임명	-
한-싱가포르	원칙)3명 위원 예외)단독위원	각자 임명	원칙)양국 합의 예외)명부 추첨	양국 합의 불가의 경우 10일 이내 각 당사국의 국민이 아닌 4명의 지명자로 구성된 각자의 명단 교환
한-뉴질랜드 1	3명 위원	원칙)각자 임명 예외)명부 추첨	원칙) 양국 합의 예외) 명부 추첨	패널설치 요청 접수일부터 30일 이내에 각 당사국 3인 후보명부 제공
한-페루	3명 위원	원칙)각자 임명 예외)다른측 당사국 지정	원칙)양국 합의 예외)명부 추첨	양국 합의 불가의 경우 10일 이내 각 당사국의 국민이 아닌 4명의 지명자로 구성된 각자의 명단 교환
한-EFTA	3명 위원	원칙)각자 임명 예외1)wto사무총장 임명 예외2)명부 추첨	원칙)양국 합의 예외1)wto사무총장 임명 예외2)명부 추첨	wto사무총장 지정 안되는 경우 각 당사국 4명 후보명단 교환

한-인도	원칙)3명 위원 예외)단독위원	각자 임명	원칙)양국 합의 예외)명부 추첨	양국 합의 불가의 경우 10일 이내 각 당사국의 국민이 아닌 4명의 지명자로 구성된 각자의 명단 교환
한-EU	3명 위원	각자 임명	원칙)양국 합의 예외)명부 추첨	무역위원회는 FTA협정 발효 후 6개월 이내에 15인 명부 작성
한-미국	3명 위원	원칙)각자 임명 예외)명부 추첨	원칙)양국 합의 예외)명부 추첨	FTA협정 발효일부터 180일 이내 14명 후보명부 작성
한-터키	3명 위원	각자 임명	원칙)양국 합의 예외)명부 추첨	공동위원회 첫 번째 회의에서 10인의 명부 작성
한-호주	3명 위원	원칙)각자 임명 예외)명부 추첨	원칙)양자 합의 예외)명부 추첨	패널설치 요청일부터 30일 이내 각자 3명의 후보명부 제공
한-캐나다	3명 위원	원칙)각자 임명 예외)명부 추첨	원칙)양자 합의 예외)명부 추첨	패널설치 요청 30일 또는 10일(자동차)이내 각기 후보자 4명 추천
한-콜롬비아	3명 위원	원칙)각자 임명 예외)다른 쪽 당사국 지명	원칙)양자 합의 예외)명부 추첨	의장에 합의할 수 없는 경우 양 당사국 각기 4명의 후보명부 교환
한-베트남1	3명 위원	각자 임명	원칙)양자 합의 예외)명부 추첨	중재패널 요청의 접수일부터 30일 이내에 세명의 후보자 제안

〈표5〉 중국 기체결 FTA 패널 구성 방식

FTA 구분	패널 구성	패널 임명	의장 선출
중-칠레	3명 위원	원칙)각자 임명 예외)WTO사무총장 지정	원칙)양자 합의 예외)WTO사무총장 지정
중-아세안	원칙) 3명 위원 예외) 단독위원	각자 임명	원칙)양자 합의 예외) WTO사무총장 임명
중-싱가포르	3명 위원 예외)단독위원	각자 임명	원칙) 양자 합의 예외)WTO사무총장 지정
중-뉴질랜드	3명 위원	원칙) 각자 임명 예외)WTO사무총장 지정	원칙) 양자 합의 예외)WTO사무총장 지정
중-페루	3명 위원	원칙)각자 임명 예외)WTO사무총장 지정	원칙)양자 합의 예외)WTO사무총장 지정
홍콩	-	-	-
마카오	-	-	-
파키스탄	3명 위원	원칙)각자 임명 예외)WTO사무총장 지정	원칙)양자 합의 예외)WTO사무총장 지정
코스타리가	3명 위원	원칙)각자 임명 예외) 다른 측 대신 지정	원칙)양자 합의 예외)WTO사무총장 지정
대만	-	-	-
아이슬랜드	3명 위원	원칙)각자 임명 예외)WTO사무총장 지정	원칙)양자 합의 예외)WTO사무총장 지정
스위스	3명 위원	원칙)각자 임명 예외)WTO사무총장 지정	원칙)양자 합의 예외)WTO사무총장 지정

한중 FTA 중재패널 구성과 관련하여 다음과 같은 4가지 쟁점이 있을 수 있다.

1. 패널 구성

한중 FTA는 양 당사국이 달리 합의하지 아니하는 한, 패널은 3인의 위원으로 구성된다고 규정하고 있다. 이것은 한국과 중국의 기체결 FTA와 동일하다. 양국의 기체결 FTA는 모두 3인의 중재패널을 기본원칙으로 인정되고 있다.

한중 FTA에서는 예외를 인정하고 있지 않다. 반면, 한국이 아세안, 싱가포르, 인도와 체결한 FTA 그리고 중국이 아세안, 싱가포르와 체결한 FTA에서는 한 측 당사국이 패널위원을 임명하지 못하는 경우 다른 측 당사국이 임명한 패널위원이 독임패널위원이 된다고 규정하고 있다.

2. 패널위원 임명

한중 FTA는 각 당사국은 패널 설치 후 15일 내에 각각 1인의 패널위원을 지명하며 양 당사국이 달리 결정하지 아니하는 한, 한쪽 당사국이 그 기간 내에 패널위원을 지명하지 못하는 경우, 그 패널위원은 다른 쪽 당사국에 의하여 지명된다고 규정하고 있다.

한국과 중국의 기체결 FTA에서는 모두 패널위원은 양 당사국에서 각기 한명의 패널위원을 지정한다고 규정하고 있다. 어느 한 측에서 패널위원 미선정 시 패널명부 추첨, 다른 쪽 당사국 대신 임명, WTO 사무총장 임명의 3가지 방식 중의 하나를 취하고 있다.

한국이 EFTA와 체결한 FTA는 패널위원에 대해 어느 한 측이 지정하지 못하는 경우 WTO 사무총장이 임명하며 WTO 사무총장이 지정하지 못하는 경우 명부에서 추첨한다고 규정하고 있다.

3. 의장 선출

한중 FTA는 양 당사국은 패널 설치 후 30일 내에 의장 직무를 수행할 세 번째 패널위원에 대하여 합의하도록 노력하되, 양 당사국이 패널 설치 후 30일 내에 의장에 대하여 합의할 수 없는 경우, 분쟁의 어느 쪽 당사국이든 세계무역기구 사무총장에게 30일의 추가 기간 내에 의장을 임명할 것을 요청할 수 있다고 규정하고 있다. 세계무역기구 사무총장이 어느 한쪽 당사국의 국민이거나 이 임무를 수행할

수 없는 경우, 어느 한쪽 당사국의 국민이 아닌 세계무역기구 사무차장이 그러한 임무를 수행하도록 요청된다.

한국과 중국의 기체결 FTA는 모두 양 당사국 간의 합의에 의해 의장을 선출한다고 규정하고 있다. 양 당사국 간의 합의로 의장을 선출할 수 없는 경우, 기본적으로 WTO 사무총장에게 위임하는 방식과 패널명부에서 추첨을 통해 임명하는 2가지 방식을 취하고 있다.

한국의 기체결 FTA에서 의장은 양 당사국 간의 합의를 거쳐 선출하는 것을 원칙으로 하고 합의가 불가능한 경우 명부를 통한 추첨에 의해 선정된다. 다만 2가지 특수한 경우가 있다. 한국이 아세안과 체결한 FTA에서는 원칙적으로 양국이 합의하되, 합의를 도출하지 못하는 경우 패널위원들이 공동으로 임명하며 패널위원들의 공동 임명이 불가한 경우 WTO 사무총장이 임명한다고 규정하고 있다. 그리고 한국이 EFTA와 체결한 FTA는 양 당사국 간에 합의를 도출하지 못한 경우 WTO 사무총장에게 위임하며 WTO 사무총장이 지정하지 못하는 경우 중재패널 명부에서 추첨으로 선정한다고 규정하고 있다.

중국의 기체결 FTA는 당사국 간에 의장 선출에 합의할 수 없는 경우 WTO 사무총장이 임명한다고 규정하고 있다.

의장 선출과 관련하여, 한중 FTA는 중국측의 입장을 받아들인 것으로 보인다.

3. 패널명부

한중 FTA에서는 패널명부 작성에 대한 규정이 없다.

한국의 기체결 FTA는 아세안과 체결한 FTA를 제외하고 패널명부 작성을 의무화하고 있다. 패널명부 작성과 관련하여 FTA 협정 발효 후 후보명부를 작성하는 방법과 중재패널 설치요청이 접수된 후 명부를 작성하는 방식 그리고 양국 간 패널위원에 대한 합의가 이루어지지 않는 경우의 명부 작성 3가지 방식이 있다.

Ⅵ. 혜택의 정지

한중 FTA는 제20.15조에서 양허 또는 그 밖의 의무의 정지관련 규정을 두고 있다. 피소국이 FTA협정에 불합치된다고 판단된 조치를 정하여진 합리적인 기간 내에 패널의 권고에 맞추어 준수하지 못하였다고 패널이 판단하는 경우, 또는 피소국이 서면으로 패널의 권고를 이행하지 않을 것이라는 의사를 표시한 경우, 또는 준수를 위하여 취하여진 조치가 존재하지 않고, 양 당사국이 보상에 관한 합의에 이르지 못한 경우, 제소국은 30일 전에 통보하고 양허 또는 그 밖의 의무의 적용을 정지할 수 있다. 정지할 양허나 그 밖의 의무를 검토하는데 있어, 제소국은 피소국

의 조치에 의하여 영향을 받은 동일한 분야나 분야들에서 우선 고려하여야 할 것이다. 동일한 분야 또는 분야들에서 양허 또는 그 밖의 의무를 정지하는 것이 실행가능하지 아니하거나 효과적이지 아니하다고 판단하는 경우에는 다른 분야에서 양허 또는 그 밖의 의무를 정지할 수 있다. 피소국이 양허 또는 그 밖의 의무의 정지 수준이 무효화 또는 침해의 수준과 동등하지 아니하다고 판단하는 경우, 피소 당사국은 원래 패널에 서면으로 요청할 수 있다. 제소국은 패널의 결정이 있기 전에 양허나 그 밖의 의무의 적용을 정지할 수 없다.

한중 FTA의 양허 또는 혜택의 정지 절차와 관련하여 다음과 같은 두 가지 쟁점이 있을 수 있다.

1. 피소국 패널소집 요청시한

한중 FTA는 피소국이 제소국의 양허 또는 그 밖의 의무의 정지 수준이 무효화 또는 침해의 수준과 동등하지 아니하다고 판단하는 경우 중재패널에 서면으로 중재를 요청해야 한다고 규정하고 있지만 신청기간에 대한 제약을 두고 있지 않다.

반면, 한국이 아세안, 미국, EU, EFTA와 체결한 FTA 그리고 중국이 스위스, 코스타리가와 체결한 FTA는 요청신청기간에 대한 규정을 두고 있다. 혜택 정지 통보를 받은 일자로부터 한국-아세안, 한국-미국, 중국-코스타리가 FTA는 30일 이내, 중국-스위스와 한국-EFTA FTA는 15일 이내, 한-EU FTA는 10일 이내에 패널소집을 요청할 수 있다고 규정하고 있다.

한국-캐나다, 한국-콜롬비아, 한국-뉴질랜드 FTA의 경우 피소국은 제소국의 서면통보를 받은 후 30일 이내에 패널 소집을 요청할 수 있다. 한국-캐나다 FTA는 또 자동차관련 사안에 대한 특별 규정을 두고 있는데 피소국은 서면통보를 받은 후 7일 이내에 패널 소집을 요청할 수 있다.

피소국이 패널에 중재요청을 한 경우, 제소국은 패널의 결정이 있기 전에 양허나 그 밖의 의무의 적용을 정지할 수 없다. 피소국의 악의적인 중재패널 소집을 막기 위해 피소국의 패널중재요청에 일정한 시간적 제한을 두어야 한다고 판단된다. 가장 이상적인 것은 제소국의 조치가 아직 취해지지 않은 상태에서 이의신청을 제기하는 것이라고 판단된다.

2. 제소국의 혜택 정지와 패널 결정 관계

한중FTA 제20.15조 제7항은 다음과 같이 규정하고 있다. “The complaining Party may not suspend the application of concessions or other obligations before the issuance of the panel’s determination pursuant to this Article.” 이 항에 대해 우리 한국은 “제소

당사국은 이 조에 따른 패널의 결정이 있기 전에 양허나 그 밖의 의무를 적용을 정지할 수 없다.”로 번역하고 있다. 반면, 중국에서는 “제소 당사국은 이 조에 따른 패널의 결정이 있기 전에 양허나 그 밖의 의무를 적용을 정지하지 않을 수 있다.(在专家组根据本条做出裁定前，起诉方可以不中止减让或其他义务)”로 번역하고 있다.

3. 정지되는 혜택

한중 FTA는 제소국의 양허 또는 의무의 정지에 대해 분야 및 수준에 대한 규정만 두고 있다. 그러나 양허 또는 의무가 한중 FTA에 의해 파생된 것임을 요구하지 않고 있다.

반면, 한국이 인도, 싱가포르, 페루와 체결한 FTA 그리고 중국이 싱가포르, 뉴질랜드와 체결한 FTA는 모두 정지되는 혜택은 FTA 협정상 피소 당사국에 부여된 혜택으로만 제한하고 있다.

당연히 한중 FTA 분쟁해결절차에서 정지되는 혜택은 한중 FTA에 의해 부여된 혜택이어야 한다고 판단된다.

Ⅶ. 결론

한중 양국은 양자 간의 FTA 체결 이전에 이미 각자 15건의 FTA와 12건의 FTA를 체결한 경험이 있다. 따라서 양국 모두 FTA 분쟁해결체제 구축에서 비교적 풍부한 경험을 갖고 있다.

때문에 한중 FTA 분쟁해결체제는 양국의 기체결 FTA와 구조적인 측면, 구체적인 내용에서 대동소이하지만 신속성, 실효성 측면에서 큰 진전이 있다. 분쟁해결의 모든 단계에서 구체적 시한을 규정하여, 분쟁의 신속한 해결을 유도하였다. 분쟁해결의 공정성을 보장하기 위해 각 단계마다 패널절차 도입이 가능하도록 하였다. 특히 비관세조치와 관련하여 중개절차 도입에 관한 특별규정을 두고 있다.

그러나 한중 FTA 분쟁해결체제는 여전히 잔존하는 문제들이 있다. 한국은 그 동안 미국, 유럽을 포함한 서구 선진국들과의 FTA 추진에 전념해 왔고 중국은 아시아지역 발전도상국가들과의 FTA 추진에 주력했다. 법전통과 법문화, 관행 등의 차이로 양국 간의 의견 차이를 줄이고 조율하는 과정에서 여전히 일부 문제들이 존재하는 듯하다.

한중 FTA 분쟁해결체제의 적용범위와 관련하여 비위반분쟁과 정부의 위임을 받은 비정부기관의 조치를 적용범위에 포함시킬 것인지 여부, 그리고 조치와 피해의 관계에 대한 검토를 진행할 필요가 있을 것으로 판단된다.

FTA 분쟁해결절차에 적용되는 대상물품은 일반물품과 특수물품으로 구분하여 일

반사안과 긴급사안에 대한 차별된 절차를 도입할 필요성이 제기된다.

앞으로 대부분의 사건은 중재패널절차 이전에 해결되도록 노력해야 할 것이다. 이를 위해 주선, 조정 또는 중개 절차 이 가운데서 특히 중개절차를 활성화할 필요성이 제기된다. 현행 규정은 지나치게 원칙적인 관계로, 한국-EU FTA를 모델로 중개관련 부속서 마련이 필요하다고 판단된다.

패널은 FTA 분쟁해결절차에서 중요한 지위를 차지하고 있다. 패널은 본안에 대한 최종보고서를 제출한 외에도 보고서의 이행과 관련하여 수시로 소집될 수 있다. 따라서 패널구성에 각별한 주의를 가질 필요가 있다. 한중 FTA에 규정된 패널구성 방식은 주로 중국의 기체결 FTA의 관련 규정을 도입하여 당사국들의 패널 지정에 문제가 있는 경우 WTO 사무총장에 의뢰한다. 가장 효과적인 것은 명부 작성과 명부에서의 추첨이라고 판단된다.

혜택의 정지와 관련하여 한중 FTA는 패소국이 제소국의 혜택 정지에 이의가 있을 경우 이의신청기간에 대한 일정한 제한을 둘 필요가 있으며 정지되는 혜택을 FTA 상 피소국에 부여된 혜택으로 제한하는 것이 합당하다고 판단된다.

일부 논쟁의 여지가 있음에도 불구하고, 한중 FTA 분쟁해결체제는 한국과 중국 모두에게 있어서 차후에도 지속적으로 추진될 FTA 체결에서 모델로서도 손색이 없는 분쟁해결체제임에는 틀림없는 것 같다.

Session 3

2. THE INVESTOR-STATE DISPUTE SETTLEMENT PROVISIONS IN THE CHINA-KOREA INVESTMENT AGREEMENTS: COMMENTS ARISING FROM THE ANSUNG CASE

Speaker:

Prof. **HAN Xiuli**
(Xiamen University)

Discussants:

Prof. **YOO Joonkoo**
(Korea National Diplomatic Academy)

中韩投资协定

中韩投资协定中的投资者—国家争端解决条款——从Ansung案谈起

韩秀丽 教授

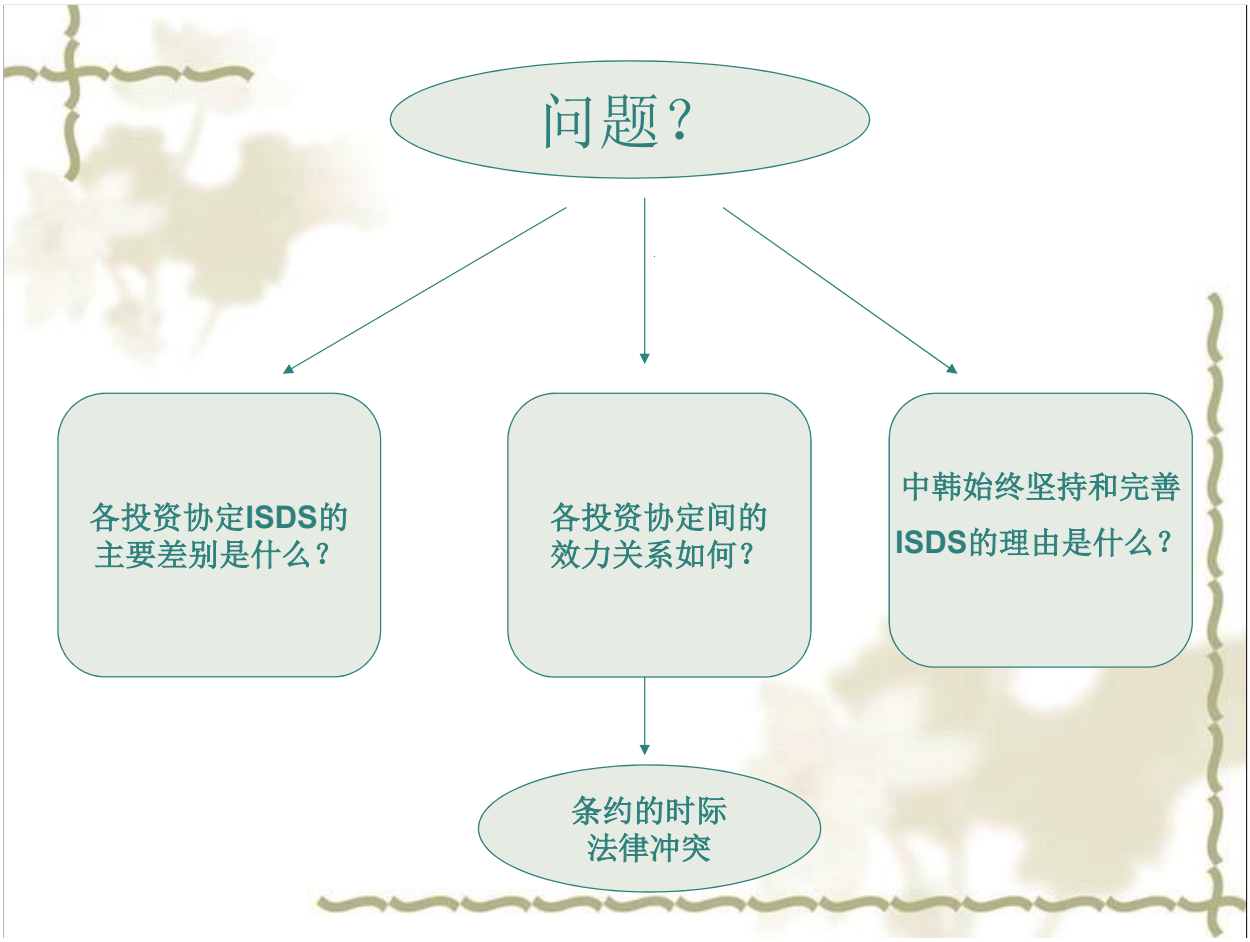
厦门大学法学院

中韩之间第一个也是目前唯一一个投资者—国家争端解决（ISDS）案——

Ansung Housing Co., Ltd. v. People‘s Republic of China (ICSID Case No. ARB/14/25)案（2014年11月4日登记，援引2007年中韩BIT）

中韩之间签订的投资协定

签订日期	生效日期	全称	简称
1992-9-30	1992-12-4	《中华人民共和国政府害人大韩民国政府关于鼓励和相互保护投资协定》	1992年中韩BIT
2007-9-7	2007-12-1	《中华人民共和国政府和大韩民国政府关于促进和保护投资的协定》	2007年中韩BIT
2012-5-13	2014-5-17	《中华人民共和国政府、日本国政府及大韩民国政府关于促进、便利及保护投资的协定》	中日韩投资协定
2015-6-1	？	《中华人民共和国政府和大韩民国政府自由贸易协定》	中韩FTA



一、各投资协定ISDS的主要差别

- （一）1992年中韩BIT中的ISDS
- （二）2007年中韩BIT中的ISDS
- （三）中日韩TIT及中韩FTA中的ISDS

- （一）1992年中韩BIT中的ISDS
  - 根据1992年中韩BIT第9.3条(ISDS条款)，投资者只能针对征收补偿额争端提出仲裁要求，反过来说，仲裁庭的强制管辖权仅限于此。而且，投资者不能诉诸ICSID仲裁庭，只能将争端提交给参考《ICSID公约》设立的仲裁委员会（arbitration board）。
  - “If a dispute concerning the amount of compensation…”

- 根据1992年BIT第9.10条，“尽管有本条的规定，在中华人民共和国成为华盛顿公约的成员国时，应投资者或政府的要求，可将除中华人民共和国声明保留不提交根据华盛顿公约设立的“解决投资争端国际中心”（以下称“中心”）的争端以外的任何争端，提交“中心”。
- 1993年2月6日加入《ICSID公约》，中国政府根据《ICSID公约》第25.4条于1993年1月7日提出了保留，即中国政府只允许就征收和国有化的补偿问题提交ICSID仲裁。

- 中国通知的英文原文：
- **“[P]ursuant to Article 25(4) of the Convention, the Chinese Government would only consider submitting to the jurisdiction of the International Centre for Settlement of Investment Disputes disputes over compensation resulting from expropriation and nationalization”,**
  - see Notifications Concerning Classes of Disputes Considered Suitable or Unsuitable for Submission to the Centre, Art. 25(4) of the Convention, ICSID/8-D.

- 各仲裁庭对征收补偿额或补偿方法争端的管辖权不存在统一的判例法，其解释具有不确定性。
- **中国—秘鲁BIT, article 8.3：”If a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article, it may be submitted at the request of either party to the international arbitration of the International Center for Settlement of Investment Disputes (ICSID)…”**
- **俄罗斯—西班牙BIT, article 10.1: “Any dispute between one Party and an investor of the other party relating to the amount or method of payment of the compensation due to article 6 (*expropriation, added*)”**

扩张性解释的案件：

- **1. Tza Yap Shum v Republic of Peru (ICSID Case No. ARB/07/6).**
- **2. Sanum Investments Limited v. Lao People's Democratic Republic（UNCITRAL, PCA Case No. 2013-13）.**
- **3. Renta 4 S.V.S.A., et tal v. The Russian Federation（SCC CASE NO. ARBITRATION V (024/2007)）.**

限缩性解释的案件：

- 1. Vladimir Berschader and Moïse Berschader v. The Russian Federation (SCC Case No. 080/2004).
- 2. RosInvestCo UK Ltd. v. The Russian Federation (SCC Case No. V079/2005)

- （二）2007年中韩BIT中的ISDS
- 1.投资争议：
- 缔约一方的投资者指控缔约另一方违反该协定对其投资造成或导致了损害和损失，但是，缔约任何一方应恪守其与缔约另一方投资者就投资所作出的任何承诺。（伞状条款）
- 投资者可选择东道国有管辖权的法院或各种国际投资仲裁之一（4个月的协商前置程序、4个月的国内行政复议前置程序）（岔路口条款）

- 诉讼时效三年
- 提起国际投资仲裁要提前90天
  以书面形式通知（要式）
- “联合国国际贸易法委员会仲裁规则”为联合国国际贸易法委员会于1976年4月28日通过的《联合国国际贸易法委员会仲裁规则》

- （三）中日韩TIT及中韩FTA中的ISDS
- 共同之处：
- 1. 中日韩TIT及中韩FTA都规定了：
- 2. 书面协商通知
- 3. 对争端缔约方管辖法院管辖权的书面弃权通知（学习美式BIT的做法）
- 4. 行政法庭或机关的行政复议作为东道国国内法院及国际仲裁的前置程序。

- 5. 各缔约方同意争端投资者将违反投资协定或“投资章节“的投资争端诉诸ISDS，是一种概括同意。从而，使仲裁庭的管辖权范围很广。
- 6. 都规定了岔路口条款，即无论是国内法院诉讼还是哪一个国际投资仲裁，选择其一即不能选择其它。
- 7.都对裁决书的内容进行了规定：违反、损失、因果关系的裁决及救济方式（赔偿及返还财产）。

- 8. 诉讼时效为三年。
- 9. 都体现了为国家安全措施采取的投资措施不可裁。
- 10. 对于环境措施，即缔约方不得（should not）采取放松环境措施的方法吸引外资，但这种措施是否可被诉讼ISDS并不明确。
- 11. 都排除了MFN对程序问题的适用。

不同之处

- 1. 中韩FTA明确了联合国国际贸易法委员会仲裁规则指2010年修订的或缔约双方嗣后同意的联合国国际贸易法委员会的仲裁规则；但中日韩TIT并未明确。
- 2. 根据中韩FTA第22章，中韩FTA是“开放式”的，有可能变动的，因为缔约双方将通过该协定生效后（不应晚于该协定生效之日后的2年内，并在2年内结束谈判）开始的第二阶段谈判修订与投资相关的章节。第二阶段谈判将包括第12章（投资）的所有条款，并基于负面清单进行，涵盖投资的准入前阶段。

结论

- 将来ISDS条款如何变动并未可知，而且，实体条款的变化也会影响到ISDS的适用范围，例如，准入前国际待遇问题是否适用ISDS？

- 中韩FTA第12.17条中提及投资委员会
- 投资委员会职能之一是谘商该协定项下任何影响投资者的投资行为的事宜，因此，这对避免投资者—国家间争端升级很有益处。

- 另外，为改进投资环境和促进投资，中韩FTA各缔约方要指定联络点以受理投资者对于东道国政府行为的投诉。

二、各投资协定间的效力关系如何？

- （一）1992年中韩BIT的夕阳条款或存续条款（survival clause）使其在被2007年中韩BIT取代后，对2007年前的投资继续有效15年，即2022年之前都可享受1992年BIT的保护。
- （二）2007年BIT和1992年BIT的替代关系
- （三）中日韩TIT与2007年BIT的关系
- （四）中韩FTA投资章节与中日韩TIT及2007年BIT的关系

- （一）**1992**年中韩**BIT**的夕阳条款或存续条款（**survival clause**）使其在被**2007**年中韩**BIT**取代后，对**2007**年前的投资继续有效**15**年，即**2022**年之前都可享受**1992**年**BIT**的保护。
  - **BIT第16.2条，“In respect of investments and returns acquired prior to the date of termination of the present Agreement, the provisions of Article 1 to 14 shall continue to be effective for a further period of fifteen years from the date of termination of the present Agreement.”**

- （二）2007年BIT和1992年BIT的替代关系
- 2007年BIT第14.4条，“1992年9月30日签订的《中华人民共和国政府和大韩民国政府鼓励和相互保护投资的协定》将于本协定生效之日终止(terminate)并被本协定取代。”
- 2007年BIT第12条“本协定应适用在其生效之前或之后缔约任何一方投资者在缔约另一方领土内按照其相关法律法规进行的投资，但是，不适用任何在本协定生效之前已发生的（arose）争议。”

结论

- **2007年之前的投资（发生争议的投资除外），在2022年之前，既可适用1992年BIT，又可适用2007年BIT。**（理论上：积极冲突）
- 因投资者不会选择**1992年BIT，1992年BIT已失去意义。**（实践上：消极冲突）

（三）中日韩TIT与2007年BIT的关系

- 中日韩TIT第27.2条：本协定也适用于任何缔约方投资者在本协定生效之前根据缔约另一方的适用法律法规在缔约另一方领土内获得的所有投资。
- 中日韩TIT第27.7条：本协定不适用于在本协定生效前发生的事件引起的权利请求，也不适用于在本协定生效前已解决的权利请求。

中日韩TIT第25条（与其他协定的关系）

- 本协定的任何条款均不影响缔约一方在该缔约方与缔约另一方达成的、在本协定生效日存在且有效的任何双边投资协定下的权利和义务，包括给予缔约另一方投资者的待遇的相关权利和义务。（例如，中日、中韩、韩日BIT）
- 注：各方确认，当缔约一方投资者与缔约另一方发生争议时，本协定的任何条款均不得解释为阻止投资者依赖该缔约双方达成的、投资者认为比本协定更优惠的双边投资协定。

结论

中日韩TIT与2007年中韩BIT存在积极冲突（已发生争议或已解决争议除外），但投资者有选择更优惠的BIT的自由。

- （四）中韩FTA投资章节与中日韩TIT及2007年BIT的关系
- 中韩FTA无条款规定，不明确。

三、中韩始终坚持和完善ISDS的理由？

- （一）中国的投资政策
- （二）韩国的投资政策
- （三）中韩投资关系

中韩四个IIAs中都包含ISDS，且不断完善，理由：

- （一）中国的投资政策
- 1998年以前，中国是纯粹的资本输入国，为了创造有利的吸引外资的投资环境，在投资协定中包含有限的ISDS。更自由的BIT始于1998，主要标志是全面接受了ICSID仲裁条款，但无疑这种政策在近年来表现更为明显。
- 中国的投资政策正在由从纯粹资本输入国转向兼顾资本输入国与输出国的角度考虑问题。

- 中国对ISDS的态度越来越积极，在中国签订的第一代BIT（1982-1989）和第二代BIT（1990-1997）中，仅承诺征收补偿额可以诉诸国际投资仲裁，但第三代BIT（1998-2009）和第四代BIT（2010-）全面放开。

- 中国签订了130个BITs，其中生效的108个，包括中日韩投资协定，仅次于德国。中国已签署其它IIAs18个，16个生效，其中，中韩FTA、中澳FTA尚未生效。
- 中国在ICSID作被告的有2个仲裁案件。

- （二）韩国的投资政策
  - 在20世纪90年代中期以前，韩国是资本输入国，为了创造有利的吸引外资的投资环境，在投资协定中包含ISDS。
  - 在20世纪90年代中期以后，韩国成为净资本输出国，发生 “身份混同”。尤其是2000年以后，韩国“通常将自己置于资本输出国的地位”， 所以投资协定中包含ISDS更符合韩国保护海外投资的政策需要。此外，韩国利用投资协定发展在国际上有吸引力的投资环境。

- 韩国一向是ISDS的积极拥护者，早期签订的BIT，如1976年韩国—英国BIT、1974年韩国—荷兰BIT就包含ICSID仲裁条款。
- 至2014年底，韩国共有IIAs107个（其中约89个生效的BIT）。 大多包含ICSID仲裁条款及其它仲裁条款。

- 韩国很少成为国际投资仲裁的被告。到目前为止，韩国在ICSID仅有三个仲裁案件。

- 韩国BIT的发展历程：早期主要是追随欧式BIT，但近年来，转而追随美式BIT。（中国？）

（三）中韩投资关系

- 在中韩之间的投资关系方面，中韩两国1992年8月24日建交以来，经贸关系不断发展，“截至2014年4月，韩国对华投资累计577.4亿美元，中国对韩国实际投资累计14.4亿美元。中国是韩国最大的海外投资对象国，韩国是中国第五大外商直接投资来源国。”

结论

- 1. 支配中韩之间投资关系的三个IIAs的ISDS条款及该条款涵盖的内容有差别，在这种情况下，对它们之间的效力关系应该有所明确。
- 2. 中国和韩国都需要ISDS，都支持ISDS。
- 3. 近年来有关ISDS的争议存废争议没有影响中韩的投资政策及其对待ISDS的态度。但是，中韩应该关注ISDS的改革和最新发展，考虑在开放的中韩FTA中将其纳入。

THANK YOU!

Session 3

3. THE INSTITUTIONAL MECHANISM IN CHINA-KOREA FTA AND THE INVESTOR-STATE DISPUTE SETTLEMENT: COMMENTS ON THE COMMITTEE ON INVESTMENT

Speaker:

Prof. **CHEN Huiping**
(Xiamen University)

Discussant:

Dr. **LEE Sangmo**
(Korea Legislation Research Institute)

中韩FTA中的投资委员会与投资者-东道国争端解决机制

陈辉萍、龚瑶
厦门大学法学院
2015.6.23

中韩FTA投资委员会

- 第12.17 条
- 各缔约方在此设立投资委员会以达成本章的目标
- 组成：委员会应当由各缔约方政府的代表组成，且可决定在各缔约方政府之外邀请具备与讨论事项有关的必要专业知识的实体的代表。（评论：为什么？与投资者-东道国争端解决机制有无关联？）

- 委员会的职能为：

（一）讨论及审议本章的实施和运作；

（二）讨论与本章相关的其他投资相关事项，包括现有不符措施的范围。

（三）讨论本协定项下任何影响一缔约方的投资者在另一缔约方领土内投资的设立、收购、扩展、管理、经营、运营、出售或其他处置行为的事宜。（评论：是否包括投资者与东道国的争端？如果是，与投资者-东道国争端解决机制是何关系？）

- 委员会在必要时可以决定向各缔约方提出适当建议，以便本章更加高效运作或者实现本章的目标。
- 委员会的任何决定都应经一致同意做出。

- 关于委员会与投资争端关系的评论：
- 投资争端可能属于可提交委员会讨论的职能范围。“（三）讨论本协定项下任何影响一缔约方的投资者在另一缔约方领土内投资的设立、收购、扩展、管理、经营、运营、出售或其他处置行为的事宜。”
- “任何”：不排除投资争端
- “影响”：包括可能影响及已经影响。不管是可能影响还是已经影响，肯定是会产生或已经产生投资者与东道国的投资争端

- 但是，对于这类争端，讨论仅限于委员会内部，即缔约方（国家）之间。投资者没有参与。可否说，类似于母国对本国投资者行使外交保护权？这样，将投资者-东道国争端上升为国家之间的争端？
- 委员会的成员包括：除缔约国政府官员外，邀请具备与讨论事项有关的必要专业知识的实体的代表。邀请专业人士的目的之一是有助于投资争端的解决。

- 投资委员会隐含的功能之一是将投资争端消灭在投资者正式对东道国提起仲裁之前？成立委员会的目的是“达成本章（投资）的目标”。解决投资争端肯定是投资章节的目标。

中韩FTA下投资者-东道国争端解决机制

- 定义：投资争端是指一缔约方与另一缔约方投资者之间的争端，前一缔约方被指违反其在本章项下与投资者或其在前一缔约方领土内涵盖投资相关的任何义务致使或导致该投资者遭受损失或损害。
- 范围宽泛，有保护伞条款

- 争端解决程序

-友好协商解决：

a. 由投资者提出书面协商请求

b. 提交法院或仲裁前4个月向争端缔约方提出

-提请东道国行政复议

a. 在请求协商后

b. 提请行政复议后4个月才能提交法院或仲裁

* 友好协商和行政复议是强制性的前置程序

- 提交东道国有管辖权的法院或提交国际仲裁：选择是终局的

投资委员会与投资争端解决

- 从上述介绍可见，各有自己的职能与程序
- 投资委员会介入投资争端的可能时机？

- 在前置程序期间，即友好协商和行政复议期间

- 为什么要有强制性的前置程序？希望将争端消灭在萌芽状态

- 在前置程序期间将问题提交委员会讨论，无论是由东道国提出，还是由母国提出。

- 委员会至少每年召开一次会议，在会议上可讨论该投资争端，或与争端相关的协议问题（如条款解释等）
- 委员会的专家可以协助讨论、处理投资争端或相关的协议问题
- 如果委员会一致同意做出一项决定，意味着投资争端或相关协议问题就解决了，从而影响争端的解决

中韩投资委员会是否创新？

- 以缔约国投资委员会的方式消除投资争端或促进投资争端的解决，是很好的一项举措。
- 中国一贯喜欢用协商解决的方式解决争议，设立委员会是友好协商的最佳方式，也是中国的一贯实践。在中国缔结的各种双边协定（包括边界条约、跨境水条约等）中，通常都有委员会这种制度性机制安排。

- 投资委员会是中国FTA的特有创新，还是其他FTA也有？
- 很多FTA都设立有一个总的FTA委员会，如NAFTA，中国-ASEAN FTA。
- 一些总的FTA委员会之外，还设立分委员会，如货物贸易委员会、服务贸易委员会等。中国对外签订的13个FTA中有6个、美国对外签订的14个FTA中，有6个有分委员会。
- 中国的FTA有7个有投资委员会，美国的FTA都没有

- 中国FTA中有投资委员会的：
- 中国-新西兰FTA （2008.4）
- 中国-秘鲁FTA（2009.4）
- 海峡两岸投资保护与促进协议（投资工作组）（2012.8）
- 中国-智利FTA （关于投资的补充协议）（2012.9）
- 中国-韩国FTA （2015.6）
- 中澳FTA（2015.6）

- 为什么自2008年起，中国喜欢在FTA中设立专门的投资委员会？
- 与投资者-东道国争端解决机制有关？
- 作为破解投资争端的困局之一种新思路？

- 中国对外签订的BIT有投资委员会吗？
- 美国、英国等国家对外签订的BIT都没有投资委员会
- 中国有7个BIT中专门的投资委员会（120多个中）

a. 中国-比卢经济联盟BIT(1984年有，2009年更新版没有)

b. 中国-日本BIT （1988）

c. 中国-韩国BIT （1992，2007年更新版没有）

d. 中国-摩洛哥BIT（1995）

e. 中国-尼日利亚BIT（1997年有，未生效，2001年更新版没有）

f. 中国-也门BIT（1998）

g. 中日韩三方投资条约（2012）

- 评论：
- 早期(21世纪前)对外签订的BIT中投资委员会，职能包括通过磋商解决投资争端 。原因：对投资争端解决态度比较保守，希望用友好协商的方式解决投资争端？
- 21世纪前10年，基本放弃投资委员会的做法。原因：中国逐渐接受投资者-东道国争端解决机制？
- 晚近5年，重新设立投资委员会。原因：投资者-东道国争端解决机制备受质疑？

投资委员会对投资争端解决是一种倒退还是一种新的路径从而值得推广？

- 投资争端解决：从国家间解决到投资者与东道国之间的仲裁，现在似乎又回到了国家间解决的路径。是倒退吗？
- 在投资者-东道国机制备受质疑的国际环境下，也许是一种创新？
- 在投资者-东道国机制的新建议中，已有知名学者提议由投资委员会作为缓冲器。
- 目前中国在这方面有较丰富的实践（跨境水条约有实践，投资条约还仅有条文），其他发达国家几乎没有。
- 这与中国的法律文化有关。值得推广。

谢　　谢！

Session 3

4. IS THERE A WAY IN THE LABYRINTH OF TREATY NORMS LEADING TO THE APPLICABLE RULE? TAKE THE EXAMPLE OF THE PROVISIONS REGARDING INVESTOR-STATE INVESTMENT SETTLEMENT IN CHINA-KOREA FTA, CHINA-JAPAN-KOREA BIT AND THE CHINA-KOREA BIT

Speaker:

Dr. Yu Li, on behalf of Prof. Kong Qingjiang
(China University of Political Science and Law)

Discussant:

Prof. **KIM Doosu**
(Hankuk University of Foreign Studies)

IS THERE A WAY IN THE LABYRINTH OF TREATY NORMS LEADING TO THE APPLICABLE RULE?
TAKE THE EXAMPLE OF THE PROVISIONS REGARDING INVESTOR-STATE INVESTMENT SETTLEMENT IN CHINA-KOREA FTA, CHINA-JAPAN-KOREA BIT AND THE CHINA-KOREA BIT

Contents

A. Introduction

- With the signature of the Free Trade Agreement between the People's Republic of China and the Republic of Korea (CK FTA) in 2015 and its incoming ratification, there will be **three sets of rules with respect to investment flow between China and Korea**, *i.e.*, The Agreement among the
  Government of the People's Republic of China, the Government of Japan and the Government of the Republic of Korea on the Promotion and Protection of Investment (**CKJ BIT**, 2013) , the Agreement of the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investment (**CK BIT**, 2007), as well as Chapter 12 (investment chapter) of the **CK FTA**.

A. Introduction

- A quick look at the rules will find there are overlapping and even conflicts among them. While the agreements were designed to facilitate the investment flow between the countries concerned, the rules will pose intimidating barriers to the investors. And even for professional lawyers, this will be a labyrinth of treaty norms. A question arises in this regard: **shall there be an integrated approach so that there will be a coherent cannon of rules, which encompass a recognition of the rules in CK FTA, CJK BIT and CK BIT as mutually complimentary to each other, and lex posterior derogat priori.**

B. Examination of Major Investment Rules

- **I. Definition and scope of investor-State investment disputes**
- **1. Definition of "investment"**

- **CK BIT takes an asset-based method to define "investment".**
- **Unlike CK BIT, an enterprise-based method was adopted by the CJK BIT to definite "investment".**
- **CK FTA shares with CJK BIT the same definition of "investment".**
- An enterprise-based method with a longer list, which intends to protect more investment activities between the contracting parties, is instrumental to fulfilling the main purpose of the investment rules to protect bilateral investment activities. In contrast, CK BIT remains an old-fashion way of defining "investment".

B. Examination of Major Investment Rules

- **I. Definition and scope of investor-State investment disputes**
- **1. Definition of "investment"**

- CK BIT emphasizes more on the restrictive conditions for "investment", rather than the definition of "investment" itself. It only describes "investment" as "every kind of asset, used as investment".
- CK FTA and CJK BIT underline to explain what could be defined as "used", it enumerates different modalities of "used" as "owns or controls, directly or indirectly". Then, CK FTA and CJK BIT continue to detail the "characteristics" of an investment, "such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk".
- **CK FTA and CJK BIT are more delicately designed agreements concerning the definition of "investment".**

B. Examination of Major Investment Rules

- **I. Definition and scope of investor-State investment disputes**
- **1. Definition of "investment"**

- CJK BIT and CK FTA add "(i) an enterprise and a branch of an enterprise" and "(iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts" as new modalities of "investment"; divide "(b) shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or joint venture " into "(ii) shares, stocks or other forms of equity participation in an enterprise, including rights derived therefrom; (iii) bonds, debentures, loans and other forms of debt, including rights derived therefrom"; enrich the modality of "intellectual property rights"; supplement "any other tangible and intangible property" to "movable and immovable property as well as any other property rights in rem such as mortgages, liens, pledges, usufruct and similar rights".
- **The definition of "investment" in CJK BIT is more sophisticated and concrete, so it is adopted by on-going CK FTA and represents a more advanced way of definition in China's International Investment Agreements (IIAs).**

B. Examination of Major Investment Rules

- **I. Definition and scope of investor-State investment disputes**
- **2. Scope of Investor-State investment disputes**

- **The three agreements have nearly the same way, with slight difference in wording, of defining investor-State investment dispute.**
- CK BIT :"a dispute between one Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party."
- CJK BIT :"a dispute between a Contracting Party and an investor of another Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of **the former Contracting Party under** this Agreement with respect to **the investor** or its investments **in the territory of the former Contracting Party**."
- CK FTA : "a dispute between a Party and an investor of the other Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of any obligation of the former Party under this Chapter with respect to the investor or its **covered** investments in the territory of the former Party."

B. Examination of Major Investment Rules

- **Ⅱ. Treatment of Foreign investors**
- **1. National Treatment**

- Under the CK BIT, national treatment obligation is only "with respect to the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments". **The national treatment obligation under the CK BIT is merely limited to the post-establishment phase, while it is vague under the CJK BIT or CK FTA whether national treatment shall be accorded to the prospective investors in the pre-establishment phase.** The vagueness is indicated under Article 2.2 of CJK BIT and Article 12.2.2 of CK FTA, which basically state that each Party shall, subject to its rights to exercise powers in accordance with the applicable laws and regulations, including those with regard to foreign ownership and control, admit investment of investors of the other Party."

B. Examination of Major Investment Rules

- **Ⅱ. Treatment of Foreign investors**
- **2. Most-favoured-nation Treatment**

- According to **CK BIT**, each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State with respect to investments and business activities, including the admission of investment. However, it has the following exceptions: the benefit of any treatment, preference or privilege by virtue of: (a) any customs union, free trade zone, economic union and any international agreement resulting in such unions, or similar institutions; (b) any international agreement or arrangement relating wholly or mainly to taxation; (c) any arrangements for facilitating small scale frontier trade in border areas.

B. Examination of Major Investment Rules

- **Ⅱ. Treatment of Foreign investors**
- **2. Most-favoured-nation Treatment**

- Pursuant to **CJK BIT**, each Contracting Party shall in its territory accord to investors of another Contracting Party and to their investments treatment no less favorable than that it accords in like circumstances to investors of the third Contracting Party or of a non-Contracting Party and to their investments with respect to investment activities and the matters relating to the admission of investment. The most-favoured-nation treatment provision shall not be construed so as to oblige a Contracting Party to extend to investors of another Contracting Party and to their investments any preferential treatment resulting from its membership of: (a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation; (b) any international agreement or arrangement for facilitating small scale trade in border areas; or (c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage.

B. Examination of Major Investment Rules

- **Ⅱ. Treatment of Foreign investors**
- **2. Most-favoured-nation Treatment**

- According to **CK FTA**, each Party shall in its territory accord to investors of the other Party and to covered investments treatment no less favorable than that it accords in like circumstances to investors of any non-Party and to their investments with respect to investment activities and the matters relating to the admission of investment in accordance with paragraph 2 of Article 12.2. The exceptions to the most-favoured-nation treatment are limited to "any preferential treatment resulting from its membership of: (a) any customs union, free trade area, monetary union, similar international agreement leading to such union or free trade area, or other forms of regional economic cooperation; (b) any international agreement or arrangement for facilitating small scale trade in border areas; or (c) any bilateral and multilateral international agreements involving aviation, fishery and maritime matters including salvage."

B. Examination of Major Investment Rules

- **Ⅱ. Treatment of Foreign investors**
- **3. Access to the Courts of Justice**

- The issue here is **whether the hosting state shall provide the fair and equitable opportunity to the foreign investor to resort to its courts** for redress where a dispute arises between the investor and the host state concerning expropriation and other measures affecting the foreign investment.

- **Both the obligation of national treatment and the obligation of most-favoured-nation treatment apply with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights.**

B. Examination of Major Investment Rules

- **Ⅱ. Treatment of Foreign investors**
- **4. Minimum Standard of Treatment**

- Under the CJK BIT, fair and equitable treatment and full protection and security is narrower than or at most equivalent to the treatment accorded in accordance with generally accepted rules of international law. The **CJK BIT solidifies the concession of the host state by requiring that each Contracting Party shall observe any written commitments in the form of an agreement or contract it may have entered into with regard to investments of investors of another Contracting Party.**
- Under the CK FTA, the minimum standard of treatment is equated to the "treatment in accordance with customary international law", which is broader than "fair and equitable treatment" and "full protection and security".**CK FTA specifically imposes an obligation of non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, or revolt, insurrection, riot, or other civil strife.**

B. Examination of Major Investment Rules

- **III. Expropriation and compensation**

- CJK BIT and CK FTA adopt a similar standard concerning expropriation. Compared with CK BIT, both CJK BIT and CK FTA are more assertive towards "measures equivalent to expropriation", which CK BIT refers to "direct or indirect" expropriation. Therefore, **more government measures are subject to the disciplines under CJK BIT and CK FTA than under CK BIT.**

B. Examination of Major Investment Rules

- **III. Expropriation and compensation**

- **When it comes to compensation, CK BIT, CJK BIT and CK FTA adopt a standard similar to each other,** i.e., "fair market value of the expropriated investments". However, all the three IIAs provide that the fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.
- There is a obvious **difference** between the CK BIT and the rest two agreements in that pursuant to CK BIT, compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred, while according to both CJK BIT and CK FTA, the compensation shall be equivalent to the fair market value of the expropriated investments at the time when the expropriation was publicly announced or when the expropriation occurred, whichever is the earlier.

B. Examination of Major Investment Rules

- **III. Expropriation and compensation**

- **All** the three IIAs require that the compensation shall be paid without delay and shall carry interest from the date of expropriation until the date of payment. In this regard, the difference is that CK BIT only prescribes "appropriate interest", while CJK BIT and CK FTA mandates the payment of interest "at commercially reasonable rate." The three IIAs all require that the payment of compensation shall be effectively realisable, freely transferable and freely convertible into the currency of the Contracting Party of the investors concerned and into freely usable currencies. However, as CJK BIT and CK FTA do not impose restriction on the "freely usable currencies", CK BIT requires the currencies must be "as defined in the Articles of the Agreement of the International Monetary Fund".
- It is also noted that **all** the three IIAs mandate that "the investors affected shall have a right of access to the courts of justice or administrative tribunals" according to its legal procedure of the host state making the expropriation "for a prompt review of the investors' case and the amount of compensation in accordance with the principles set out in this Article."

B. Examination of Major Investment Rules

- **IV. Exclusion of disputes from the subject matters of international arbitration**
- **1. Time of limitation**

- All the three agreements employ time of limitation as a means to exclude disputes from falling within the province of international arbitration. **In common, all the agreements provide for a three-year time of limitation for arbitration,** which suggests that no claim may be submitted to the arbitration if more than three years have elapsed.
-
- The **only differentia** worth mentioning is that unlike CK BIT, both CK FTA and CJK BIT insert "whichever is the earlier" after "the date on which the disputing investor first acquired, or should have first acquired", which literally made the time of limitation clearer and more specific.

B. Examination of Major Investment Rules

- **IV. Exclusion of disputes from the subject matters of international arbitration**
- **2. Intellectual property**

- The three IIAs only prescribe intellectual property (IP) in general and there is no IP content concerning investor-state investment disputes. According to Article 31 of Vienna Convention, the whole text of treaty should be taken into consideration when interpreting provisions. As IP is a form of investment listed in the definition of "investment", IP disputes between investors and state could be resorted to arbitration in case of no IP exclusion.

B. Examination of Major Investment Rules

- **IV. Exclusion of disputes from the subject matters of international arbitration**
- **3. Prudent carve-out**

- **CK BIT does not have any clause concerning prudential measures.**
- **CJK BIT uses two clauses in Article 20 to reserve the right of "taking measures relating to financial services for prudential reasons".** Although CJK BIT accords the Contracting Party the power to take financial measures for prudential reasons, it does not authorize Contracting Party to take measures that do not conform with the CJK BIT as a means of avoiding its obligation under the BIT. In this regard, it is noted that CJK BIT does specify what measures are eligible. In the event of dispute thereover, such issues shall be decided by the arbitration tribunal established by the Contracting Parties.
- **Under the CK FTA, the prudent carve-out clause is incorporated into a Services-Investment Linkage clause.** Unlike CJK BIT, CK FTA specifies the obligations which can not be compromised by "any measure affecting the supply of financial service by a financial service supplier of a Party through commercial presence in the territory of the other Party", thus providing more predictability and transparency as to what measures are eligible as prudential carve-out measures.

B. Examination of Major Investment Rules

- **V. Pre-set consultation, fork-in-the-road provision and exhaustion of local remedies**

- CK BIT requires a pre-set consultation before the investor of one Contracting Party can resort to other means of resolution of disputes between it and the government of the other Contracting Party.
- While both CJK BIT and CK FTA has a sophisticated clause concerning pre-set consultation. They share the same wording: "Any investment dispute shall, as far as possible, be settled amicably through consultation between the investor who is a party to the investment dispute and the Party that is a party to the investment dispute."
- The difference of CJK BIT and CK FTA lies in that the former adds "A written request for consultation shall be submitted to the disputing Contracting Party by the disputing investor before the submission of the investment dispute to the arbitration". Then CJK BIT lists the specific requirements for the written request by four conditions and three notices.

B. Examination of Major Investment Rules

- **V. Pre-set consultation, fork-in-the-road provision and exhaustion of local remedies**

- Therefore, **the idea of pre-set consultation stays the same in the three agreements, and CJK BIT carries a more specific modality requirement for the pre-set consultation.** The specific requirement of pre-set consultation sets more obstacles when foreign investor intends to submit to international arbitration.
- The change is reflective of the general attitude towards international arbitration. This attitude is partly a result of the recent legitimacy crisis of international arbitration tribunal and China is among the counties who take a more conservative attitude towards international arbitration tribunal.

B. Examination of Major Investment Rules

- **V. Pre-set consultation, fork-in-the-road provision and exhaustion of local remedies**

- After examining the articles in aforementioned three agreements, **they all contain fork-in-the-road provision,** which means the choice of the disputing investor shall be final and the disputing investor may not submit thereafter the same dispute to the other court or tribunal for a resolution

B. Examination of Major Investment Rules

- **V. Pre-set consultation, fork-in-the-road provision and exhaustion of local remedies**

- The three agreements require of prior domestic administrative review procedure before international arbitration with a soft wording as "the disputing Contracting Party may require the investor concerned to go through the domestic administrative review procedure specified by the laws and regulations of that Contracting Party before the submission to the arbitration".
- While **all the three agreements specify a four-month period for the domestic administrative review procedure,, both CJK BIT and CK FTA require the disputing state to "require the investor concerned to go through the domestic administrative review" "without delay ".** Equally noteworthy is that a note is inserted to emphasize the right to arbitration of the investor regardless of the decision made under the domestic administrative review procedure.

B. Examination of Major Investment Rules

- **VI. Investor-State Investment Dispute Arbitration**
- **1. Arbitration institution and arbitration rules**

- CK FTA and CJK BIT have the same prescription of arbitration institutions and arbitration rules, which said investors could submit disputes to either a competent domestic court or an arbitration tribunal that arbitrates under ICSID Convention, ICSID Additional Facility Rules, UNCITRAL Arbitration Rules and any arbitration rules agreed with the disputing Party.
- Under CK BIT, the arbitration institutions include arbitration tribunal established under ICSID Convention and an ad hoc arbitration tribunal established under UNCITRAL Arbitration Rules or any other arbitration rules agreed upon by both parties.
- A comparison shows **that ICSID Additional Facility Rules is only available under CK FTA and CJK BIT, while the arbitration institution could be the same in three IIAs.** The additional arbitration rule made the arbitration procedure more specific and less indistinct.

B. Examination of Major Investment Rules

- **VI. Investor-State Investment Dispute Arbitration**
- **2. Applicable law in arbitration**

- **Only CK BIT mentions the application law in arbitration:**
- "The arbitration award shall be based on the law of the Contracting Party to the dispute including its rules on the conflict of laws, the provisions of this Agreement as well as the principles of international law accepted by both Contracting Parties."
- According to CK BIT, applicable law in arbitration is the domestic law of contracting party with its conflict laws, as well as the principle of international law accepted by both contracting parties. **Both CJK BIT and CK FTA do not contain such kind of clause in their texts.**

B. Examination of Major Investment Rules

- **VI. Investor-State Investment Dispute Arbitration**
- **3. Remedies available in arbitral awards**

- **CK BIT provides in arbitral awards for no remedy.**
- **Under CJK BIT and CK FTA, "monetary damages and applicable interest" and "restitution of property" are two kinds of remedies available in arbitral awards.** In lieu of restitution, monetary damages and any applicable interest paid by contracting party could also become available remedies. This evolution provides better protection for foreign investor, which conforms to the purpose of the preamble of IIAs. Thus, China shows its will to better protect investor, based on the fact that Chinese investors are becoming increasingly active in overseas investment activities.

B. Examination of Major Investment Rules

- **VII. Denial of benefits**

- **CK BIT does not contain a denial of benefits clause.**
- **CJK BIT** provides in this regard:
- "1. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party and the denying Contracting Party:
- (a) does not maintain normal economic relations with the non-Contracting Party; or
- (b) adopts or maintains measures with respect to the non-Contracting Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.
- 2. A Contracting Party may deny the benefits of this Agreement to an investor of another Contracting Party that is an enterprise of the latter Contracting Party and to its investments if the enterprise is owned or controlled by an investor of a non-Contracting Party or of the denying Contracting Party, and the enterprise has no substantial business activities in the territory of the latter Contracting Party.

B. Examination of Major Investment Rules

- **VII. Denial of benefits**

- **CK FTA** has in place a similar denial of benefits clause, which reads:
- 1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the latter Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party and the denying Party:
- (a) does not maintain normal economic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.
- 2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of the latter Party and to its investments if the enterprise is owned or controlled by an investor of a non-Party or of the denying Party, and the enterprise has no substantial business activities in the territory of the latter Party.

C. Determination the Applicable Rule among Various Treaties: under the Vienna Convention

- Amid the labyrinth of the norms in various valid treaties between the same Contracting Parties, there are differing ways of determining and applying the applicable rule:
- -- either by making a concrete act of individual application in accordance with conflict-of-convention clause/ conflict of convention provision(s), if applicable;
- -- or by laying down a subsidiary rule concerning the application of the rules.
- In both cases, applying the rule requires the determination of the applicable rule in the first place.
-
- The **Vienna Convention on the Law of Treaties** (Vienna Convention), which provides for a set of rules for the determination of applicable rules among various treaties, is an illustration of the above statement.

C. Determination the Applicable Rule among Various Treaties: under the Vienna Convention

- The following conflict-of-conventions clause can be found in CJK BIT. Article 25 of CJK BIT, entitled "*Relation to Other Agreements*" states:
- "Nothing in this Agreement shall affect the rights and obligations of a Contracting Party, including those relating to treatment accorded to investors of another Contracting Party, under any bilateral investment agreement between those two Contracting Parties existing on the date of entry into force of this Agreement, so long as such a bilateral agreement is in force."
- It is further noted and confirmed that, when an issue arises between an investor of a Contracting Party and another Contracting Party, nothing in this Agreement shall be construed so as to prevent the investor from relying on the bilateral invest ment agreement between those two Contracting Parties which is considered by the investor to be more favorable than this Agreement.
- In light of this conflict-of-conventions clause, **the foreign investor may invoke a CJK BIT provision to assert his rights. He may also choose to invoke a different provision in the CK BIT to assert his rights.** Article 30 of the Vienna Convention does not affect his right.

C. Determination the Applicable Rule among Various Treaties: under the Vienna Convention

- However, a problem arises where the foreign investor does not opt to invoke either a CK BIT provision or a CJK BIT provision as the legal basis for his claim. In this context, which provision, in the CK BIT or in the CJK BIT, shall prevail? Equally, when it comes to the issue of determining which treaty provision prevails between CK FTA and CK BIT and between CK FTA and CJK BIT?
- The Vienna Convention provides for a set of rules for the interpretation of treaties. Among the principles contained in Article 31 of the Vienna Convention an interpretation that looks at the treaty's object and purpose is particularly popular. In the context of BITs, this often leads to an interpretation that is favourable to investors. According to article 31, treaties have to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the object and purpose of the Treaty, while recourse may be had to supplementary means of interpretation, including the preparatory work and the circumstances of its conclusion, only in order to conform the meaning resulting from the application of the aforementioned methods of interpretation. Reference should also be made to the principle of effectiveness (*effet utile*), which, too plays an important role in interpreting treaties.

C. Determination the Applicable Rule among Various Treaties: under the Vienna Convention

- The ICSID practices lend itself to the following conclusion:
- **Where the provisions in the CK BIT, CJK BIT and CK FTA are different, whichever is in the interest of investment flow and instrumental to the protection of foreign investment, shall prevail.**

D. Conclusion

- The similarities and differences in the CK BIT, CJK BIT and CK FTA offer various possibilities of how to determine the applicable rules. Article 30 of the Vienna Convention provides partial solution: the conflict-of-conventions that can be found in the consecutive agreements in questions shall be referred to determine the applicable rules. Among the aforesaid three agreements, unfortunately, there is a conflict-of-conventions rule in the CJK BIT regarding its relation with CK BIT. At the simplest level, it seems plausible that the foreign investor be allowed to choose the applicable treaty provision among the three sets of investment rules; A further look will find that even this seemingly simple way has narrow limits: (1) firstly, both CJK BIT and CK FTA have contained a denial of benefits clause to exclude the treaty shopping; (2) when the investor invokes neither CK BIT nor CJK BIT to determine his rights and obligations, the issue of determining the applicable treaty rule still lingers.

D. Conclusion

- The Vienna Convention offers further rules for the application of successive treaties relating to the same subject-matter and interpretations of treaty rules.
- The third paragraph of Article 30 of the Vienna Convention provides that the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty when all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under Article 59;
- Article 30.4 (a) also stipulates that when the parties to the later treaty do not include all the parties to the earlier one as between States parties to both treaties, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. It can be inferred from the paragraphs that lex posterior derogat priori when the provisions of an earlier treaty are incompatible with those of the latter treaty. This rule applies to the issue of determination the applicable rules among CK BIT and CJK BIT and the investment chapter of CK FTA.

D. Conclusion

- Faced with the conflicts between various rules, a tribunal mandated with the jurisdiction to settle an investor-state dispute needs to ask itself the following questions in order to find its way out:
- Is treaty-shopping allowed among the three instruments ?
- Lex posterior derogat priori ?
- As Article 25 of CJK BIT serves as the conflict-of-conventions rule to determine the applicable rule between CK BIT and CJK BIT, the foreign investor shall be allowed to choose the applicable law to support his claims; the author suggests that where he does not make such choice, the *lex posterior derogat priori* shall apply.
- When it comes to the determination of the applicable rule among CK BIT, CJK BIT and CK FTA, the denial of benefits clauses rule out the possibility that the foreign investor make a choice of the applicable rule.

D. Conclusion

- Where no choice is allowed concerning the applicable rules, the author again suggests that the *lex posterior derogat priori* shall apply. The Vienna Convention and the *traveaux preparatoirs* make a resonance in this regard. Article 31 of the Vienna Convention concerning treaty interpretation suggests the object and purpose of the treaty shall be taken into consideration as secondary criteria. As the Feasibility Study Report of the CK FTA, the important *traveaux prepatoires*, further exhibits, the CK FTA was in line with the gradual process of investment liberalization vis-à-vis the CK BIT or CJK BIT. Against the backdrop, it is fair to argue that where there is a contradict between the provisions of the investment chapter of CK FTA and CK BIT or between the provisions of the investment chapter of CK FTA and CJK BIT, the object and purpose of promoting gradual investment liberalization shall be taken into account. In other words, the latter treaty—CK FTA –shall be given priority where no applicable rule can be chosen by the foreign investor.

D. Conclusion

- According to Article 32 of the VCLT, the materials reflecting the preparatory work to a treaty only figure as supplementary means of interpretation. They are to be used only to confirm a meaning resulting from the primary means of interpretation contained in Article 31 or to determine the meaning if the primary means leave the meaning ambiguous or obscure or lead to a result that is manifestly absurd or unreasonable. In practice, resort to *travaux preparatoires* seems to be determined less by their position among the canons of interpretation than by their availability even if they are minded to do so.

D. Conclusion

- All these boil down to one question: **there shall be an integrated approach so as to have a coherent cannon of rules.** That is to say, where the provisions in the CK BIT, CJK BIT and CK FTA are different, whichever is in the interest of investment flow and instrumental to the protection of foreign investment, shall prevail. Similarly, while following *Lex posterior derogat priori,* the tribunal shall endeavor to view the IIAs as mutually complementary, which calls for chronological sequence of application of the rule in CK FTA and CJK BIT and CK BIT where a latter agreement fails to provide for the rule for an investment activity in question.

Session 4

1. TRADE IN SERVICES IN CHINA-KOREA FTA: WHERE ARE WE NOW AND WHERE ARE WE HEADED NEXT?

Speaker:

Prof. **SHI Jingxia**
(University of International Business & Economics)

Discussant:

Prof. **LEE Seryon**
(Chonbuk National University)

Trade in Services in China-Korea FTA: Progress & Prospects

中韩FTA中的服务贸易：进展及前景

Jingxia Shi 石静霞

June 23, 2015

Xiamen University, Law School

中韩FTA的商签背景

- 中国是韩国最大的贸易伙伴国和最大的海外投资对象国。韩国是中国第三大贸易伙伴国和第五大海外投资来源地。
- 根据中韩FTA，韩国92%的产品将对中国实现零关税，覆盖自中国进口额的91%。
- 中国91%的产品将对韩国实现零关税，覆盖自韩国进口额的85%。

中韩FTA总览

- 中韩FTA除序言外，共22个章节，包括初始条款和定义、国民待遇和货物市场准入、原产地规则和原产地实施程序、海关程序和贸易便利化、卫生与植物卫生措施、技术性贸易壁垒、贸易救济、服务贸易、金融服务、电信、自然人移动、投资、电子商务、竞争、知识产权、环境与贸易、经济合作、透明度、机构条款、争端解决、例外和最终条款。
- 此外，中韩FTA还包括货物贸易关税减让表、服务贸易具体承诺表等18个附件。

中韩FTA服务贸易规定总览

- 在框架协议部分，中韩双方参照GATS条款，就适用范围、市场准入、国民待遇、具体承诺减让表、其他承诺、国内规制、透明度、支付与转移、利益的拒绝给予、服务贸易委员会等相关义务要求作出安排。—第八章
- 目前成果以正面清单方式列明。双方出价实现了较高的自由化水平，以各自在WTO多哈回合谈判的改进出价为参照，进一步解决了彼此的重要利益关注，主要体现在：
    - 韩国在中国关注的速递和建筑服务领域，首次作出超出其所有目前FTA水平的承诺。
    - 中国在韩国关注的法律、建筑、环境、体育、娱乐服务和证券领域，根据现行法律法规作出进一步开放承诺。
    - 双方就电影、电视合拍及出境游作了相应安排。

中国：解决韩国在法律、建筑和相关工程、环境、娱乐、体育和其他娱乐、证券的利益关注

- 关于法律服务，韩国律师事务所只能以代表处的形式提供法律服务。
- 代表处可从事营利性活动。
- 代表处可从事本国、第三国及国际法律事务，但不得从事中国法律事务。
- 在中国上海、福建、广东、天津自由贸易试验区中，允许在自贸区设立代表处的韩国律师事务所与中国律师事务所以协议方式相互派驻律师担任法律顾问并实行联营。
- 联营期间，双方的法律地位、名称和财务保持独立，各自独立承担民事责任。
- 联营组织的外国律师不得办理中国法律事务。

关于建筑和环境服务

- 韩国建筑企业在中国申请建筑企业资质时更便利。
- 在上海自由贸易试验区内设立的韩国建筑企业可以承揽位于上海市的中外联合建设项目。在这种情况下，将不受此类项目中的外资投资比例限制。
- 两国建筑产业的交流将更加密切。
- 关于环境服务，韩国环保企业可以在中国成立独资企业，从事城镇污水（不含50万人口以上城市排水管网的建设经营）、垃圾处理、公共卫生、废气清理和降低噪音服务。
- 有利于两国产业加强环保技术交流，提升中国的环境保护能力和水平。

关于娱乐、体育及证券服务

- 韩国企业可以通过合资、合作的形式在中国开展演出经纪、演出场所经营等业务，有利于扩大两国娱乐文化交流。
- 关于体育和其他娱乐服务，韩国企业可以在中国设立独资企业，从事除高尔夫和电子竞技外的体育活动宣传、组织及设施经营业务，两国的体育文化交流得以深化。
- 关于证券服务，韩国证券企业可以拓展与中国的合格境内机构投资者合作领域。这有利于其深度参与中国的合格境内机构投资者发起的各类理财产品，也有利于中国境内投资者参与韩国资本市场投资。

韩国：主要解决了中国在速递服务和建筑服务的重要利益关注，作出了超过其目前FTAs的承诺水平。

- 关于速递服务（courier services）：中国的快递企业无须在韩国设立办事处，即可在韩国开展包括空运和海运的各项国际速递业务，并可以开展除韩国邮政部门依法保留业务以外的所有国内速递业务。
- 中国快递企业在韩国开展业务的限制条件进一步减少，业务范围得到空前扩大。这为支持中国快递企业发展壮大，鼓励和推动其向韩国市场“走出去”创造了良好环境和保障。
- 关于建筑服务，中国的建筑企业无须在韩国设立办事处，即可签订建筑合同提供服务。作为总包方获得建筑合同后，也无须将业务分包给韩国企业。
- 这表明，中国的建筑公司在韩国拓展业务的限制条件进一步减少，企业利润可以进一步扩大，企业具有更大动力拓展韩国建筑市场。

自然人移动

- 中韩双方就签证便利化、准予临时入境、透明度、自然人移动委员会等方面设定了相关义务。
- 考虑到韩国劳动市场的特殊性和敏感性，以及两国双向贸易和投资的巨大潜力，该章节与中国以往签署的FTAs的自然人移动章节略有不同，重点就双方具有共同关注的签证便利化和投资促进作出了对等的优惠安排，为便利两国人员流动，密切经济融合，促进双向贸易和投资创造了有利条件。

- 对商务人员临时入境，双方允许在首次合法入境且无不良记录离境后，即可申请一年多次往返签证，每次停留时间为30天。
- 对公司内部流动人员和投资者，韩国公民在中国办理就业证、外国专家证和居留证件时可获得两年有效期，并在办理延期时给予加速审批。
- 中国公民在韩国办理外国人登陆证时享受同等待遇。
- 这是中国首次在FTAs中对此类情况作出承诺。
- 对与投资相关的人员，两国政府主管部门将作出特殊安排，便利人员往来。

金融和电信章节

- 在中国之前商签的FTAs中，除服务贸易章节和自然人移动章节外，未设立过金融服务和电信服务的单独章节。
- 中韩FTA谈判的目标是打造高标准、高质量的FTA，因此参照国际先进做法，设立了金融服务和电信两个专门章节，以处理这两个最重要的服务部门的开放问题。
- 金融和电信关系到国计民生，同时又相对复杂。中国结合现行法律法规，与韩方达成了较高标准的条款内容。
- 中韩FTA为中国未来与其他发达国家商谈高标准FTA奠定了良好基础，也向“形成面向全球的高标准自贸区网络”目标迈出了重要一步，是中国扩大服务业开放的重要举措。

金融服务章节

- 中国首次在对外商签的FTA中单独设立金融服务章节，具体条款内容在中国加入WTO承诺和其他协定承诺水平基础上，做了进一步开放承诺，体现了开放态度。
- 中韩双方就适用范围、国民待遇、市场准入、特定信息处理、审慎例外、透明度、支付和清算系统、审慎措施的承认、具体承诺、金融服务委员会、金融服务投资争端的事前磋商等相关义务和要求作出安排。
- 就加强双方监管机构合作、在符合各自法律法规要求的基础上，加速业务申请审批方面作出了承诺。

- 在透明度方面，依照各自的国内法律法规要求，双方承诺将提高金融服务领域的监管透明度，为两国的金融服务提供者进入彼此市场并开展运营提供了政策确定性。
- 在投资者与国家的投资争端解决方面，专门设置了事前磋商机制，可以通过两国金融主管部门就争议开展磋商，有助于以协商的方式解决分歧。
- 这些安排为密切和深化两国在金融领域的合作打造了良好的政策框架。

电信服务章节

- 中国首次在FTA中单独设立电信章节，为中国未来与其他发达国家商谈高标准的FTAs奠定了基础。
- 中韩双方在电信章节达成18项高承诺水平的条款。
- 双方承诺加强主管部门间沟通，深化在电信领域国际标准化方面的合作，并将推动降低两国移动通信国际漫游资费水平等。
- 该章节有利于推动和深化两国电信产业的交流、合作与发展，并将进一步惠及两国民众。

- 在这两章中，政府作为主体讨论的是制定合作的游戏规则。
- 尽管良好的政策框架和透明公平的竞争环境并不一定会立刻加快加深双方企业在相关领域的合作，但减少政府干预，将主导权交给市场，使双方合作更为顺畅，是中国政府在商谈FTA时的一大突破。
- 这为中国未来与其他发达国家商谈高标准的自贸协定奠定了扎实的基础，也向“形成面向全球的高标准自贸区网络”目标迈出了重要的一步，更是中国扩大服务业开放的重要举措。

服务贸易：一个动态的协定

- 中韩FTA是一个动态协定。谈判分为两个阶段，目前达成的协定是第一阶段的谈判成果。
- 双方商定，在协定生效后两年内，以负面清单模式启动服务贸易的第二阶段谈判，以实现更高自由化水平。（模版）
- 关于第二阶段服务贸易谈判的安排，主要有两方面考虑：
  - 在协定生效后，两国各自服务市场还存在进一步开放的可能。通过第二阶段谈判，将继续给予彼此更高自由化水平的待遇。这将有利于大力发展中国的服务业，稳定和增加就业，调整经济结构，提高发展质量效率，培育新的增长点。
  - 中国采用负面清单模式开展服务贸易谈判，将有利于中国改革并完善服务业的管理模式，为中国服务业和服务贸易发展创造更为宽松良好的政策环境，也是中国建设法治政府和服务型政府的一项重要举措。

服务贸易和投资（第12.18条）

- 本协定第12.5条(最低标准待遇)、第12.9条(征收和补偿)、第12.10条(转移)、第12.11条(代位)、第12.12条(投资者与一缔约方之间的投资争端解决),和附件12-A(习惯国际法)、12-B(征收)和12-C(转移)，经必要调整后，适用于影响一缔约方的服务提供者依据第八章(服务贸易)通过在另一缔约方领土内设立商业存在提供服务的任何措施，但仅限于与涵盖投资有关的情形下。
- 为进一步明确，对于此类涵盖投资，第12.12条仅适用于对于缔约一方和缔约另一方投资者之间就违反本条所列的有关条款项下义务产生的投资争端。

- 本协定第12.5条(最低标准待遇)、第12.9条(征收和补偿)、第12.10条(转移)、第12.11条(代位)、第12.12条(投资者与一缔约方之间的投资争端解决)、第12.13条(特殊程序和信息要求)、第12.15条(拒绝授惠)和附件12-A(习惯国际法)、12-B(征收)和12-C(转移)，经必要调整后，适用于影响一缔约方的服务提供者依据第九章(金融服务)通过在另一缔约方领土内设立商业存在提供服务的任何措施，但仅限于与涵盖投资有关的情形下。

电子商务（electronic commerce)

- 中韩FTA电子商务专章共9个条款，包括总则、与其他章节关系、关税、电子认证和签名、电子商务中个人信息保护、无纸贸易、电子商务合作、定义及争端解决不适用条款。
- 双方主要承诺：
  - 保持目前WTO的做法，不对电子传输征收关税；
  - 电子签名法律不得否认电子签名的法律效力，允许交易双方共同确定电子签名和认证方法。认证机构可向司法或行政部门证明其电子认证符合法律要求，鼓励数字证书在商业中应用，努力实现数字证书和电子签名互认；

  - 采取措施保护电子商务用户的个人信息，并就此交流信息和经验；
  - 努力向公众提供电子贸易管理文件，探索使电子贸易管理文件与纸质文件具有同等法律效力；
  - 就电子商务法律法规、规则标准和最佳实践等交流信息和经验，鼓励研究和培训等能力建设合作，鼓励企业间交流合作；
  - 双方还承诺在地区和多边论坛中加强合作。
  - Data flow? absent.

- 这是中国已正式签定的FTAs中首次涉及电子商务方面的内容。
- 在中韩FTA首次纳入电子商务等"21世纪经贸议题"，设立电子商务专章，是将中韩自贸协定定位于全面高标准自贸协定的具体体现。
- 该章节的签订为便利中国电子商务企业走出去，推动中韩两国电子商务企业的合作及两国电子商务的发展共赢营造了有利的国际规则环境。

- 电子商务合作顺应时代发展
- 中韩之所以能在电子商务领域达成开放的一致，首先得益于中国电子商务的蓬勃发展。起步不晚，发展迅速，也诞生了像阿里巴巴这样具有全球影响力的企业。
- 同时，该领域的合作也切实符合中国中小电商企业的发展需求。
- 但是，诸如数据跨境流动、禁止数据本地化要求等方面的规定辅之阙如。与美韩FTA的电子商务章节的区别。

竞争政策章节

- 在中韩FTA中，双方明确了共同遵循的竞争执法原则，有利于外界进一步了解中国反垄断执法的相关情况。
- 该章规定的多种合作形式对双方合作制止损害双边贸易和投资的垄断行为、促进双边贸易自由化和投资便利化等方面，具有重要意义。

- 在竞争政策章节中，双方主要承诺包括四个方面：
  - 竞争执法应遵循透明、非歧视和程序公正原则；
  - 竞争章节平等适用于包括公用企业在内的所有经营者，不影响双方赋予企业以特殊或排他性权利；
  - 提高竞争执法合作水平，双方应互相通报可能对对方重要利益产生实质性影响的执法活动，与对方就其提出的重要关注进行磋商；
  - 竞争章节不影响双方竞争执法的独立性，双方在竞争章节实施过程中产生的争端应通过协商解决。

环境章节

- 环境议题是国际自贸区和投资规则领域的新议题。
- 中韩FTA专门设立了独立的环境与贸易章节，主要包括环境保护水平、多边环境公约、环境法律法规的执行、环境影响评估、双边合作及资金安排等多项内容。
- 其中，对于FTA实施进行环境影响评估以及同意为环境与贸易章节的实施设立资金机制是中国首次在FTAs中做出规定，将为中国与其他国家开展FTAs的环境议题谈判提供重要参考。

对中韩FTA的评价

- 目前中国签订的FTAs中“含金量最高”，包括首次在FTAs中设立的金融服务和电信章节，对原本开放程度仅高于教育领域的这两个领域进行承诺。
- 首次设立的金融服务和电信章节部分解决了规则制定的问题，说明中韩FTA的高水平。
- 如果说FTAs1.0谈的是货物贸易，2.0谈的是市场准入层面的问题，现在最高级的自贸协定3.0关注的重点则是规则制定。

- 总体上看,中韩FTA是一个互利、开放与保护微妙平衡的高水平协定。
- 两国间贸易投资壁垒的取消和降低，将进一步促进两国经济和产业链的全面融合，从而充分利用地域临近、经济结构互补的优势，促进两国的经济活力进一步释放，共同提升两国在全球市场的竞争力，在互利共赢基础上实现共同发展。

- 双方商定，在协定生效后两年内，启动负面清单模式的第二阶段服务贸易谈判和以准入前国民待遇加负面清单模式的投资议题后续谈判，争取实现更高的自由化水平。
- 就东北亚地区而言，中韩FTA将促进处在直接竞争地位的中日韩自贸协定、海峡两岸服务贸易协议谈判的提速。
- 就亚太区域而言，中韩FTA破冰成功，让人们看到了整合亚太区域层叠纠缠的FTAs谈判的可能性，以此撬动区域全面经济伙伴关系协定(RCEP)和亚太自贸协定(FTAAP)的谈判。

几点观察：关于服务贸易的亮点

- 在结构和章节安排上，对美韩FTA参照较多
- 金融和电信专章。
- 结合中国正在进行的FTZ，考虑了韩方的服务提供者在FTZs服务提供的进一步便利
- 后续谈判的负面清单列表方式
  - 韩国：可能需要较多参照美韩FTA，欧韩FTA、加韩及澳韩等FTAs的实践，以发现韩国的offers
  - 中国：CEPAs, 中美BIT、中欧BIT、中澳BIT, 以发现中国的offers.
- 更多机制需要深入研究，如ratchet clause, standstill clause, 新出现的服务分类及待遇等。

Session 4

2. KOREA-CHINA FTA: ENVIRONMENT AND TRADE

Speaker:

Prof. **PARK Deokyoung**
(Yonsei University)

Discussant:

Dr. **Su Yu**
(Xiamen University)

Korea-China FTA: Environment and Trade

Deok-Young Park | Professor at Yonsei Law School, Yonsei University

Table of Contents

Environmental Protection in KORUS FTA

KORUS FTA

- Mentioned its desire to promote **"sustainable development"** and implement the agreement in a manner consistent with **"environmental protection and conservation"** in its Preamble
- Inserted a separated **Environment Chapter** (Chapter 20)
- Recognized the right of each Party to establish its own **levels of environmental protection** and ensured **effective enforcement of its environmental laws** in Chapter 20
- Respected those **multilateral environmental agreements** to which both Parties are party
- Provided **opportunities for public participation** in Chapter 20 (i.e. request for investigation of alleged violation of its environmental laws)

ROK-US Environmental Affairs Council (EAC) in session for implementation of Chapter 20 of the ROK-US FTA – 26 March, 2013, Washington D.C., USA

Environmental Protection in ROK-EU FTA

Korea-EU FTA

- Reaffirmed their commitment to **"sustainable development"** and **"protection and preservation of the environment and natural resources"**
- Inserted a separate chapter titled **"Trade and Sustainable Development"** (Chapter 13)
- Reaffirmed their commitments to the effective implementation of **multilateral environmental agreements** to which they are party
- Provided articles on settlement of disputes over environmental matters through **government consultations** and **panel of experts**

*Committee on Trade and Sustainable Development
- 1st meeting: Brussels, Belgium, April 2012
- 2nd meeting: Seoul, Korea, September 2013
- 3rd meeting: Brussels, Belgium, December 2014

II. Environmental Protection in China's FTAs before Korea-China FTA

Environmental Provisions in China's FTAs

- Mostly found in preamble, clauses on environmental cooperation and environmental exceptions for trade measures
- Increasing awareness of environmental matters, i.e. energy cooperation, and importance of environmental protection in China; more topic-specific discussions on environmental cooperation taking place in China

FTA	Effective Date	Environmental Provisions				Environment Chapter	Environment Protection Clause
		Preamble	General Exception	SPS	Cooperation		
China-ASEAN FTA	4 Nov 2002	O	O	O			
China-Hong Kong CEPA	1 Jan 2004						
China-Macau CEPA	1 Jan 2004						
China-Chile FTA	1 Oct 2006		O	O	O		
China-Pakistan FTA	1 Jul 2007	O		O			
China-New Zealand FTA	1 Oct 2008	O	O	O	O		
China-Singapore FTA	1 Jan 2009		O	O	O		
China-Peru FTA	1 Mar 2010	O	O	O	O		
China-Taiwan ECFA	12 Sep 2010						
China-Costa Rica FTA	1 Aug 2011		O	O	O		
China-Iceland FTA	1 Jul 2014	O	O	O			O
China-Switzerland FTA	1 Jul 2014	O	O	O		O	

China-Switzerland FTA

- Mentioned **"environmental protection"** and **"sustainable development"** in its Preamble
- Provided **Sanitary and Phytosanitary Measures** in Chapter 7 of the Agreement
- **Environment Chapter** (Chapter 12)

Article	Title	Article	Title
12.1	Context and Objectives	12.5	Bilateral Cooperation
12.2	Multilateral Environmental Agreements and Environmental Principles	12.6	Resources and Financial Arrangements
12.3	Promotion of the Dissemination of Goods and Services Favoring the Environment	12.7	Implementation and Consultation
12.4	Cooperation in International Fora	12.8	Review

Other FTAs

China-Chile | 1 Oct 2006

- Provisions on **SPS** in Chapter 7 of the Agreement
- Provided that **GATT Article XX** is part of this Agreement according to Article 99 General Exception in Chapter 12
- Included **exchanges and cooperation** in terms of labor, social security and the environment in Article 108 of the Agreement

China-Pakistan | 1 Jul 2007

- **"environmental protection"** and **"sustainable development"** in its Preamble
- Provisions on **SPS** in Chapter 6 of the Agreement

China-New Zealand | 1 Oct 2008

- **"environmental protection"** and **"sustainable development"** in its Preamble
- Provisions on **SPS** in Chapter 7 of the Agreement
- Dealt with the environment, health and safety in Articles 96.1 (c) and 96.3
- Included **GATT Article XX (b) and (g)** on life, health and the environment as part of this Agreement according to Article 200.2 on General Exception

China-Singapore | 1 Jan 2009

- Provisions on both **TBT and SPS** in Chapter 7 of the Agreement
- Mentioned their flagship **China-Singapore Tianjin Eco-city project** in Article 87.2, and stipulated their commitment to enhance cooperation in areas including environmental protection and resource and energy conservation
- Included **GATT Article XX** as part of this Agreement according to Article 105 on General Exception in Chapter 13 and also provided **general exception clauses for animal and plant health in trade in services**

Other FTAs

China-Peru | 1 Mar 2010

- **"environmental protection"** and **"sustainable development"** in its Preamble
- Provisions on **SPS** in Chapter 6 of the Agreement
- Provided **health and environmental protection** in Article 99.1 (b) which is part of Chapter 7 on **TBT**
- Provisions on **environmental cooperation** in Articles 161 and 162 of Chapter 12 in this Agreement
- Included **GATT Article XX (b) and GATS Article XIV (b)** as part of this Agreement in Article 193 on General Exception, Chapter 16 of this Agreement

China-Costa Rica | 1 Aug 2011

- Determined to reinforce **cooperation in trade** according to Chapter 11 of this Agreement
- Mentioned **"sustainable development"** in Article 123.2 (b), (c), (d), (e), (l), (m) on cooperation in agriculture
- Included **GATS Article XIV (b)** as part of this Agreement

China-Iceland | 1 Jul 2014

- **"environmental protection"** and **"sustainable development"** in its Preamble
- Included **GATT Article XX and its interpretative notes** as part of this Agreement according to Article 11 General Exceptions
- Provisions on **SPS** provided in 9 paragraphs of Article 19 of this Agreement
- Stipulated their commitment to further enhance communication and cooperation in accordance with **"the Memorandum of Understanding on Environmental Protection Cooperation between the State Environmental Protection Administration of the People's Republic of China and the Ministry for the Environment of Iceland"** provided in Article 96.2 of this Agreement

Key Features of China's FTAs in terms of Environmental Protection

China's level of environmental protection is relatively low, and thus its level of liberalization in environmental services is also low

Rather than promoting environmental protection in mainland China through inserting environmental provisions in FTAs, China tends to include such provisions based on the other Party's level of and request for environmental protection

China is still a developing country, and thus its purpose of concluding FTAs puts more weight on economic and political interests than environmental interests

Nonetheless, level of environmental protection required in China's FTAs is gradually increasing

III. China's Environmental Law

1980s	2008 Beijing Olympics	Recent Trends	International Treaties
Several laws enacted in the 1980s to regulate pollution activities but did not meet the standard of developed countries at international level	2008 Beijing Olympics paved the way for China to deal with environmental matters, consistently "amending" environmental laws such as Environmental Impact Assessment Act	More legislations amended with the aim of *sustainable* economic growth, i.e. Air Pollution Control Act, Water Pollution Control Act, Noise Pollution Control Act, etc.	Became party to MEAs such as CBD, UNFCCC, UNCCD and Vienna Convention for the Protection of Ozone Layer, continuing its efforts both internally and internationally

*Recently, with an increasing number of brand new eco-city projects in according with the new Environmental Protection Act in 2015, investments in the so-called environment industry also increased

IV. Key Environmental Provisions in Korea-China FTA

Preamble, Chapters 5, 6 and 8

PREAMBLE

- **MINDFUL** that economic development, social development and **environmental protection** are **interdependent and mutually reinforcing** components of **sustainable development** and that closer economic partnership can play an important role in promoting sustainable development…

CHAPTER 5: SANITARY AND PHYTOSANITARY MAESURES

Article 5.1: Objectives

The objectives of this Chapter are to:

(a) minimize the negative effects of sanitary and phytosanitary (hereinafter referred to as "SPS") measures on trade between the Parties while **protecting human, animal or plant life or health** in the Parties' territories;

CHAPTER 6: TECHNICAL BARRIERS TO TRADE

Article 6.7: Transparency

1. Each Party shall allow a period of at least 60 days following the notification of its proposed technical regulations and conformity assessment procedures to WTO Central Registry of Notifications to solicit comments from the other Party except where urgent problems of safety, health, **environmental protection,** or national security arise or threaten to arise.

CHAPTER 8: TRADE IN SERVICES

Annex 8-A Schedule of Specific Commitments

ROK-China Comparison in Environmental Services

Category	ROK	China
Refuse Water Disposal Services	Only collection and treatment services of industrial waste water	O
Refuse Disposal Services	Only collection, transport and disposal services of industrial refuse	O
Sanitation Services (road sweeping, snow clearing, etc.)	X	O
Cleaning Services of Exhaust Gases	O	O
Noise Abatement Services	O	O
Nature and Landscape Protection Services	X	Only in the form of joint ventures
Other Environmental Protection Services	Only environment testing and assessment services	Only in the form of joint ventures

*Source: ROK Ministry of Environment "WTO/FTA Negotiation Trends" (16 Dec 2014)

IV. Key Environmental Provisions in Korea-China FTA

Chapter 16: Environment and Trade

Article 16.1
Context and Objectives

- Recall previous efforts of the international community in environmental protection, including:
  - *Stockholm Declaration on the Human Environment of 1972*
  - *Rio Declaration on Environment and Development of 1992*
  - *Agenda 21 of 1992*
  - *Johannesburg Plan of Implementation on Sustainable Development of 2002*
  - *Rio+20 Outcome Document "The Future We Want" of 2012*
- Reaffirm commitments to promoting economic development in such a way as to contribute to the objective of sustainable development
- Warn a potential pursuit of trade protectionist purposes

Article 16.2
Scope

- Apply to the measures including laws and regulations adopted or maintained by the Parties for addressing environmental issues.

Article 16.3
Levels of Protection

- Reaffirm each Party's sovereign right to establish its own levels of environmental protection
- Encourage improving respective levels of environmental protection

Article 16.4
Multilateral Environmental Agreements

- Recognize that MEAs play an important role
- Commit to consulting and cooperating with respect to negotiations in the MEAs to which both Parties are party
- Reaffirm commitments to the effective implementation in their laws and practices of the MEAs to which both Parties are party

*MEAs to which both Parties are party

Basel Convention, Cartagena Protocol, Convention on Biodiversity (CBD), Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), Kyoto Protocol, Minamata Convention on Mercury (Signatories), Montreal Protocol, Rotterdam Convention, Stockholm Convention, UN Convention to Combat Desertification (UNCCD), UN Framework Convention on Climate Change (UNFCCC), Vienna Convention

*MEAs to which only ROK is signatory

Nagoya Protocol on Access and Benefit-sharing (ABS)

Article 16.5
Enforcement of Environmental Measures Including Laws and Regulations

- Ensure effective enforcement of environmental measures including laws and regulations
- Recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in its environmental laws, regulations, policies and practices
- Do not empower a Party's authorities to undertake environmental law enforcement activities in the territory of the other Party

Article 16.6
Environmental Impact

- Commit to review the impact of the implementation of the Agreement on environment
- Share information on techniques and methods for reviewing the impact

Article 16.7
Bilateral Cooperation

- Recognize the importance of cooperation in the field of environment; commit to strengthen cooperative activities
- Provide the indicative list of areas of cooperation:
  - promotion of the dissemination of environmental goods including environmentally-friendly products and environmental services;
  - cooperation on development of environmental technology and promotion of environmental industry;
  - exchange of information on policies, activities and measures for environmental protection;
  - establishment of environmental think-tanks cooperation mechanisms including exchange of environmental experts;
  - capacity building which include workshops, seminars, fairs and exhibition in the field of the environment;
  - build-up of environmental industry base in respective countries as a pilot area; and
  - other forms of environmental cooperation as the Parties may deem appropriate.
- Reinforce cooperation in the field of environment including the *Memorandum of Understanding between the Ministry of Environment of the Republic of Korea and the Ministry of Environmental Protection of the People's Republic of China on Environmental Cooperation* signed on 3 July 2014

Article 16.8
Institutional and Financial Arrangement

- Shall designate an office within each Party's administration to serve as a contact point for the purpose of implementing this Chapter
- May request consultations through contact points
- Establish a Committee on Environment and Trade
- Shall meet when deemed necessary to oversee the implementation of this Chapter
- Recognize that adequate and sustainable financial resources are necessary for the implementation of this Chapter

Article 16.9
Non-Application of Dispute Settlement

- Neither Party shall have recourse to Chapter 20 (Dispute Settlement) for any matter arising under this Chapter

IV. Key Environmental Provisions in Korea-China FTA

Chapter 17: Economic Cooperation
Section D: Government Procurement

CHAPTER 17: ECONOMIC COOPERATION

Section D: Government Procurement

Article17.17: Further Negotiation

- The Parties agree to **commence negotiations on government procurement as soon as possible** following completion of negotiations on the accession of China to the *WTO Agreement on Government Procurement* with a view to concluding, on a reciprocal basis, an agreement on government procurement between the Parties.

V. Implications

- **Established a common understanding on environmental protection and sustainable development** (as reaffirmed in its Preamble)
- **The first FTA specifying environmental obligations for China** (China-Switzerland FTA Environment Chapter only recommends such)
- **Included even laws and regulations of each Party under the scope of the ROK-China FTA Environment Chapter**
- **Expected to see ROK companies providing environmental services in China**
- **Due to the absence of a Government Procurement Chapter, bilateral cooperation in accordance with Chapter 17 Section D Article 17.17 is essential**

VI. Way Ahead

- Seek measures to deal with ROK-China IPR/TBT-related disputes
- Oversee implementation of environmental obligations under the Agreement
- Establish a Committee on Environment and Trade in accordance with the Agreement (MOTIE, MoE)
- Host a ROK-China FTA Environment Forum (consultations with experts, etc.)
- Conduct a risk assessment on imports after the Agreement comes into effect
- Necessary to implement strict origin certification system under the Agreement
- Identify potential conflicts – Non-trade barriers (NTBs)

*** ROK-China FTA should not remain as it is designed by both governments**

SSK CENTER FOR CLIMATE CHANGE AND INTERNATIONAL LAW
INSTITUTE FOR LEGAL STUDIES, YONSEI UNIVERSITY

The Best NRFK Research Project Award (Nov 2013)

National Research Foundation of Korea
SSK (Social Science Korea) Program

Phase I: Sep 2010 – Aug 2013

Research on international trade law issues of each nation's domestic legislation and policy on climate change

Phase II: Sep 2013 – Aug 2016

Response strategy in the era of climate change crisis:
International dispute settlement concerning environment, trade and investment

Deok-Young PARK
(Yonsei University, International Economic Law)

Hana Kim(Yonsei): Environmental and Energy Policy

Sunja Lee(Yonsei): Korea's Environmental Law

Climate Change and Energy Law & Policy Research Team	Trade & Investment Disputes over Climate Change and Energy Law & Policy Research Team	International Environmental Dispute Settlement Strategy Research Team
• Young-Duk KIM(Busan): Energy Economics • Joong-Kyo LEE(Yonsei): Tax (Carbon Tax) • Siwon PARK(Kangwon): Envt Governance • Taewha LEE (Seoul City): Urban Admin and Public Policy	• Deok-Young PARK(Yonsei): Int'l Trade Law • Jaemin LEE(SNU): Int'l Investment Law • Sherzod Shadikhodjaev(KDI): Int'l Trade Disputes	• Jaegon LEE(CNU): Int'l Envt Disputes • Byoung-Keun KANG(Korea): Int'l Dispute Settlement • Sung-Won KIM(WKU): Human Rights and Environment

SSK Center for Climate Change and International Law: a research center established within the Yonsei Institute for Legal Studies in September 2013 with its research proposal titled "Research on Harmonization of a Climate Change and Energy Legal Framework and International Trade and Investment Regimes as well as International Environmental Dispute Settlement" designated by the National Research Foundation of Korea as its mid-phase Social Science Korea (SSK) research project.

Phase I (Sep 2010 – Aug 2013)

Articles: 21 / Books: 5

Phase II (Sep 2013 – Present)

Articles: 10 / Books: 2

Books to be published in 2015

In Korean
International Agreements on Climate Change: A Commentary
China's Environmental Diplomacy
Japan's Environmental Diplomacy
Case Studies on International Environmental Disputes
Case Studies on Trade and Environment Disputes
Carbon-related Border Adjustment and WTO Law
Climate Change and Law
International Investment Law and Environment
Case Studies on Energy Investment Disputes

In English
Climate Change and International Economic Law (Springer)

East Asian Responses to Climate Change and Energy Issues / Roundtable for East Asian Responses to the New Climate Change Regime

Date: May 29-30

Venue: Yonsei Law School International Seminar Room

- Distinguished scholars from Korea, China, Japan and Taiwan discussed issues on climate change and its new regime

THANK YOU

Deok-Young Park (lawpd@yonsei.ac.kr)

한·중 FTA: 환경과 무역

박덕영 | 연세대학교 법학전문대학원 교수

목차

I. 한·미 FTA 및 한·EU FTA상 환경보호

한·미 FTA의 경우

- 서문에서 **"지속가능한 발전"** 증진 및 **"환경보호 및 보전"**에 합치하는 방식의 협정 이행 희망
- 별도의 **환경챕터** 포함 (제20장)
- 환경챕터에서 각 당사국의 **환경보호 수준을 결정할 권리**를 인정하고 **자국 환경법의 효과적인 이행**을 보장
- 양 당사국이 동시에 비준한 **다자간 환경협정** 준수
- 환경챕터에서 **대중의 참여기회** 명시 (자국 환경법 위반여부 조사 요청 등)

한미 FTA의 환경챕터 이행에 관한 논의가 진행 중인 한미 환경협의회(EAC) – 2013.03.26 미국 워싱턴DC

I. 한·미 FTA 및 한·EU FTA상 환경보호

한·EU FTA의 경우

- 서문에서 **"지속가능한 발전"**에 대한 신념 재확인 및 **"환경과 천연자원의 보호 및 보존"** 언급
- **"무역과 지속가능한 발전"**이라는 제목의 별도 챕터 포함 (제13장)
- 각 당사국이 당사자인 **다자간환경협정**의 효과적인 이행 약속 재확인
- **정부간 협의** 및 **전문가 패널**을 통한 환경관련 분쟁해결 규정

***무역과 지속가능발전 위원회 개최**

- 1차: 2012. 4. 브뤼셀
- 2차: 2013. 9. 서울

II. 한·중 FTA 이전 중국의 FTA상 환경보호

중국의 FTA 환경관련 규정

- 대체적으로 전문, 환경협력 관련 조항, 무역조치에 대한 환경적 예외조항을 두는 수준으로 이루어짐
- 중국에서도 에너지협력의 강화 등 환경문제 관련 문제들과 환경보호의 중요성에 대한 인식이 높아지고 있고, 환경협력에 대한 구체적인 논의도 확대되고 있음

FTA	발효	환경관련 규정				환경 챕터	환경 보호 조항
		두문	일반예외	SPS조항	협력		
중국-ASEAN FTA	2002.11.04	O	O	O			
중국-홍콩 CEPA	2004.01.01						
중국-마카오 CEPA	2004.01.01						
중국-칠레 FTA	2006.10.01		O	O	O		
중국-파키스탄 FTA	2007.07.01	O		O			
중국-뉴질랜드 FTA	2008.10.01	O	O	O	O		
중국-싱가포르 FTA	2009.01.01		O	O	O		
중국-페루 FTA	2010.03.01	O	O	O	O		
중국-대만 ECFA	2010.09.12						
중국-코스타리카 FTA	2011.08.01		O	O	O		
중국-아이슬란드	2014.07.01	O	O	O			O
중국-스위스	2014.07.01	O	O	O		O	

중국-스위스 FTA

- 서문에서 환경보호와 지속 가능한 발전을 언급
- 협정문 제7장에서 위생과 식물위생조치를 규정

조항	제목	조항	제목
제12.1조	배경과 목표(Context and Objectives)	제12.5조	양자간 협력(Bilateral Cooperation)
제12.2조	다자간 환경협정과 환경원칙(Multilateral Environmental Agreements and Environmental Principles)	제12.6조	자원과 자금의 배정(Resources and Financial Arrangements)
제12.3조	환경에 유리한 상품과 서비스무역을 촉진(Promotion of the Dissemination of Goods and Services Favoring the Environment)	제12.7조	실행과 협상(Implementation and Consultation)
제12.4조	국제포럼협력(Cooperation in International Fora)	제12.8조	심의(Review)

그 외 중국이 체결한 FTA (1/2)

중-칠레 <2006.10.01>

- FTA 제7장에서 위생과 생물위생관련 조항
- 제12장 예외 제99조 일반예외에서 GATT 20조를 본 협정의 일부분이라고 규정
- 협정문 제108조에서 노동, 사회보장과 환경협력이라는 이름으로 환경방면에서의 교류와 협력을 규정

중-파키스탄 <2007.07.01>

- 서문에서 환경보호와 지속 가능한 발전을 언급
- FTA 제6장에서 위생과 식물위생조치를 규정

중-뉴질랜드 <2008.10.01>

- 서문에서 환경보호와 지속 가능한 발전을 언급
- 본문 제7장에서 위생과 식물위생조치를 규정
- 제96조 규정협력 제1항 c호와 제3항에서 환경, 건강, 안전 관련 내용을 언급
- 협정문 제200조 일반예외 제2항에 생명과 안전 및 환경에 관련된 GATT 제20조 b항과 g항은 협정문에 포함

중-싱가포르 <2009.01.01>

- FTA 제7장에서 기술장벽과 위생과 식물위생조치를 같이 규정
- 제87조 2항에서는 생태도시 건설 프로젝트를 언급하면서 지속 가능한 발전의 모델로 환경보호와 자원과 에너지 절약 등 영역에서의 협력을 강화한다고 규정
- 제13장 예외 제105조 일반예외에서 GATT 20를 본 협정에의 일부분이라고 규정하고 별도로 서비스무역에서의 동식물 건간에 관련한 일반적인 예외를 규정

그 외 중국이 체결한 FTA (2/2)

중-페루
<2010.03.01>

- 서문에서 환경보호와 지속 가능한 발전을 언급
- 협정문 제6장에서 위생과 생물위생조치를 규정
- 협정문 제7장 기술무역장벽의 제99조 1항 b호에서 건강과 환경보호를 언급
- 협정문 제12장 협력 제161조, 제162조는 환경에 관한 협력은 규정
- 협정문 제16장 예외 제193조 일반예외에서 생명과 안전에 관련된 GATT 제20조 b항과 GATS 제14조 b항은 이 협정의 일부분으로 원용

중-코스타리카
<2011.08.01>

- 협정문 제11장 무역관계에 관한 협력, 강화와 확대
- 제123조 농업협력 제2항 b호, c호, d호, e호, l호, m호에서 환경과 지속가능한 발전을 언급
- GATS 제14조 b항은 이 협정의 일부분으로 원용

중-아이슬란드
<2014.07.01>

- 서문에서 환경보호와 지속 가능한 발전을 언급..
- 협정문 제11조 일반예외에서는 이 협정은 GATT 제20조 및 그에 대한 설명을 이 협정의 일부분으로 원용된다 라고 규정
- 협정문 제19조에서는 9개 항을 두어 위생과 식물위생조치를 규정
- 협정문 제96조는 노동과 환경보호를 제목으로 제2항에서 환경문제를 2005년 5월에 체결한 '중화인민공화국 국가환경보호총국과 아이슬란드공화국 환경부 환경합작 양해'에 따라 실시

중국이 체결한 FTA 환경관련 특징

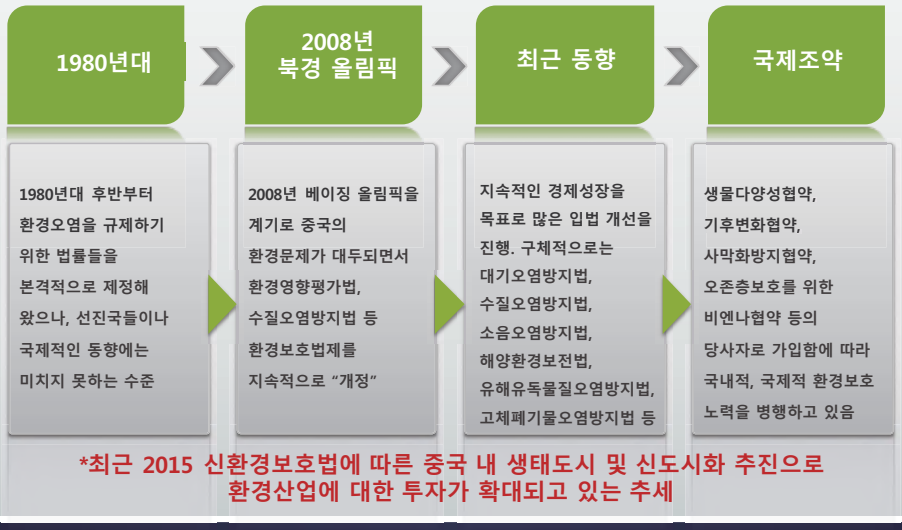
중국의 환경보호 수준이 낮은 편이고, 따라서 환경서비스 개방수준도 낮음

자유무역에 환경관련 내용을 추가함에 있어 중국 본토의 환경보호 유인보다는, 무역 상대방의 수준과 요구에 따라 환경규정을 두는 것으로 보임

중국은 발전중인 개발도상국이므로, FTA를 체결하는 목적은 환경을 우선 순으로 하기보다 경제와 정치적인 목적에 치중함

FTA상 규정되고 있는 환경보호 수준이 점차 높아지고 있음

III. 중국의 환경법제



*최근 2015 신환경보호법에 따른 중국 내 생태도시 및 신도시화 추진으로 환경산업에 대한 투자가 확대되고 있는 추세

IV. 한·중 FTA 환경관련 주요내용 (1/2)

서문, 제5장, 제6장 및 제8장

서문

Preamble

- 경제 발전, 사회 발전 및 **환경 보호**가 **지속가능한 발전**의 **상호 의존적이고 상호 보완적**인 구성요소이고, 밀접한 경제 동반자 관계가 지속가능한 발전을 증진하는데 있어 중요한 역할을 할 수 있다는 점을 염두에 두며...
- MINDFUL that economic development, social development and **environmental protection** are **interdependent and mutually reinforcing** components of **sustainable development** and that closer economic partnership can play an important role in promoting sustainable development...

제5장: 위생 및 식물위생조치

CHAPTER 5: SANITARY AND PHYTOSANITARY MEASURES

제1조: 목적

이 장의 목적은 다음과 같다.

가. 양 당사국의 영역 내의 **인간, 동물 또는 식물의 생명이나 건강을 보호**하면서, 위생 및 식물위생 조치가 양 당사국 간 무역에 미치는 부정적인 영향을 최소화하는 것

제6장: 기술에 관한 무역장벽
CHAPTER 6: TECHNICAL BARRIERS TO TRADE

제6.7조: 투명성

이 장의 목적은 다음과 같다.

1. 안전, 건강, **환경보호** 또는 국가안보상 긴급한 문제가 발생하거나 발생할 우려가 있는 경우를 제외하고, 각 당사국은 다른 쪽 당사국이 의견을 제시할 수 있도록 자국이 제안한 기술규정 및 적합성 평가절차의 세계무역기구 중앙통지문등록처 통지 후 최소 60일의 기간을 부여한다.

제8장: 서비스 무역
CHAPTER 8: TRADE IN SERVICES

부속서 8-가 구체적 약속

환경서비스에 대한 한·중 양허표 비교

분류	대한민국	중국
하수처리서비스	산업폐수만 부분개방	전체 개방
폐기물처리서비스	산언폐기물만 부분개방	전체 개방
위생서비스 (도로청소, 제설 등)	미개방	개방
배기가스(대기) 정화서비스	개방	개방
소음저감서비스	개방	개방
자연 및 경관 보전서비스	미개방	합자조건으로 개방
기타 환경서비스	환경영향평가만 개방	합자조건으로 기타 환경서비스 전체 개방

*출처: 환경부 "WTO/FTA 협상 동향" (2014.12.16)

IV. 한·중 FTA 환경관련 주요내용 (2/2)

제16장: 환경과 무역

제16.1조: 배경 및 목적
Article 16.1: Context and Objectives

- 「1972년 인간환경에 관한 스톡홀름 선언」, 「1992년 환경과 개발에 관한 리우 선언」, 「1992년 의제 21」, 「2002년 지속가능발전에 관한 요하네스버그 이행계획」, 「2012년 리우+20의 결과문서 "우리가 원하는 미래"」등 환경관련 국제사회의 노력을 상기시킴
- 지속가능한 발전(Sustainable Development)의 목적에 기여하는 방식의 경제발전 재확인
- 보호무역주의에 대한 경고

제16.2조: 적용범위
Article 16.2: Scope

- 달리 규정된 경우를 제외하고 환경문제 해결을 위해 양 당사국에 의해 채택되거나 유지되는 모든 법과 규정 포함

제16.3조: 보호 수준
Article 16.3: Levels of Protection

- 환경보호 수준을 결정하는 주권적 권리 재확인
- 각국의 환경보호 수준 개선 노력

제16.4조: 다자간환경협정
Article 16.4: Multilateral Environmental Agreements

- 다자간환경협정(MEA) 역할의 중요성 인정
- 양 당사국 모두가 당사국이 될 다자간환경협정 협상에서의 협력 약속
- 양 당사국 모두가 당사국인 다자간환경협정의 효과적인 이행 약속

*대한민국과 중국 모두 가입한 다자간환경협정

바젤 협약, 카르타헤나 의정서, 생물다양성 협약(CBD), 멸종위기에 처한 야생동식물의 국제거래에 관한 협약(CITES), 교토 의정서, 수은에 관한 미나마타 협약(서명), 몬트레올 의정서, 로테르담 협약, 스톡홀름 협약, UN 사막화 방지 협약(UNCCD), 기후변화에 관한 UN 기본 협약(UNFCCC), 비엔나 협약

*대한민국만 가입한 다자간환경협정

생물유전자원 접근 및 이익공유에 관한 나고야 의정서(ABS)

제16.5조: 법과 규정을 포함한 환경조치의 집행
Article 16.5: Enforcement of Environmental Measures Including Laws and Regulations

- 자국의 법과 규정을 포함한 환경조치의 효과적인 집행 보장
- 자국의 환경법, 규정, 정책, 관행 등을 통해 부여된 환경보호 수준을 약화시키거나 감소시키면서 무역 또는 투자를 장려하는 방식의 부적절함 인정
- 한쪽 당사국의 당국은 다른쪽 당사국의 영역에서의 환경조치 불가

제16.6조: 환경영향
Article 16.6: Environmental Impact

- 협정 이행에 따른 환경영향 검토
- 환경영향 검토 기법 및 방법에 관한 정보 공유

제16.7조: 양자협력
Article 16.7: Bilateral Cooperation

- 환경분야의 협력 중요성 인정, 협력활동 강화 약속
- 협력분야에 관한 예시적 목록 열거
  - 환경친화제품을 포함한 환경상품과 환경서비스의 보급 촉진
  - 환경기술 개발에 관한 협력과 환경산업의 증진
  - 환경보호를 위한 정책, 활동과 조치에 관한 정보교환
  - 환경전문가 교류를 포함한 환경 두뇌집단 협력 메커니즘 구축
  - 환경분야의 워크샵, 세미나, 박람회 및 전시회를 포함한 역량 구축
  - 각국에서 시범지대로서 환경산업단지 조성
  - 양 당사국이 적절하다고 판단할 수 있는 그 밖의 형태의 환경 협력
- 2014년 7월 3일 서명된 「대한민국 환경부와 중화인민공화국 환경보호부 간의 환경협력에 관한 양해각서」 등 대기오염 관련 협력 강화

제16.8조: 제도적 및 재정적 약정
Article 16.8: Institutional and Financial Arrangement

- 환경챕터 이행을 위한 접촉선 역할을 하는 사무소 지정
- 접촉선을 통한 협의 요청가능
- 환경과 무역에 관한 위원회 설치
- 환경챕터 이행 감독을 위해 필요한 경우 회합
- 환경챕터 이행을 위해 충분하고 지속적인 재정적 자원 필요성 확인

제16.9조: 분쟁해결의 비적용
Article 16.9: Non-Application of Dispute Settlement

- 환경챕터에서 발생하는 사항은 제20장(분쟁해결) 절차 이용 불가능

V. 시사점

- 환경보호와 지속가능한 발전에 대한 공감대 형성 (서문 등에서 확인)
- 중국 입장에서는 환경과 관련한 구체적인 의무를 규정한 최초의 FTA (중-스위스 FTA 환경챕터는 권고 수준)
- 정부의 환경조치를 비롯하여 관련 법과 규정까지 환경챕터 적용범위에 포함
- 환경서비스 관련 한국 기업들의 중국 진출 기대

VI. 향후대책

- 향후 중국과의 지식재산권 및 TBT 분쟁 대응방안 강구
- 중국의 협정상 환경관련 의무 이행 감독방안 확인
- 협정에 따라 환경과 무역에 관한 위원회 설치 (산자부, 환경부)
- 한·중 FTA 환경 포럼 개최 (전문가 자문 등)
- 중국 수입제품에 대한 신속하고 정확한 위해성 평가 실시
- 중국 수입제품에 대한 엄격한 원산지 증명제도 적용 필요
- 국내기업의 애로사항 파악 - 중국의 비관세장벽(NTB) 등

*한·중 FTA가 정부만의 정책으로 끝나지 않아야 함

VII. SSK 기후변화와 국제법센터

한국연구재단
SSK (Social Science Korea) 사업

한국연구재단 최우수 연구과제상 수상(2013.11.13)

소형단계: 2010.9-2013.8
기후변화에 대한 각국의 입법 및 정책의 국제통상법적 쟁점에 대한 연구

중형단계: 2013.9-2016.8
기후변화위기 시대의 대응전략: 환경·통상·투자관련 국제분쟁해결

박덕영
(연세대학교, 국제경제법)

김하나(연세대): 환경·에너지정책

이순자(연세대): 한국 환경법제

기후변화·에너지 법제 및 정책연구팀	기후변화·에너지법제·정책 관련 통상·투자분쟁 연구팀	국제환경분쟁해결 전략 연구팀
• 김영덕(부산대): 에너지경제학 • 이중교(연세대): 세제(탄소세) • 박시원(강원대): 환경거버넌스 • 이태희(서울시립대): 도시행정및공공정책	• 박덕영(연세대): 국제통상법 • 이재민(서울대): 국제투자법 • Sherzod Shadikhodjaev(KDI): 국제통상분쟁	• 이재곤(충남대): 국제환경분쟁 • 강병근(고려대): 국제분쟁해결 • 김성원(원광대): 인권과 환경

SSK 기후변화와 국제법 센터: "기후변화·에너지법제와 국제통상·투자규범의 조화방안과 국제환경분쟁해결에 대한 연구"가 한국연구재단의 중형단계 한국사회기반연구사업(Social Science Korea: SSK)에 선정되어 2013년 9월 연세대학교 법학연구원내에 설립된 연구사업단.

소형단계 연구실적 (2010.9 – 2013.8)

논문: 21 / 저역서: 5

중형단계 연구실적 (2013.9 – 현재)

논문: 10 / 저역서: 2

출간예정도서 (2015)

기후변화 국제협약 해설
중국의 환경외교 / 일본의 환경외교
국제환경분쟁 사례연구 / 무역과 환경 분쟁 사례연구
탄소국경조치와 WTO / 기후변화와 법이야기
국제투자법과 환경 / 에너지투자분쟁 사례연구
Climate Change and International Economic Law

동아시아의 기후변화대응과 에너지문제에 대한 국제세미나

일시: 5월 29-30일
장소: 연세대학교 법학전문대학원 광복관 별관 국제세미나실
- 한국, 중국, 일본, 대만의 전문가 발표 및 신기후체제에 대한 토론

감사합니다

박덕영 (lawpd@yonsei.ac.kr)

Session 4

3. THE COMPETITION CHAPTER OF THE KOREA-CHINA FTA IN THE CONTEXT OF THE WTO'S COMPETITION DEVELOPMENTS: AN ANALYSIS

Speaker:

MS. **LEE Jeehyung**
(Ewha Woman's University)

Discussant:

Dr. **Zhang Huang**
(Xiamen University)

The Competition Chapter of the Korea-China FTA

in the Context of the WTO's Competition Developments

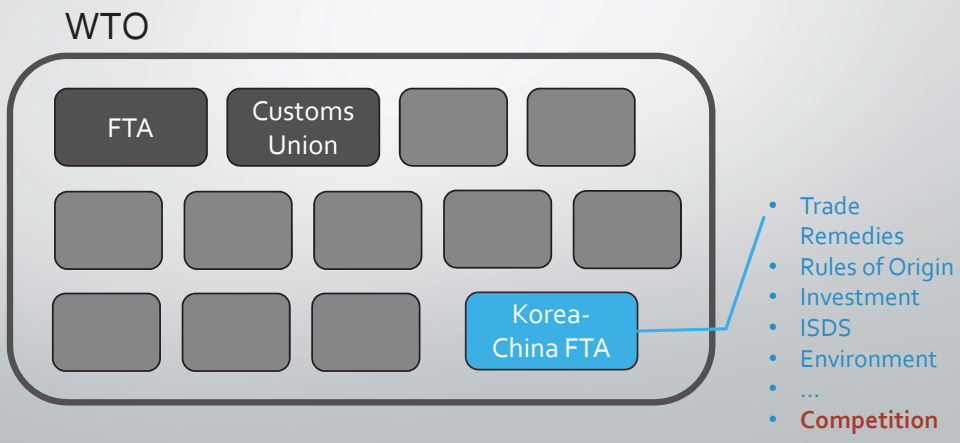
Jee Hyung Lee

Ph.D. Candidate

Ewha Womans University

Contents

1. The Korea-China FTA



2-1. Competition Policy Pre-GATT/WTO

- Article 46 of the Havana Charter
  - Implementation: Each Member shall take appropriate measures . . . to prevent . . .
  - Cooperation: Each Member shall . . . shall co-operate with the Organization . . . to prevent . . .
  - Common authority: complaints regarding any of the practices . . . shall be subject to investigation . . .

2-2. Competition Policy in GATT/WTO: The Trans-Atlantic Difference

The EU Model

- Implementation
- Cooperation
- Common authority
- Harmonization

The U.S. Model

- Implementation
- Cooperation

※ Non-binding documents outside the WTO

- UNCTAD Set
- OECD recommendations

2-2. Competition Policy in the GATT/WTO: Timeline of Negotiations

1996	2000	2001	2003	2004
Singapore Ministerial Conference	Seattle Ministerial Conference	Doha Ministerial Conference	Cancun Ministerial Conference	Post-Cancun General Council
Mandate to launch Working Group	Failure to start new Round	Postponement of competition issue		Removal of competition from Doha Round

2-3. Competition Policy "Post"-WTO: Competition Policy in RTAs

- Types of competition provisions in RTAs
  - Cooperation: Binding, non-binding
  - Implementation, harmonization
  - Harmonization, common authority

3. Korea-China Competition Chapter

Article	Content	I	IS	C	H	CA
14.1	Objectives	•				
14.2	Competition Laws & Authorities	•				
14.3-4	Principles in Law Enforcement		•			
14.5	Application of Competition Laws		•			
14.6-10	Cooperation in Law Enforcement			•		
14.11	Independence of Law Enforcement		•	•		
14.12	Dispute Settlement			•		

I = Implementation
IS = Implementation standards
C = Cooperation
H = Harmonization
CA = Common Authority

4. Conclusion

- Korea-China FTA competition chapter is an implementation-cooperation type set of RTA competition provisions with light obligations
- The competition chapter envisages cooperation and not harmonization or a common authority
- The cooperation mechanisms could be a valuable forum for the resolution of outstanding competition issues, though it shows no move toward deeper integration beyond trade liberalization

非常感谢!

The Competition Chapter of the Korea-China FTA in the Context of the WTO's Competition Developments: An Analysis

Jee Hyung Lee

1. Foreword

Negotiations for the Free Trade Agreement Between the Government of the Republic of Korea and the Government of the People's Republic of China (hereinafter called the "Korea-China FTA") concluded in November of 2014 and was signed on June 1, 2015.[1]

The ramifications of the Korea-China FTA are many and far-reaching, but from the perspective of trade and competition policy one characteristic that catches the eye is that the text of the Agreement has a chapter devoted to competition issues. In this the Korea-China FTA follows the precedent of many modern FTAs—but how closely? Does the competition chapter of the Korea-China FTA follow the trend of competition provisions in other FTAs, or are there aspects that distinguish the Korea-China FTA competition chapter from other FTAs? Furthermore, does the competition chapter address outstanding competition policy issues between the two countries? This article aims to answer those questions.

The article therefore analyzes the competition chapter of the Korea-China FTA, specifically in the context of the competition policy development of the World Trade Organization (WTO) and its antecedents, the General Agreement on Tariffs and Trade (GATT) and the abortive International Trade Organization (ITO). It then moves on to the proliferation of Regional Trade Agreements (RTAs) and makes a brief survey about the development of competition policy in the proliferation of RTAs. The paper then goes on to examine the Korea-China FTA in the context of these historical developments, placing the competition chapter of the Korea-China FTA in the history of earlier developments and what implications the chapter has for the future of competition policy in the WTO system.

Accordingly, the paper proceeds in the following order. Section Two gives a summary of the treatment of competition policy under the WTO system—both in the pre-WTO negotiations and bodies, and the post-WTO, or at least post-Doha Round, proliferation of regional trade agreements. Section Three gives a detailed analysis of the competition chapter of the Korea-

[1] Korea and China formally sign FTA, http://www.fta.go.kr/main/info/news/paper/doc/

China FTA as the basis for applying the foregoing discussion. Section Four discusses the competition chapter of the Korea-China FTA in the context of competition in the WTO system, synthesizing the discussion of Section Two with the analysis in Section Three, and also briefly addresses outstanding competition policy issues between China and Korea and whether the new competition chapter would address them. Section Five concludes, summarizing the article's findings and discussing the implications of this and other competition chapters in the various RTAs for the future of competition policy in the global trade system.

2. Competition Policy in the WTO

It has been argued that "competition and trade are sibling policies" in their pursuit of similar objects: The reduction of obstacles to free trade, and the solicitation of customers based on competitive merit alone as far as possible.[2] This linkage between trade and competition policy is logically obvious and has been seized on by policymakers from the start. Trade liberalization, at least as pursued by the GATT/WTO system, places restrictions, including and up to prohibition, on the measures by states to exclude foreign competitors from domestic markets. It is generally international in scope, pursued in bilateral, regional, or multilateral fora. Even when countries unilaterally reduce trade restrictions, their actions affect international trade and have international effect. Competition policy places restrictions on restrictive business practices that harm competition within a given economy. The scope of competition policy is generally domestic, and while attempts have been made to change this state of affairs the results are mixed, as we will see. A summary of these contrasts may be diagrammed as below:

	Trade Liberalization	Competition Policy
Subject of Regulation	Public trade-restricting measures	Private restrictive business policies
Scope	International	Domestic

Table 1: Conrast between trade liberalization and competition policy

Of course, the contrast is not quite so neat and the descriptors here should all come with

[2] Andrew Scott, Cain and Abel? Trade and Competition Laws in the Global Economy, Modern Law Review 68(1) 135-155, 135 (2005)

an asterisk. For instance, restrictive business practices do not always originate from the private sectors and it has been studied that regulation is a major cause of monopolies. The contrast is drawn in broad generalities for the sake of simplicity, but the lines are not clearly drawn in all cases.

Despite the differences in their coverage and focus, trade liberalization and competition policy both deal with different barriers to competition, with trade liberalization covering barriers against external competition and competition policy traditionally dealing with barriers against internal competition. It is a historical rather than logically required development that they grew into separate disciplines, one largely relegated to the international sphere and the other to the domestic.

Issue linkage between trade and competition: Increasing internationalization and interdependence of economies mean that restrictive business practices now have international reach and directly affect international trade;[3] domestic market structure has a direct and predictable impact on market access,[4] However, lowering trade costs when they are initially low may be anticompetitive, showing that trade policy is not a replacement for competition policy.[5]

(1) Competition Policy Prior to the WTO

For the reasons above discussed, competition policy was meant to be a part of the post-World War II trade system under Bretton Woods and there were movements in the direction of incorporating competition policy into trade. The Havana Charter that was intended to establish the International Trade Organization (ITO) had a section on restrictive business practices, which required members to take appropriate measures and to cooperate with the ITO to prevent business practices that affect international trade and restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful

[3] Brendan Sweeney, International Competition Law and Policy: A Work in Progress, Melbourne Journal of International Law 10, 58-69, 2009

[4] E.g. Joseph Francois and Ian Wooton, *Market Structure and Market Access,* The World Economy (2010) 873-893

[5] Damoun Ashournia et al., Trade Liberalization and the Degree of Competition in International Duopoly, Review of International Economics 21(5), 1048-1059, 2013

effects on the expansion of production or trade and interfere with the achievement of any of the other objectives in Article 1 of the Chapter.[6]

The obligations that would have arisen under the Havana Charter, then, included implementing competition policy and enforcement, and cooperating with the ITO. The prospective members of the ITO including the United States were reluctant to give competition law authority to the ITO, partly in fear of watering down domestic standards, and competition policy was not a direct part of GATT 1947 which grew out of the ITO negotiations.[7]

(2) Competition Policy in the GATT/WTO Era

Though competition policy did not become part of GATT, efforts continued toward cross-border competition policy outside and within the WTO. Efforts outside the WTO included non-binding OECD recommendations in the years 1979, 1998, 2005, 2009, 2011, 2012, and 2014 to voluntarily cooperate in competition enforcement,[8] and the United Nations Set of Principles and Rules on Competition (adopted in 1980, latest version in 2000) called for cooperation at the international level[9] and implementation and enforcement at the domestic level.[10] These initiatives were all voluntary, however, unlike the GATT and later WTO rules which provide for binding legal commitments.

---

[6] Article 46(1) of the Havana Charter for an International Trade Organization. The goals enumerated in Article 1 include assuring real income and effective demand, increase in production, fostering and assistance of industrial and general economic development etc.

[7] Philip Marsden, *A Competition Policy for the WTO,* Cameron May (2003) p. 47

[8] Recommendations and Best Practices on Competition Law and Policy, http://www.oecd.org/daf/competition/recommendations.htm

[9] "Appropriate action should be taken in a mutually reinforcing manner at national, regional and international levels to eliminate, or effectively deal with, restrictive business practices, including those of transnational corporations, adversely affecting international trade, particularly that of developing countries and the economic development of these countries." The United Nations Set of Principles and Rules on Competition C.1.

[10] "States should, at the national level or through regional groupings, adopt, improve and effectively enforce appropriate legislation and implementing judicial and administrative procedures for the control of restrictive business practices, including those of transnational corporations." The United Nations Set of Principles and Rules on Competition E.1.

The WTO agreements, which superseded the GATT 1947, Within the WTO there was a split between two models of competition policy in a multilateral forum, with each point of view headed by the European Union and the United States. In June 1996 the EU proposed that WTO members negotiate a binding agreement to enact, enforce, and cooperate in enforcing competition laws.[11] The U.S.'s competition authorities, on the other hand, resisted making competition part of the WTO's binding rules and proposed enforcement cooperation agreements between governments as an alternative.[12]

The WTO members nevertheless agreed during the 1996 WTO Ministerial Conference in Singapore to launch the WTO Working Group on the Interaction between Trade and Competition Policy,[13] but the failure to launch a new round of trade negotiations in the Seattle Ministerial Conference meant that the negotiation on competition would be left to the Doha Ministerial Conference.[14] Though competition was one of the four Singapore Issues that were part of the Doha Development Agenda, the 2001 Doha Ministerial Conference postponed the issue of competition policy to after the fifth Ministerial Conference in hopes of expediting talks.[15] Competition was subsequently removed from the Doha Agenda altogether in the General Council's post-Cancun decision,[16] more due to developing country intransigence than because of the U.S., which was at this point willing to compromise with the EU to expedite Doha talks and reappraising the market access effects of restrictive business practices in developing markets.[17]

At the WTO level, therefore, the competition issue has been dropped from the multilateral negotiating agenda for the present, with little prospect of its revival due to the stalling of the Doha Round. The U.S. original position on advocating bilateral cooperation over multilateral

[11] Marsden, *supra* at note 7*,* p. 56

[12] Marsden, *supra,* p. 58

[13] Gary Hufbauer and Jisun Kim, International Competition Policy and the WTO, The Antitrust Bulletin 54(2), 327-335, 329, 2009

[14] Marsden, *supra* at 64

[15] Doha WTO Ministerial 2001: Ministerial Declaration, WT/MIN(01)/DEC/1 20 November 2001, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm

[16] Decision Adopted by the General Council on 1 August 2004, https://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm#invest_comp_gpa

[17] Hufbauer and Kim, *supra* at note 13, 330-331..

cooperation has prevailed, mostly by default as the Doha talks foundered. As in much else in the area of international trade rule-making, therefore, trade-related competition rules are currently left to regional trade agreements, a subject we will examine next.

(3) Competition Policy in Regional Trade Agreements

Regional trade agreements (RTAs) between WTO members, authorized under Article XXIV of the General Agreement on Tariffs and Trade, constitutes a major exception to most-favored-nation treatment. RTAs are also the fora where the most dynamic rule-making is taking place in the WTO jurisprudence.

This rulemaking dynamism holds true for competition issues as well. In contrast to the perpetual twilight status of competition policy at the multilateral level, RTAs frequently include competition rules relating to trade, usually in the form of enforcement cooperation rather than harmonization with the European Union being a prominent example of harmonization. In this, as in many other issues, the regional trade agreements can be said to have taken over the role of rulemaking and development in international trade. This means that there is progress on the issue of trade-related competition policy, but also that the rules are fragmented rather than uniform. In its advocacy for this bilateral cooperation approach, the U.S. competition authorities' position was that bilateral cooperation would bring about a higher level of standards and enforcement than a minimal multilateral standard could; it would be interesting to see in the future if this assertion holds true now that this position has come to prevail in the jurisprudence of international trade in spite of the subsequent softening of the U.S.'s position.

The factors that make competition a compelling issue for international trade are only exacerbated in RTAs. The lower trade barriers compared to multilateral WTO commitments, due to the requirement in Article XXIV of the GATT that trade barriers to virtually eliminated between RTA partners, means greater economic integration and consequently greater cross-border effects of restrictive business practices. There is also the fact that RTAs entail greater cooperation and harmonization among the trading partners in general, and competition policy may be one aspect of such harmonization. This likely explains why association RTAs that aim for deep integration are likelier to have competition provisions (75% as surveyed by the

UNCTAD in 2005) than bilateral and plurilateral FTAs (40% and 20%).[18]

Those RTAs that have competition provisions evince a wide variety. In the first category with the lightest obligations, some RTAs only require cooperation on competition issues. Sometimes the "obligation" to cooperate in these agreements are not even legally binding but only requires effort to cooperate on the parties' part. An example of the latter is the New Zealand-Singapore Closer Economic Partnership of 2000. A second category of competition provisions require the parties to adopt domestic competition laws and, sometimes, achieves substantive harmonization of the laws. The third and most ambitious category is the establishment of a common competition regime in addition to substantive harmonization, as seen in the European Communities.[19]

3. The Competition Chapter of the Korea-China FTA

Chapter 14 of the Korea-China FTA deals with competition rules and policy. It is composed of 13 articles, beginning with Article 14.1 on the objectives of the Chapter and concluding with Article 14.13 defining key terms.

The Chapter is characterized by its emphasis on mutual cooperation rather than harmonization of any substantive competition rules. Aside from obligating each Party to "maintain or adopt competition laws that promote and protect the competitive process in its market by proscribing anticompetitive business practices," (Article 14.2(1)) three of the thirteen articles in the Chapter deal with the principles of application and enforcement (Article 14.3 on "Principles in Law Enforcement," Article 14.4 on "Transparency," and Article 14.5 on "Application of Competition Laws"), six articles deal with mutual cooperation between the Parties in matters of competition including cooperation in law enforcement, notification, consultation, exchange of information, technical cooperation, independence of competition law enforcement, and dispute settlement. Chapter 14 of the Korea-China FTA, therefore, can be said to deal mainly with the application of competition laws in the two Parties and mutual

[18] Philippe Brusick et al. eds., Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, United Nations 2005, x

[19] Melaku Geboye Desta and Naomi Julia Barnes, Competition Law in Regional Trade Agreements, 239-263, Lorand Bartels and Federico Ortino eds., Regional Trade Agreements and the WTO Legal System, Oxford University Press 2006, 244-5

cooperation and relationship that arise from such enforcement.

Article 14.1 states the Objectives of the Chapter, providing that:

> Each Party understands that proscribing anti-competitive business practices of enterprises, implementing competition policies and cooperating on competition issues contribute to preventing the benefits of trade liberalization from being undermined and to promoting economic efficiency and consumer welfare.

The ultimate objectives of the Chapter are to prevent the undermining of the benefits of trade liberalization, and the promotion of economic efficiency and consumer welfare. Here we see a recognition of the relationship between competition policy and trade liberalization and the common goals of the Parties in promoting economic efficiency and consumer welfare, a common goal for competition laws.

The means to achieve these ultimate ends are the obligations or policy emphases implied, if not expressly provided to be obligations. They are threefold:

First, proscribing anti-competitive business practices of enterprises. This forms the backbone of competition policy, which has as its object the regulation of restrictive business practices, as discussed above. Anti-competitive business practices are defined in Article 14.13 to include the classic categories of concerted practices, abuse of dominant position, and mergers that significantly impede effective competition.

Second, implementing competition policies. In addition to the direct proscription of anti-competitive business practices, the competition chapter of the Korea-China FTA envisages the implementation, and therefore the formulation, of broader competition policy to promote competition and achieve the objectives of this Chapter. This is in line with Article 3 of the Korean Monopoly Regulation and Fair Trade Act, which obligates the Fair Trade Commission to formulate and implement policies to promote competition, and Article X of the Chinese Anti-monopoly Law.

Third, cooperating on competition issues. Where the two previous implied obligations could be pursued by each Party domestically, cooperation between the Parties is an international endeavor that must be pursued jointly and forms bulk of the substance of this

Chapter.

Starting with Article 14.2 the provisions move on to concrete obligations, with Article 14.2.1 providing that "Each Party shall maintain or adopt competition laws that promote and protect the competitive process in its market by proscribing anticompetitive business practices." Here the first of the implied obligations which the Parties recognized as being beneficial in Article 14.1 is now provided as a direct obligation in the form of domestic regulation of restrictive business practices.

It is unlikely that the domestic enforcement provision of Article 14.2.1 can be enforced by dispute settlement, however. While Article 14.8 (Consultation) provides for consultation to foster understanding or to address specific matters arising under the Chapter. Article 14.12 (Dispute Settlement) provides in Paragraph 2 that "Neither Party shall have recourse to Chapter 20 (Dispute Settlement) for any matters arising under this Chapter." The same goes for the other obligations in this Chapter.

Article 14.3 lays down the principles in enforcing competition law. Article 14.3.1 provides for the general principles of transparency, non-discrimination, and procedural fairness in competition law enforcement. 14.3.2 elaborates on the non-discrimination policy by providing for national treatment in competition law enforcement, while 14.3.3 gives more substance to the procedural fairness principle by obligating the parties to grant certain procedural guarantees to persons subject to investigations or sanctions. Article 14.4 provides for specific obligations relating to the first principle, transparency, including obligations of publishing the relevant laws and regulations (Paragraph 1), issuing written administrative decisions on competition law violations (Paragraph 2), and endeavoring to make decisions and implementation orders (with business confidential information and other protected information excised) public.

Article 14.5 clarifies the scope of the application of the Chapter, applying it to the businesses of both parties (Paragraph 1) but also making it clear that the Chapter does not prevent the establishment or maintenance of public enterprises (Paragraph 2). State enterprises are still subject to the requirement of not undermining the benefits of trade liberalization and are subject to the competition laws of each Party, according to Paragraph 3—but with the important caveat that the performance of the state enterprises' assigned tasks comes first ("in so far as the application of these principles and competition laws does not obstruct the

performance, in law or in fact, of the particular tasks assigned to them"). This is a natural restriction, since government-compelled action and state enterprises are exempt from antitrust action within the scope of state-assigned activities, or through sovereign immunity from lawsuits.[20]

Article 14.6 lays out the means of competition law enforcement cooperation that will define much of the remaining Chapter, specifically the means for cooperation. In 14.6.1, recognizing "the importance of cooperation and coordination in competition field, to promote effective competition law enforcement," the Parties lay out four modalities of cooperation: Notification, consultation, exchange of information, and technical cooperation. These four means of cooperation are the subjects of the following Articles from 14.7 to 14.10. Article 14.6.2 provides an equivalent basis for cooperation on the enforcement of consumer protection laws, but not as a strict obligation: Where 14.6.1 provided that "the Parties *shall* cooperate" through the means enumerated above, 14.6.2 provided that "the Parties *may* exchange and communicate consumer protection information." (Emphases added.)

The modalities of competition law enforcement cooperation are a mix of obligatory and hortatory provisions, with much left to the discretion of the competition authorities of each Party. In Article 14.7 on notification, for instance, though the duty to notify the other Party is given as an absolute obligation ("Each Party . . . shall notify the other Party of an enforcement activity"), the condition for triggering that obligation is left to the notifying Party's discretion ("if it considers that such enforcement activity may substantially affect the other Party's important interests"). Paragraphs 2 and 3 of the same Article are more hortatory in nature in providing, respectively, for early and detailed notification ("the Parties shall endeavor to notify at an early stage and in a detailed manner") and compliance with notice obligations ("The Parties undertake to exert their best efforts to ensure that notifications are made in the circumstances set out above").

Article 14.8 on consultation, similarly, is a mix of obligatory and hortatory provisions. There is an absolute obligation to enter into consultations with the other Party on request to foster understanding or to address specific matters that arise under the Chapter (Paragraph 1). The obligation to accord full and sympathetic consideration to the concerns raised by the other

[20] Desta and Barnes, *supra* at note 19, 240-241

Party (Paragraph 2) is phrased as an obligation, but given that the phrase "full and sympathetic consideration" is open to interpretation the obligation may be more hortatory than at first glance. On the other hand, the usage and meaning established for "full and sympathetic consideration" may act as a guide to the parties in fulfilling their obligations under this Paragraph. The provision of information to facilitate discussion on the subject of the consultation is a hortatory one where each Party "shall endeavor to provide relevant non-confidential information to the other Party."

The exchange of information between the parties in Article 14.9 is a hortatory provision (Paragraph 1), but the obligation to maintain the confidentiality of confidentially-provided information is an absolute one (Paragraph 2), as is the obligation to make available to the other Party public information concerning its exemptions and immunities to its competition laws (Paragraph 3).

Technical cooperation, the fourth modality of competition law enforcement cooperation, is purely voluntary ("The Parties may promote technical cooperation"), and may be understood as providing a foundation for voluntary cooperation between the Parties, especially their competition authorities. It is to be understood that such technical cooperation is subject to and restricted by the absolute obligations in this Chapter, such as the Article 14.9.2 obligation of confidentiality.

Article 14 provides for dispute settlement as related to competition issues, with Article 14.1 providing for consultation in the Korea-China Free Trade Area Joint Commission established under Article 19.1 of the FTA. This appears to be distinct from the consultation provision under Article 14.8. For one thing the conditions for triggering the two processes are different: Consultation as a modality for competition law enforcement cooperation under 14.8 envisions a broad range of objectives for consultations, from fostering understanding between the Parties or addressing specific matters that arise under the competition chapter of the FTA. Consultation as a means of dispute settlement under Article 14.12, by contrast, is more restrictive in requiring that a Party consider that a given practice (presumably of the other Party) continues to affect trade. For another, the procedures are different. Article 14.8 consultation does not involve the Joint Commission but only consultations regarding representations made by a Party. Article 14.12, on the other hand, provides that the request for consultation to be made in the Joint Commission.

	Article 14.8 (Cooperation)	Article 14.12 (Dispute Resolution)
Reason for requesting consultation	- Fostering understanding between the Parties - Addressing specific matters that arise under Chapter 14	- a Party considers that a given practice continues to affect trade
Procedure for requesting consultation	Request of a Party	Request in the Joint Commission

Table 2: Contrast between Article 14.8 and 14.12 consultation

Article 14.12.2, as discussed above, provides that the Parties shall not have recourse to the Dispute Settlement chapter of the FTA for any matters arising under the competition Chapter, meaning the obligations under this Chapter are not directly enforceable through dispute settlement procedures of the FTA, unless the competition measure also constitutes a violation of the WTO Agreements (e.g. the GATT Article III obligation of national treatment) and the aggrieved Party initiates a procedure under the WTO dispute settlement rules.

4. The Korea-China FTA Competition Chapter in Context

In light of the foregoing discussion on the status of competition policy in the WTO, the competition chapter of the Korea-China FTA emphasizes cooperation and non-discriminatory enforcement with little in terms of harmonization with a few absolute obligations and mostly discretionary obligations or hortatory provisions. This means its obligations are fairly light as RTA competition chapters go, placing it in the first category of RTA competition provisions of the three discussed in Section 2.

Furthermore, the Korea-China FTA can be understood within the larger trend of RTAs rather than the WTO at large carrying forward the rule-making efforts when it comes to competition policy in international trade. Where the Doha Round has stagnated on the issue of competition, the various RTAs concluded around the world have continued to make the rules and set the pace for competition and other issues that are becoming increasingly relevant to trade.

The Chapter is also in line with the trends of non-associative RTAs in its handling of competition policy, in that there is an emphasis on non-discrimination principles in enforcement and on cooperation. Indeed, non-associative RTAs that do not aim for greater economic and policy integration between countries would be spectacularly unsuitable fora in which to pursue the harmonization of competition rules, given that this could pull a country's own competition policies in radically different directions depending on the trading partner it concluded the RTA with and fragmenting a country's competition policy.

There are also outstanding competition policy issues between Korea and China with the expansion of trade between the two countries and the consequently greater impact of both private enterprises' restrictive practices and the measures of competition authorities. In particular, the enactment of the Anti-monopoly Law of China in 2008 raised concerns in Korea about the predictability and transparency of Chinese antitrust law. It appears that having a forum for mutual discussion through the chapter will have a positive effect on airing and resolving differences of opinion on competition issues, even if harmonization is not contemplated.

5. Conclusion

The inclusion of comprehensive competition policy in the WTO jurisprudence has not become a reality so far, starting with the abortive attempt to form the ITO which included a competition section in its Charter, to the removal of competition from the current round of negotiations after years of discussions. However, the various RTAs, which are the source of much new rulemaking in trade jurisprudence where the WTO at large has stalled, have competition provisions in a number of cases and the Korea-China FTA is one such example.

In terms of commitment competition chapters of RTAs come in several types. From shallowest to deepest in terms of commitment, the first type is a cooperation-focused set of provisions with no substantive obligations, the second is one that adds substantive requirements including the requirement to enact competition laws, and the third a set of provisions for harmonization and common administration.

On analysis, the competition chapter of the Korea-China FTA is the first type, that is one that focuses on cooperation and does not impose substantive requirements, far less harmonization. Though the obligations under the competition chapter are not enforceable under

the FTA's dispute resolution chapter, there are provisions for mutual consultation that may provide avenues for communication about competition issues. Also, by achieving greater communication and enforcement cooperation, the parties could present a united front to corporations behaving in anticompetitive ways and thus extend the effectiveness and reach of their antitrust activities.

Thus, although the level of competition policy commitment in the Korea-China FTA is relatively light, it has the potential to open much-needed dialogue and pathways for cooperation between the two parties' competition authorities at a time when increasing trade volumes makes communication and cooperation more necessary than ever. It also remains to be seen whether the competition rules of the various RTAs will bring about the kind of convergence to bring competition law, at last, into the jurisprudence of international trade.

Abstract

This paper examines the competition chapter of the Korea-China FTA in the context of competition policy in the WTO and RTAs. With the Doha Development Agenda stalled in general and the issue of competition removed from it altogether, it is the regional trade agreements (RTAs) that are currently making new rules in the WTO jurisprudence, including competition rules. Analyzing Chapter 14 of the Korea-China FTA, the Competition chapter, in this context, it was revealed that the competition provisions focus on cooperation rather than substantive issues, far less harmonization. This may open up valuable channels for communication and cooperation between the Parties, and it remains to be seen whether the competition rules of the various RTAs will bring about the kind of convergence to bring competition law, at last, into the jurisprudence of international trade.

Keywords: Competition law, antitrust, regional trade agreements, Korea-China FTA

국문요약

본고는 WTO 및 지역무역협정의 맥락 속에서 한-중 FTA의 경쟁 장을 분석하였다. WTO 체제 내외에서 국제 경쟁법의 역사 및 도하 라운드가 정체된 가운데 경쟁법을 포함하여 국제무역 체제에서 지역무역협정이 새로운 규정 제정 역할을 맡게 된 현황을 살핀 후, 한-중 FTA의 경쟁 규정 장인 제14장을 분석한 결과 한-중 FTA의 경쟁법 관련 규정은 실체적 내용이나 법의 조화보다는 경쟁법 집행 협력에 중점을 둔 형태였다. 이는 양국의 경쟁법 현안을 해결하는 소통과 협력의 장이 될 수 있으며, 이러한 지역무역협정에서의 경쟁 관련 조항이 세계무역 법체계의 경쟁법 체계 형성으로 이어질 지는 앞으로의 연구과제로 남아있다.

키워드: 경쟁법, 독점규제, 지역무역협정, 한중 FTA