Korea's Responses in WTO Disputes and Trade Policy Reviews: A Perspective of Non-State Actors

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Abstract

In this paper, materials from Korea's trade policy reviews are considered in terms of Korean responses to issues raised by other members of the WTO with respect to the Korean foreign trade regime from the perspective of non-state actors. In the same vein, recent Korean cases are considered in terms of Korean responses. The materials drawn from the trade policy reviews and the cases are illustrative and not intended to be exhaustive. The primary purpose of the paper is to highlight the point that there is a non-state dimension in the conflict management of the WTO, at the level of responses that calls for greater appreciation. This perspective is set against the background of the legislative setting of the foreign trade regime within the Korean legal system.

Key Words: WTO; Trade policy review; Dispute settlement; Non-state actors; Custodian

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'… it would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix.'[1]

I. Introduction

Within and from Korea, understandably, there has been much scholarly focus on the Korean involvement and engagement in the WTO dispute settlement.[2] Two articles particularly stand-out[3] – one in Korean and the other published in the Journal of International Economic Law. Both set out the Korean context of the GATT accession and the WTO membership, as well as, the Korean engagement in disputes as a respondent, claimant and a Third Party**.** However, at least a decade has passed since these were written. Similarly, there has been little analysis of the various specific concerns raised in the different trade policy reviews of Korea in the WTO – in particular with reference to the consistency of Korean measures with the WTO agreements.

This paper builds, in some manner, upon the existing body of materials. First, it gives an insight into the kind of concerns with respect to Korean foreign trade legislation and its practice in terms of the WTO consistency. These have been raised by the members of the WTO, both in 'reviews' of the member's trade practices within the framework of the WTO Trade Policy Review Mechanism (TPRM),[4] and in 'disputes' within the WTO Dispute Settlement System.[5] The objectives of the TPRM, as they are well understood, are to 'contribute to improved adherence by all Members to' the WTO disciplines 'by achieving greater transparency in, and understanding of, the trade policies

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1. Panel Report, United States – Section 301-310 of the Trade Act of 1974, WT/DS152/R at ¶ 7.73 (Dec. 22, 1999) [hereinafter "Section 301 Panel Report"].
2. *See* Soo-Jin Gong *et al.*, *WTO Dispute Settlement and Korea* (Hakyoungsa 2006) (S. Kor.) ; Don Moon, *Korea and WTO Dispute Settlement Body: Economic Analysis of Law*, 13 Nat'l Strategy 5-40 (2007) (S. Kor.).
3. Wook Chae & Chan-Bae Seo, Kor. Inst. Int'l Econ. Pol'y, *Policy Analyses 01-14*, *Assessment of WTO & Korea-related Trade Disputes and Policy Implications* (2001), *available at* http://www.kiep.go.kr/eng/publications/pub02_view.jsp?page=1&no=131625&sCate=013001&sSubCate= (S. Kor.); Dukgeun Ahn, *Korea in the GATT/WTO Dispute Settlement System: Legal Battle for Economic Development*, 6 J. Int'l Econ. L 597-633 (2003).
4. For general evaluation of the WTO Trade Policy Review Mechanism as such, *see* Asif H. Qureshi & Andreas Ziegler, *International Economic Law* (Sweet & Maxwell 2011).
5. For general evaluation of the WTO Dispute Settlement System as such *see Id.*

and practices of Members.'[6] On the other hand, disputes between members of the WTO are settled solely within the WTO dispute settlement system; the objective of which, inter alia, is to preserve the rights and obligations of the members and thereby, 'ensure security and predictability to the multilateral trading system.'[7]

This juxtaposition of concerns expressed by the members in trade policy reviews and their disputes under dispute settlements is an appropriate capture of the continuum of practice where member concerns are expressed, discussed and ultimately resolved. This assimilative approach of focusing on concerns regarding the aspects of the Korean foreign trade regime invites questions as to the relationships between the issues raised in trade policy reviews and the actual disputes. This is despite the fact that the TPRM is not 'intended to serve as a basis for the enforcement of specific obligations under' the Agreements of WTO Furthermore, there has not been any systemic analysis of the Korean trade policy reviews in literature, neither generally nor in terms of concerns raised with respects to the consistency of Korean measures with the WTO obligations. Although this paper does not cover this, it does serve the purpose of highlighting the value of future comprehensive research and analysis of such topic. In the same light, this paper touches on recent disputes involving Korea in the WTO dispute settlement process. Such recent disputes have not been the focus of significant analysis till now.

Second, the focus, herein, is mainly on the manner in which Korea has responded to concerns raised by other members of the WTO, in relation to its foreign trade regime being consistent with WTO obligations. There are two main reasons for focusing particularly on the Korean responses. First, such an inquiry is concerned with the Korean foreign trade legislation from an external standpoint, this is particularly so since it focuses on the problematic areas of the Korean foreign trade regime from the perspective of the WTO. Second, from an internal stand-point, such a focus sheds light on the Korean capacity and approaches in responding to disputes in dispute settlements. It also airs concerns in the review of Korean trade practices in relation to conforming to the WTO agreements under the TPRM. Thus, the thrust of the fo-

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6. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1894 U.N.T.S. 154 [hereinafter "Marrakesh Agreement"] at annex 3.

7. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, 1869 U.N.T.S. 401 [hereinafter "DSU"].

cus of this paper is on 'disputes' under the WTO dispute settlement system; as well as, 'concerns,' with respect to conformity with WTO obligations aired through the TPRM.

Finally, this study seeks to contextualize this focus outlined above into a conceptual framework from the perspective of non-state actors. A non-state actor is essentially an open ended category that excludes the State while including diverse entities and interests such as, importers, exporters, raw material suppliers, manufacturers, retailers, multinational enterprises, consumer organizations, trade unions and NGOs. The interests of non-state actors can therefore be divergent and even conflicting. This approach is also of general relevance in terms of analyzing other member's disputes and concerns expressed in the TPRM.

II. Part One: Context

A. Conceptualizing the Framework for Analysis

Member responses to the potential and actual disputes can be analyzed from a number of perspectives viz., substantively in terms of the law, methodologically in terms of the general approach, qualitatively in relation to the kind of engagement in the dispute discourse, space of policy oriented with the State's trade and non-trade regulatory authorities, and implementation and outcome focused in terms of the subsequent action taken and results achieved.

First, the substantive member responses can range from *mea culpa* to defensive in terms of the claim, non-trade justifications and procedure. Second, the methodology in responding can be diplomatic, pragmatic, grounded in economic analysis, legalistic, ad hoc, strategic and indeed, culturally based. Third, the responses can be qualitatively assessed, for example, in terms of rigor and quality of an argument. Fourth, since these disputes are at the State level, they may well be underpinned by the need to preserve and guard a member's policy space – thus, Dukgeun Ahn titles his article as, 'Korea in the GATT/WTO Dispute Settlement System: Legal Battle for Economic Development.' The guarding of policy space can act as the hand maiden for different objectives to include not only development objectives but protectionist capacities. Fifth, the analysis of responses can be oriented by implementa-

tion, focusing on the manner in which implementation has taken place, as for instance, through the legislative changes.

Conceptualizing the member responses within the frameworks of such a range of perspectives have an obvious analytical value, both from the standpoints to better understand a member as a respondent, and for the responding member, in terms of capacity building, as a respondent in the future. These perspectives generally have one underlying focus, namely, 'the State member'. The engagement by the State member in dispute resolutions and the capacity of the State member to effectively engage in dispute discourse and subsequent implementation are given emphasis. This is understandable given that the normative framework of the WTO is set in terms of member State actors; and the State member is the filter through which various interests are litigated and raised, in particular, private consumer and trade interests. Much of the case-oriented analysis of other members' experiences in the WTO dispute settlement is also drawn from the State paradigm.[8] However, to note, there has been a focus on the public-private partnerships in the WTO litigations as well.[9] The emphasis in that discourse has been mainly in terms of working with the State to initiate litigation. Additionally, another thing to take note of is the general human rights approach to international trade which also has relevance to the dispute settlements.[10]

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8. *See e.g.,* Chi Manjiao, China's Participation in WTO Dispute Settlement over the Past Decade: Experiences and Impacts, 15 J. Int'l Econ. L. 29-49 (2012) and Victor Mosoti, Africa in the First Decade of WTO Dispute Settlement, 9 J. Int'l Econ. L. 427-53 (June 2006); J. Lacarte-Mur & P. Gappah, Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench, 3 J. Int'l Econ. L. 395-401 (2000) and A. Rosas, Implementation and Enforcement of WTO Dispute Settlement Findings: An EU Perspective, 1 J. Int'l Econ. L. 131-44 (2001); Int'l Ctr. Trade & Sustainable Dev. (ICTSD), Asian Participation in the WTO Dispute Settlement System December (Dec. 2012), available at http://ictsd.org/downloads/2013/02/asian-participation-in-the-wto-dispute-settlement-system.pdf (last visited Feb. 22 2012).
9. *See* G. C. Shaffer & R. Melendez-Ortiz, Int'l Ctr. Trade & Sustainable Dev. (ICTSD), *Dispute Settlement at the WTO: The Developing Country Experience* (G. C. Shaffer & R. Melendez-Ortiz eds., Cambridge 2012), *available at* http://www.scribd.com/doc/92208824/Dispute-Settlement-at-the-WTO-The-Developing-Country-Experience#download; G. C. Shaffer, *Defending Interests: Public-Private Partnerships in WTO Litigation* (Brookings Inst. Press 2003); G. Shaffer *et al.*, ICTSD, *Resource Paper No. 5: Towards A Development-Supportive Dispute Settlement System in the WTO* (2003).
10. *See* Ernst-Ulrich Petersmann, International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods (Hart Publ'g 2012).

The State-centric analysis of the WTO disputes has been somewhat at the expense of an appropriate consideration of the 'custodian' role that the State has – at any rate once it takes on a dispute – in the manner in which it manages disputes, responds to disputes and raises the WTO consistency concerns in the TPRM. The State member, in effect, is the guardian of the interests of the non-state participants in its constituency. These interests are enshrined in the WTO agreements, the agreements that a member was mandated initially to negotiate and agree on behalf of its constituency. The actions of a member engaging in disputes make an imprint on the development of the WTO law through the interpretations brought in litigation, and changes in domestic law. Such actions of the State member affect and concern the non-state economic and non-economic actors in its constituency. The actors, therefore, have a legitimate expectation that the State member's defense will be informed (or tampered) by its 'custodianship' of the non-state actors' interests which are within the WTO Agreements. Thus, there is a non-state perspective to the conflict management in the WTO – albeit one that is somewhat nuanced, probably not addressed nor, at any rate, consciously made as such. Indeed, support for such a custodian role can, in part, be found in the US-Section 301 Trade Act case[11]albeit in the context of the deliberations of the Panel with respect to the relationship of domestic trade legislation with non-state actors. The Panel, in that case, confirmed that 'the GATT/WTO legal order' had an indirect effect on the non-state actors,[12] and that, reference in the Dispute Settlement Understanding of the 'security and predictability' of the multilateral trading system is 'per force, composed not only of States but also, indeed mostly, of individual economic operators. The lack of security and predictability affects mostly these individual operators…'[13] 'the protection of which is one of the principal objects and purposes of the WTO.'[14] This observation is equally relevant to the advanced normative developments resulting from engagements in dispute settlements, including the manner of the State's engagement in the dispute settlement proceedings. The custodian role referred to however, in this paper, is not simply in relation to individual economic actors but also to a wider set of non-state actors.

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11. Section 301 Panel Report, *supra* note 1, at ¶ 7.71 onwards.
12. Section 301 Panel Report, *supra* note 1, at ¶ 7.78.
13. *Id.* at ¶ 7.76.
14. *Id.* at ¶ 7.86.

Given that the non-state perspective is not 'monolithic' in terms of this custodian role, two questions are posited. First, does the State (and if so, how) inculcate the divergence of interests in the management of responses to disputes and concerns raised through the TPRM? Second, within the dynamics of the competing non-state interests, which interests manage to be dominant in influencing the State apparatus that manages the conflicts? To respond to both questions authoritatively, empirical work is needed, and indeed, the practices would be diverse in different jurisdictions. Some observations may, albeit somewhat intuitively, be proffered. With respects to the former question, in relation to the actual practice of the States, a member State may or may not have an institutional mechanism from which an interest amongst the divergent non-state interests manages osmosis in initiating litigation and perhaps even driving it through the litigation process. However, in the actual management of the dispute, particularly regarding the responses within the process of a dispute, the likelihood of the divergent non-state interests having a bearing on the conduct of the proceedings is probably diminished. This is because the proceedings, generally, are not open to the public in the WTO, and very likely, there are no institutional mechanisms for the inculcation of the non-state interests at this juncture of the proceedings. Moreover, there are also two inhibiting factors. First, once a case is started, it has its own momentum, informed by a certain time-framework and the State's defensive apparatus is, in any event, likely to be blind to the non-state interests at this level of the proceedings. Second, given that the non-state interests can be diverse, and possibly not even represented, actually delivering the custodian role can be complex. However, despite these inhibitors, the advocacy for the role and value of the custodian function is not undermined. The diversity of non-state interests needs to be kept in perspective, as indeed the complexity in weighing the divergent interests. Importantly, the mere awareness that there is a custodian role here that calls for reflection is in itself significant. Finally, in so far as trade policy reviews are concerned, these are also somewhat insulated from non-state inputs. Generally thus, trade policy reviews are not the subject of discussion, albeit post-facto, in national parliamentary deliberations. However, the Trade Policy Report compiled by the WTO Secretariat, which forms the basis of the trade policy review, may well be based on and takes into account the non-state interests; and non-state actors may have a greater degree of opportunity in pressing their points of views through the filter of a member State through on-going reviews provided that they

were cognizant of it. In so far as questions that relate to the conformity with the WTO agreements are concerned, which are given to the member in the trade policy review process, the input with respects to the response is from the State member, and therefore, insulated from the non-state participation.

One assumption that could be read underlying the State centric approaches to evaluate conflicts in the WTO is whether all responses to disputes and within disputes in the WTO can be assumed to be anti-trade or anti non-state actor? This is not necessarily the case as for instance, when non-trade justifications are invoked or indeed when the claims are without justification. Conceivably, responses could be trade re-enforcing. Similarly, although there is an assumption in most analysis of WTO trade disputes that the State paradigm is exclusive, this does not, however, cast aside the value of State centric approaches to evaluating conflicts in the WTO for non-state actors. An analytical framework that unpacks member responses to and in disputes provides for some measure of greater transparency, albeit at a pace removed, to the non-state actors on whom the manner of responding of a member in a dispute has a real impact and ultimate bearing upon. Moreover, State responses can be non-state actors' concerns of reinforcing. Thus, policy space arguments may ultimately be to the non-state actor's advantage. For example, it has been observed[15] that Korea had been reluctant to be embroiled in legal confrontations in disputes during the GATT era. This has been attributed inter alia to (i) pragmatism; (ii) legal culture of avoiding confrontation; and (iii) economic security evidenced by large trade surpluses during this period. On the other hand, during the WTO era, at any rate, until 2003, Korea has been more proactive a user of the WTO dispute settlements but has been prepared to settle cases where the merits of the case so suggest and where the economic states are not high.[16] These are interesting insights in terms of a State member centric analysis of a member's behavior in the management of conflicts. However, from the perspective of the non-state actor, the observations in relation to Korean management of disputes also call for the insight that, during the GATT era, the Korean approach to disputes was set against a Korean economy that was more dictatorial then.[17] In such circumstances, the

15. *See* Ahn, *supra* note 3, 598, 607-08.

16. *See Id.* at 611.

17. Right after he took the power, President Park tried to facilitate more rapid economic growth by using rather coercive economic policies which might have been against the

Korean state should take a more 'global' approach to the management of its portfolio of disputes. It should take a pragmatic stance to secure in its trade surplus. Korea was in a position to ignore the individual impacts on non-state actors to the point, which in the long run, could have had a graver significance, for example, on particular domestic industries/economic actors.

In this paper, materials from Korea's trade policy reviews are considered in terms of Korean responses to issues raised by other members of the WTO, with respect to the Korean foreign trade regime from the perspective of non-state actors. Moreover, recent Korean cases are considered in terms of Korean responses. The materials drawn from the trade policy reviews and the cases are illustrative and not intended to be exhaustive. To reiterate, the primary purpose of this paper is to highlight the point that there is a non-state dimension in the conflict management of the WTO at the level of responses that calls for greater appreciation. This perspective is set against the background of the legislative setting of the foreign trade regime within the Korean legal system.

B. Korean Foreign Trade Regime: Generally

Korea's trade policy is formulated mainly by the executive branches of the government through respective concerned ministries – at the time of writing this, the Ministry of Foreign Affairs and Trade (MOFAT)[18] was the most prominent one. The National Economic Advisory Council (NEAC) also advises the president on the development of policies relating to domestic and

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spirit of democracy. This oppressive tactics may have been a driving force of Korea's trade liberalization. *See* for example, Byeong-cheon Lee, *Developmental Dictatorship and the Park Chung-Hee Era* at iv (Byeong-cheon Lee ed., Homa & Seley Books 2003); Hyung-A Kim, *Korea's Development Under Park Chung Hee: Rapid Industrialization, 1961-79* at 13 (RoutledgeCurzon 2004).

18. MOFAT is divided into two departments with different ministers: the Minister of Foreign Affairs and Trade and the Minister for Trade. The Minister of Foreign Affairs and Trade is mainly responsible for trade matters, in practice, and later the Minister for Trade acquires the delegation. *See* Ministry of Foreign Affairs and Trade, Republic of Korea [MOFAT], Organizational Chart, http://www.mofat.go.kr/ENG/ministry/organization/organizational/index.jsp?menu=m_50_60_20. *See also* Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat, Republic of Korea Revision*, WT/TPR/S/268/Rev.1 at 18 (Nov. 8, 2012).

international economic affairs.[19] MOFAT has also been charged with protecting Korean interests 'against unfair trade practices of its trading partners,' as well as, defending the Korean economic system from external challenges.[20] In this respect, MOFAT has been assisted by other concerned ministries,[21] as for example, the Ministry of Knowledge Economy (MKE) which has a broad mandate including information and communications, science and technology, and finance and economy.[22]

According to the President-elect Park Geun-hye's government reorganization plans,[23] the current trade functions of the Ministry of Foreign Affairs and Trade (MOFAT) will be transferred to a new Ministry of Industry, Trade and Energy, which will be formed by the Ministry of Knowledge Economy. Under this form, the new ministry will deal with the issues of industry, trade and energy altogether. Since the plan has been perceived as controversial, its constitutionality was debated with regards to the separation of foreign affairs from trade. Moreover, it has been observed that this type of government structure is outdated and inappropriate for the current economic situations of Korea, which no longer rely on the industry-based trade policies. For some non-state actors, however, the de-coupling of a State-centric foreign policy from trade may be welcomed.

There is no independent statutory body in Korea which can 'publicly assess trade or assistance policies from a national welfare perspective,' although the trade policy formulation process is quite open to the public – providing with various opportunities to participate, in particular, in the business community.[24] Thus, the MOFAT's Trade Negotiation Advisory Council, a branch of the Policy Advisory Council, holds consultation sessions to map out general trade policy directions and strategies.[25] In these sessions both domestic and

19. Trade Policy Review Body, *supra* note 18, at 18.

20. MOFAT, WTO Policy Issues, http://www.mofat.go.kr/ENG/policy/wto/overview/index.jsp?menu=m_20_90_10.

21. *Id.*

22. Ministry of Knowledge Economy [MKE], MKE History, http://www.mke.go.kr/language/eng/about/history.jsp (last visited Dec. 6, 2011); Ministry of Knowledge Economy [MKE], MKE Responsibilities, http://www.mke.go.kr/language/eng/about/responsibilities.jsp (last visited Dec. 6, 2011).

23. It was announced by the 18th Presidential Transition Committee on January 15th, 2013.

24. Trade Policy Review Body, *supra* note 18, at 19-20.

25. Press Release, Spokesperson for MOFAT, Tongsangjeolchabeobe Ttareun Tongsanggyose-

foreign firms are able to participate during the regular enlarged meetings on trade and investment policy by the Council. With Korea's well-developed information technology and internet network, many ministries, including MOFAT and MKE, keep their ears open to the community.[26] Moreover, the sub-committee on Trade and Industry of the NEAC 'involves private sector representatives (including two foreign representatives) and academics when advising on development policies and launching-related research projects.'[27] Certain foreign firms can make representations to the Advisory Council for Foreign Investment under Invest Korea, which advises the government on foreign investment policy.[28]

Public research organizations focusing on trade policy also act as a bridge between the public and private sectors in the process of trade policy making, [29]organizations such as, the government-funded think-tank Korea Institute for International Economic Policy (KIEP), the Korean Institute for Industrial Economics and Trade (KIET), the Korea Development Institute (KDI), the Korea Economic Research Institute, and the Korea Rural Economic Institute (KREI).[30] In particular, the Institute for International Trade under the Korea International Trade Association encourages public debate on Korea's trade policies by ensuring that the public sector considers private sector interests when developing trade policy.[31]

In sum, although the role of the private sector is limited to advising and consultation, the opportunities provided by the ministries and the public institutions seem to enable non-state actors to participate in the trade policy formulation process. Having that said, there is little public material on how the interaction between the Korean State apparatus in trade policy formulation and implementation is institutionalized. Also, it is difficult for outsiders to discern the actual practice of the interaction as between the State apparatus

omminganjamunwiwonhoe Chulbeom (Nov. 22, 2012), MOFAT, *available at* http://www.mofat.go.kr/webmodule/htsboard/template/read/korboardread.jsp?boardid=235&seqno=344840&tableName=TYPE_DATABOARD&typeID=6 (S. Kor.). *See* Trade Policy Review Body, *supra* note 18, at 19-20.

26. Trade Policy Review Body, *supra* note 18, at 19-20.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Note, *supra* note 18, at 19-20.

and non-state actors.[32]

Applicability of WTO law in the Korean Legal Order

The manner of the setting of international trade norms, in particular, the WTO law, within Korea's legal system is important for a non-state actor in ensuring the implementation of international norms within Korea. Under Article 6 paragraph 1 of the Constitution of the Republic of Korea, international law (treaties ratified by Korea, including the General International Law) has the same effect as domestic 'law'.[33] According to many scholars, international laws that are consistent with the Korean Constitution[34] do not need any further domestic legislative process (except for a procedural step of the promulgation)[35] to have a direct effect in the Korean domestic legal system.[36]

32. In this paper this legitimate line of enquiry is not followed further as it does not detract from the central focus of the paper.

33. 1987 Daehan Minkuk Hunbeob [Hunbeob] [Constitution] art. 6 (Oct. 29, 1987) (S. Kor.):
(1) Treaties duly concluded and promulgated under the Constitution and the generally recognized rules of international law shall have the same effect as the domestic laws of the Republic of Korea.
(2)The status of aliens shall be guaranteed as prescribed by international law and treaties. *See also* Min-seo Kim, *Classification of the Domestic Legal Status of the Treaties by the Types*, 89 Kor. Soc'y Int'l L. 29-30 (2001) (S. Kor.).

34. Treaties which become the 'law' of Korea cannot overcome the superiority of the Constitution in accordance with the legal hierarchy. *See* Constitutional Court [Const. Ct.], 99HeonGa13, Apr. 26, 2001 (S. Kor.).

35. Beom-nyeong-deung-gong-po-e-gwan-han-beom-nyul [Promulgation of Acts and Subordinate Statutes], *amended by* Act No. 10059 art. 11 ¶ 1, Mar. 12, 2010 (S. Kor.), *translated in* http://elaw.klri.re.kr/eng_service/main.do (S. Kor.):
"In cases where amendments to the Constitution of the Republic of Korea, Acts, treaties, presidential Decrees, Ordinances of the Prime Minister, and Ordinances of Ministries are promulgated, and proposed amendments to the Constitution of the Republic of Korea, budgets, and contracts incurring financial obligation on the State outside the budgets are publicly notified, they shall be published in the Official Gazette." Especially about treaties, Promulgation of Acts and Subordinate Statutes art. 6 says: "In cases of treaties, the fact the treaties have obtained the consent of the National Assembly or have undergone the deliberation of the State Council shall be mentioned in the preambles of promulgations of those treaties, on which the President shall affix his/her seal after signing his/her name and write the date of promulgation and which the Prime Minister and the competent members of the State Council shall countersign."

36. Kyung Soo Jung, *Korean Legal System and Experience on Domestic Application of International Law*, 28 Kor. Int'l L. Rev. 98 (2008) (S. Kor.). *See also* on monism, Anthony Aust, *Modern Treaty Law and Practice* 146 (Cambridge Univ. Press 2000); Thomas Buergenthal, *Self-Executing and Non-Self-Executing Treaties in National and International Law*, 235 Recueil des Cours 303, 316 (1992).

Since Korea has adopted and promulgated the covered agreements of the WTO as a package in 1994, these international agreements are enforceable domestically.[37]

The direct effect of the WTO agreements and their invocations in domestic courts by non-state actors has been considered in several decisions of the Supreme Court of Korea,[38] as well as in the Constitutional Court of Korea.[39] Thus, in the Constitutional Court case of *A Constitutional Appeal on the Act on the Aggravated Punishment, ETC. of Specific Crimes*,[40] Mr. Kim submitted a petition challenging the imposition of an aggravated punishment alleging that it was based on a 'treaty' that violated the Constitution. Mr. Kim's importation of Chinese sesame without an approval[41]from the Minister violated Article 10-3 of the Act on Distribution and Price Stabilization of Agricultural and Fishery Products [hereinafter "Agreement on Agriculture"].[42] Article 10-3 of the Agreement on Agriculture sets out the prerequisites for importation in order to keep the Market Access Volume less than 5% of the total domestic consumption.[43] Mr. Kim's smuggling was considered as a hindrance to the

37. Trade Policy Review Body, *supra* note 18, at 22; The Special Act on the Implementation of the Agreement Establishing the World Trade Organization, Act. No. 4853, *gazetted* on Dec. 31, 1994, *amended by* Act No. 8681, Dec. 14, 2007, was revised to simplify its original text.
38. *See* Supreme Court [S. Ct.], 91Nu10763, July 14, 1992 (S. Kor.); Supreme Court [S. Ct.], 2004Chu10, Sept. 9, 2005 (S. Kor.); Supreme Court [S. Ct.], 2004Chu72, Dec. 24, 2008 (S. Kor.); Supreme Court [S. Ct.], 2008Du17936, Jan. 30, 2009 (S. Kor.).
39. Constitutional Court [Const. Ct.], 97 Hun-Ba65, Nov. 26, 1998 (S. Kor.).
40. *Id.*
41. This can be seen as a sort of permission since it needs a process to request for a recommendation first and be accepted.
42. Currently, Act on Distribution and Price Stabilization of Agricultural and Fishery Products [hereinafter "Agreement on Agriculture"] art. 15 (Recommendation of Agricultural Products Imports) states:

    (1) Any person who intends to import agricultural products which are not prescribed otherwise by other Acts from among the agricultural products which are imported at the concessionary tax rates that apply to the market access volume as shown on the Schedules of Concessions of the Republic of Korea following the Marrakesh Agreement Establishing the World Trade Organization (WTO) shall get the recommendation from the Minister for Food, Agriculture, Forestry and Fisheries. Act on Distribution and Price Stabilization of Agricultural and Fishery Products, *amended by* Act No. 8852, Feb. 29, 2008, *translated in* http://elaw.klri.re.kr/eng_service/main.do (S. Kor.).

43. In the Agreement on Agriculture, a part of Marrakesh Agreement, especially Article 4 sets out about Market Access concessions and Korea had made such concessions as this.

Korean government's restriction on the Market Access Volume that was intended to reflect commitments under the Marrakesh Agreement. This violation aggravated the punishment on his smuggling. The petitioner argued that a mere 'treaty' cannot be the sole reason for such an aggravated penalty,[44] since there is no specific wording that states a 'treaty' can be the cause of an aggravated penalty in the Customs Act or "the Act on the Aggravated Punishment, etc. of Specific Crimes". According to the petitioner, further amendment of this Act is necessary to make this 'aggravation' possible. Also, he insisted that this was an infringement of his fundamental rights and the principle of "nulla poena sine lege" since the aggravation was not based on the 'law' as stated in the Constitution, which should be a 'domestic legislation' according to the petitioner.[45] However, the Court pointed out Article 12:1[46] and 13:1[47] of the Constitution, especially Article 6 in relation to the direct effect, saying that a treaty has the same effect as a domestic Act. The Court said "since the Marrakesh Agreement is also a lawful treaty having the same effect as a domestic Act, the aggravated punishment based on the Marrakesh Agreement should be treated equally as if it were based on a purely domestic legislation." Thus, the Court had ruled in this case, that the aggravated punishment based on the Marrakesh Agreement is not "a criminal punishment without any reason under the law" and did not infringe any fundamental rights of Mr. Kim. In sum, the Court recognized the direct effect of the WTO agreements in considering the challenge by the petitioner of the criminal punishment imposed upon him.

The decisions supporting the direct applicability in the Korean Supreme Court are as follows. First, in the case of *Cancellation of the Imposition of*

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44. Under the Marrakesh Agreement, this is just a concession by Korea and the "penalty" for Korea violating its concession would be the countermeasures by other Member states. But here in this case, "penalty" is on Mr. Kim's smuggling due to the violation of Korea's domestic law which gives effect to the Marrakesh Agreement.

45. Constitutional Court [Const. Ct.], 97 Hun-Ba65.

46. Constitution of the Republic of Korea, Article 12:1 "… No person shall be punished, placed under preventive restrictions or subject to involuntary labor except as provided by Act and through lawful procedures." 1987 Daehan Minkuk Hunbeob [Hunbeob] [Constitution] art. 12(1), *translated in* http://elaw.klri.re.kr/eng_service/main.do (S. Kor.).

47. Constitution of the Republic of Korea, Article 13:1 "No citizen shall be prosecuted for an act which does not constitute a crime under the Act in force at the time it was committed, nor shall he be place in double jeopardy." 1987 Daehan Minkuk Hunbeob [Hunbeob] [Constitution] art. 13(1), *translated in* http://elaw.klri.re.kr/eng_service/main.do (S. Kor.).

Tariff,[48] Daewoo Electric Generation brought a suit against the customs authority's tariff imposition. The Supreme Court based its decision on Article VII (a) and (b) of GATT 1947 and provisions of the Korean Customs Act.[49] The case, however, only affirmed that the customs authority, a governmental body, has the duty to comply with the relevant provisions of GATT 1947 as it bears the international obligation qua 'state.' On the facts of the case, the Supreme Court did not need to analyze the consistency of the Korean legislation with GATT as such.

Second, in the *Ordinances for School Food Service in the Province of Jeollabukdo* case,[50] the Superintendent of Education in Jeollabukdo brought a suit against the Provincial Assembly with respect to one of its ordinances. The ordinance at issue is provided as follows:

> [T]he use of quality agricultural/marine/livestock products and processed food produced in that region ("quality agricultural products") shall be preferred in the school food service of the elementary/middle/high schools by a specific local government; part of the food or the subsidy for its purchase money is offered selectively to consumers of quality agricultural products; recipient schools of monetary grants must use them for the purchase of quality agricultural products.[51]

The plaintiff, the Superintendent of Education, claimed that this local government ordinance was invalid, due to its violation of the national treatment standard set out in Article III of GATT 1994, since it explicitly encouraged preference for the locally produced ingredients to the imported ones.[52] In its response, the defendant, the Provincial Assembly, tried to justify the violation of the national standard under the government procurement exception in Article III (8) (a) of GATT 1994. The Supreme Court ruled on whether the ordinance (a lower rule than the 'law' in the hierarchy of the Korean legal

48. Supreme Court Decision, 91Nu10763 (S. Kor.).
49. *Id.*
50. Supreme Court [S. Ct.], 2004Chu10 (S. Kor.).
51. *Id.*
52. *Id.*

system) complied with the WTO law.[53] In this case involving a wide-region local government like Jeollabukdo, according to Articles 1, 2 and 3 of the Agreement on Government Procurement (AGP), and Korea's Schedules of Concessions, a government procurement exception can only be recognized if the goods are valued at less than the procurement price of 200,000 SDR.[54] Articles 4 (2), 6 (2) and 6 (3) of the enacted ordinance under challenge in this case did not place any restrictions on the price of the foods 'which are purchased or for which subsidies are granted by a Wide-Area Local Government.'[55] The Supreme Court, therefore, held that the ordinance violated 'the principle of national treatment under Article 3 of the AGP even in the case of purchase for the governmental utilization.'[56] In particular, the court stated the treaties 'were accorded legal validity equivalent to the domestic law under Article 6 (1) of the Constitution, and accordingly, the ordinances enacted by local governments are invalid if they violate the GATT or the Agreement on Government Procurement (AGP).'[57] Moreover, the defendant had argued that the Supreme Court was not the appropriate forum because only the WTO dispute settlement body had the authority to rule on the issues related to the WTO agreements, according to the Understanding on Rules and Procedures Governing the Settlement of Dispute (DSU) Article 23:1 and Article 23:2 (a) and (b).[58] However, the Supreme Court rightly denied the displacement of its jurisdiction through the application of Article 23 of the DSU, on the basis that the DSU only applied with respect to disputes between the members of the WTO and was not relevant with respect to issues as between the local government and the central government within a member state.[59]

While this case caused some public sensation,[60] a lower court followed the

53. Supreme Court [S. Ct.], 2004Chu10 (S. Kor.).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Many newspaper articles dealt with this decision having debates on whether it is a 'right' decision regarding the sensitive agricultural sector in Korea. For example, *See* Young-jin Jung, *The WTO Agreement and the Ordinances for School Food Service*, Gyung-hyang Shinmun, Sept. 26, 2005 (S. Kor.) and Hee-kyung Byun, *Regretful Decision of the Supreme Court on the Ordinances for School Food Service*, Seoul Shinmun, September 21, 2005 (S. Kor.).

Supreme Court decision, and directly referred to WTO law in a subsequent case.[61] In this case, the *Cancellation of the denial of the Ordinance Enactment Request*,[62] before the Seoul Administrative Court, Mr. Hong, the plaintiff, challenged the defendant Eunpyung-gu (town) ward with respect to its cancellation of the ordinance that encouraged the use of Korean agricultural products in the school food service. The court maintained that it had the authority to judge on the consistency of the ordinance with WTO law.[63]Just as in the Supreme Court decision, the Seoul Administrative Court ruled that the proposed ordinance, which had the same contents as the ones in the previous Ordinances for School Food Service in the Province of Jeollabukdo case, were inconsistent with the higher laws, such as GATT 1994 and AGP. Thus, regarding the hierarchical relationship between 'laws' and 'ordinances', the ordinance cannot overrule the treaties, and the denial of the request by the Plaintiff to enact the ordinance by the Eunpyung-gu (town) ward, was not unreasonable.[64]

Third, in *The Confirmation on the Invalidity of Ordinances for School Food Service in the Province of Kyungsangnamdo* the Supreme Court also followed its former decision.[65] In this case the Superintendent of Education in Kyungsangnamdo, brought a suit against the Provincial Assembly with respect to one of its ordinances similar to the one implicated in the case in Jeollabukdo.[66] The Supreme Court ruled as invalid the enacted ordinance for the same reasons as in the former Jeollabukdo case with direct reference to it.[67] It invoked Article III of GATT 1994 and applied it directly to find the invalidity of the ordinance, thus affirming the direct effect of WTO agreements in domestic courts.

However, there are still negative views on the direct effect and the invocability of the WTO rules in the domestic Korean legal system. Thus, with

61. Seoul Administrative Court [Seoul Admin. Ct.], 2006GuHab 37738, July 4, 2007 (S. Kor.).

62. *Id.*

63. *Id.*

64. *Id.*

65. Supreme Court [S. Ct.], 2004Chu72 (S. Kor.).

66. The ordinance decided by Kyungsangnamdo provincial assembly had same contents as the ones by Jeollabukdo provincial assembly. *See* Seoul Administrative Court [Seoul Admin. Ct.], 2006GuHab 37738 (S. Kor.).

67. *Id.*

respect to the *Ordinances for School Food Service in the Province of Jeollabukdo* case (and other later cases with the same factual background), some scholars consider these cases as exceptions. Thus, Ju[68] observes that given the fact that the WTO system is underpinned by the reciprocity principle, Korea should not unilaterally afford direct effect while other members, such as the U.S., EU and Japan require additional domestic legislative steps to implement international laws domestically, and thus bring to bear domestic considerations on the question of direct applicability.[69] Moreover, Korea is not 'obliged' to allow the direct application of the WTO agreements in its domestic courts.[70] In the same vein, Park[71] observes that the plaintiff in this case was not a 'private party' but a person with the authority given by the government.[72]And since the ruling itself does not deliberate on the private parties' rights and obligations, the case cannot be seen as recognizing the direct effect of WTO agreements in the Korean domestic legal system.[73] Thus, it has been observed Korea is not different from other WTO members such as the U.S. and EU.[74]

More recently in 2009, the question of direct applicability of WTO law appears to have taken a negative twist. In the Supreme Court decision of *Cancellation of the Imposition of Anti-dumping Duties,* a Chinese company, Shanghai ASA Ceramic Co., brought a suit against the Minister of Strategy and Finance asking for the cancellation of the imposition of Anti-dumping duties since it violated the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (ADA). The Supreme Court ruled that the 'ADA is an 'international treaty' which sets out rights and obligations as between states. And due to the content and nature of the treaty, a legal dispute involving the agreement should be resolved in the WTO dispute settlement body. Thus, the ADA does not have a direct effect and cannot be

68. Jin-Yul Ju, A Critical Review of the Domestic Effect of the WTO Agreement in Korea, 23 Seoul Int'l L. J. 39-41 (2005) (S. Kor.).
69. Ju, *supra* note 68.
70. Ju, *supra* note 68.
71. Nohyung Park, Korean Courts, Acceptance of International Law: Direct Effect of WTO Agreements, 92 Justice 458-59 (2006) (S. Kor.).
72. *Id.*
73. *Id.*
74. *Id.*

invoked by the parties in the Korean domestic courts.[75] The court observed that 'a private party cannot bring a suit directly against the government of a member of the WTO in its domestic courts in order to invoke the violation of the ADA, to challenge the imposition of ant-dumping duties.'[76] The court did not refer to the former *Ordinances for School Food Service in the Province of Jeollabukdo* case. Not surprisingly, scholars such as Ju[77]consider this decision as reinforcing their stand-point that WTO agreements generally do not have direct effect in the domestic Korean legal system.[78]

However, could this decision rest on the textual interpretation by the Court, correctly or incorrectly, of the specific provisions of the ADA as not being able to have direct effect, given that the Agreement specifically provides for an inter-state based system of resolving disputes relating to the ADA? In the US- Section 301 Trade Act,[79] the Panel was open to the fact that some WTO obligations may or may not produce the direct effect. The Panel observed, albeit in a footnote, as follows:

> We note that whether there are circumstances where obligations in any of the WTO agreements addressed to Members would create rights for individuals which national courts must protect, remains an open question, in particular in respect of obligations following the exhaustion of DSU procedures in a specific dispute (*see* Eeckhout, P., *The Domestic Legal Status of the WTO Agreement: Interconnecting Legal Systems*, Common Market Law Review, 1997, p. 11; Berkey, J., *The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting*, European Journal of International Law, 1998, p. 626). The fact that WTO institutions have not to date construed any obligations as producing direct effect does not necessarily preclude that in the legal system of any given Member, following internal constitutional principles, some obligations will be found to give rights to individuals. Our statement of fact does not prejudge any decisions by national courts on this issue.

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75. Supreme Court [S. Ct.], 2008Du17936 (S. Kor.).
76. *Id.*
77. Ju, *supra* note 68, at 39-41.
78. *Id.* at 3-41.
79. Section 301 Panel Report, *supra* note 1, at ¶ 7.72.

A related question to the direct applicability issue is whether foreign business enterprises registered in Korea and foreign nationals can invoke the provisions of the WTO agreements with respect to Korean legislation and practices as they relate to trade? In principle this seems possible given that the State Compensation Act of Korea provides that remedies under Korean law are available to foreigners, who are subject to such remedies being available also to a Korean national in a similar law suit in the country of the foreign national.[80] Thus, when this reciprocity condition is met, a foreign citizen or foreign enterprise can challenge the measures of the Korean government or local public entities directly in the Korean courts, and obtain redress.[81] Moreover, foreigners are also qualified to bring a suit according to the Civil Procedure Act.[82]

In sum, although there is no doctrine of *stare decisis* operating in Korea's civil law system, the jurisprudence of the courts, in particular, the Supreme Court carries weight. Given, however, the existence of some ambivalence in the interpretation of the deliberations of the courts and the seeming lack of consistency in the judgments – in the least, it can be observed that the jury is still out. It would be controversial to categorically assert that there is no chance for a non-state actor, whether or not a national, to claim rights reflected in the WTO agreements in the Korean domestic courts. Thus, although Korea does not appear to have institutionalized a comparable mechanism, such as the Section 301 in the US or the Trade Barriers Regulation in the EU, to enable non-state actors to voice concerns about illegal trade practices in third countries' direct applicability within Korea, to some extent, serves the purpose of arming the non-state actors with respect to Korean WTO law

80. Gukgabaesangbeop [State Compensation Act], Act No. 09803 art. 7 (Liability for Alien), Oct. 21, 2009, *translated in* http://elaw.klri.re.kr/eng_service/main.do (S. Kor.):

> "This Act shall apply only in cases where a mutual guarantee with a corresponding nation exists, if an alien is a victim".

81. Moon-soo Chung, *Implementation of the Results of the Uruguay Round Agreements: Korea*, *in* Implementing the Uruguay Round 393 (John H. Jackson & Alan Skyes eds., Clarendon Press & Oxford Univ. Press 1997).

82. Minsasosongbeop [Civil Procedure Act], No. 10373 art. 57 (Special Provisions for Litigation Capacity for Foreigners), July 23, 2010, *translated in* http://elaw.klri.re.kr/eng_service/main.do (S. Kor.):

> "In case where a foreigner has a litigation capacity under the laws of the Republic of Korea, he shall be deemed to have a litigation capacity, even in case where he does not have such capacity pursuant to the laws of his home country."

inconsistencies.

C. Brief Overview of Trade Disputes and Trade Policy Reviews

This section sets out in outline form, only the disputes Korea has been involved in thus far, along with a brief account of the number of times Korea's trade policy has been the subject of review in the WTO. The section is intended as background to Section 5 below wherein the relationship between the TPRM and Dispute Settlement is further discussed.

In the GATT era, Korea was involved only in two disputes.[83] In both cases, Korea was a respondent.

Table 1: Korea – Disputes in the GATT

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
Restrictions on imports of beef	Australia/Korea (BISD 36S/202) New Zealand/Korea (BISD 36S/234) United States/Korea (BISD 36S/268)			07.11.89
Anti-dumping duties on imports of polyacetal resins from the United States (BISD 40S/205)	United States/Korea (BISD 40S/205)			27.04.93

In the WTO system, as a respondent, Korea was involved in 12 cases set out below until 2012.[84]

83. WTO, Guide to GATT Law and Practice: Analytical Index 1040 (WTO & Bernan Press 1995).

84. *See* WTO, Dispute Settlement: Disputes by Country/Territory, *available at* http://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm.

Table 2: Korea – Disputes in the WTO as a Respondent[85]

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel/AB report circulated	Panel/ Appellate Body Report adopted
Measures Concerning the Testing and Inspection of Agricultural Products	U.S./Korea (WT/ DS3/1)	06.04.95	In consultations	
Measures Concerning the Shelf-Life of Products	U.S./Korea (WT/ DS5/1)	03.05.95	Mutually Agreed Solution notified: 20.07.95	
Measures concerning Bottled Water	Canada/ Korea(WT/ DS20/1)	08.11.95	Mutually Agreed Solution notified: 24.04.96	
Laws, Regulations and Practices in the Telecommunications Procurement Sector	EC/Korea (WT/ DS40/1)	05.05.96	Mutually Agreed Solution notified: 29.10.97	
Measures concerning Inspection of Agricultural Products	U.S./Korea (WT/ DS41/1)	24.05.96	In consultations	
Taxes on alcoholic beverages	EC/Korea (WT/ DS75/1) U.S./Korea (WT/ DS84/1)	02.04.97 23.05.97	17.09.98 AB report: 18.01.99	17.02.99 Implementation notified: 27.01.00
Definitive Safeguard Measure on Imports of Certain Dairy Products	EC/Korea (WT/ DS98/1)	12.08.97	21.06.99 AB report: 14.12.99	12.01.00 Implementation notified: 26.09.00

85. Table 2 is composed by the authors checking the cases listed in the WTO official website.

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel/AB report circulated	Panel/ Appellate Body Report adopted
Measures Affecting Imports of Fresh, Chilled and Frozen Beef	U.S./Korea (WT/ DS161/1) Australia/Korea (WT/DS169/1)	01.02.99 13.04.99	31.07.00 AB report: 11.12.00	10.01.01 Implementation notified: 25.09.01
Measures Affecting Government Procurement	U.S./Korea (WT/ DS163/1)	16.02.99	01.05.00	19.06.00
Measures Affecting Trade in Commercial Vessels	EC/Korea (WT/ DS273/1)	21.10.02	07.03.05	11.04.05 Implementation notified: 11.04.05
Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia	Indonesia/Korea (WT/DS312/1)	04.06.04	28.10.05 Art.21.5 Panel Report: 28.09.07	Compliance proceedings completed with finding(s) of non-compliance: 22.10.07
Measures Affecting the Importation of Bovine Meat and Meat Products from Canada	Canada/ Korea(WT/ DS391/1)	09.04.09	Mutually Agreed Solution notified: 19.06.12 Panel Report: 03.07.12	Settled or terminated (withdrawn, mutually agreed solution): 20.06.12

As a complainant, Korea has been involved in 15 cases set out below until 2012.[86]

86. *See* WTO, *supra* note 84.

Table 3: Korea – Disputes in the WTO as a Complainant[87]

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
Anti-Dumping Duties on Imports of Colour Television Receivers from Korea	Korea/U.S. (WT/ DS89/1)	10.07.97	Withdrawn on 15.09. 98	
Anti-Dumping Duty on Dynamic Random Access Memory Semi-conductors (DRAMs) of one Megabit or above	Korea/U.S. (WT/ DS99/1 and Corr.1 and Corr.2)	14.08.97	29.01.99 Art.21.5 Panel Report: 07.11.00	19.03.99 Mutually acceptable solution on implementation notified: 20.10.00
Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip	Korea/U.S. (WT/ DS179/1)	30.07.99	22.12.00	01.02.01 Implementation notified: 01.09.01
Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe	Korea/U.S. (WT/ DS202/1)	13.06.00	29.10.01 AB report: 15.02.02	08.03.02 Implementation notified: 18.03.03
Anti-Dumping Measures Regarding Polypropylene Resins	Korea/The Philippines (WT/ DS215/1)	15.12.00	In consultations	

87. Table 3 is composed by the authors checking the cases listed in the WTO official website.

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
Continued Dumping and Subsidy Offset Act of 2000	Korea/U.S. (WT/ DS217/1) (action also taken by Australia, Chile, the EC, India, Indonesia, Japan and Thailand)	21.12.00	16.09.02 AB report: 16.01.03	27.01.03 Authorization to retaliate granted: 26.11.04
Definitive Safeguard Measures on Imports of Certain Steel Products	Korea/U.S. (WT/ DS251/1)	20.03.02	11.07.03 AB report: 10.11.03	10.12.03
Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs)	Korea/U.S. (WT/ DS296/1 and WT/ DS296/1/Add.1)	30.06.03 and 18.08.03	23.01.04 AB report: 27.06.05	20.07.05 Implementation notified: 14.03.06
Countervailing Measures on Dynamic Random Access Memory Chips	Korea/EC (WT/ DS299/1 and WT/ DS299/1/Rev.1/ Add.1)	25.07.03 and 25.08.03	23.01.04	03.08.05 Implementation notified: 21.04.06
Measures Affecting Trade in Commercial Vessels	Korea/EC (WT/ DS301/1)	03.09.03	19.03.04	20.06.05 Mutually acceptable solution on implementation notified: 20.07.05
European Communities – Aid for Commercial Vessels	Korea/EC (WT/ DS307)	13.02.04	In consultations	

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
Japan – Import Quotas on Dried Laver and Seasoned Laver	Korea/Japan (WT/DS323)	01.12.04	Mutually agreed solution notified: 23.01.06	
Japan – Countervailing Duties on Dynamic Random Access Memories from Korea	Korea/Japan (WT/DS336)	14.03.06	13.07.07 AB report: 28.11.07	17.12.07 Authority for panel lapsed: 05.03.10
Use of Zeroing in Anti-Dumping Measures Involving Products from Korea	Korea/U.S. (WT/DS402/1)	24.11. 09	18.01. 10	24.02.11 Implementation notified: 19.12.11
Anti-dumping measures on corrosion-resistant carbon steel flat products from Korea	Korea/U.S. (WT/DS420/1)	31.01. 11	Panel established, but not yet composed: 22.02.12	

Korea has been involved as a third party on 53 occasions as set out below.[88] This Korean participation as third party reflects the domestic industry concerns, for example automobiles, computers, information technology. Additionally, Korea seems to shown an interest in systemic issues in areas of the WTO where it has a particular interest, for example trade remedies. The participation as a Third Party is thus understandably in line with the interests of the domestic non-state actors.

88. *See* WTO, *supra* note 84.

Table 4: Korea – Disputes in the WTO as a Third Party[89]

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
Export Financing Programme for Aircraft	Canada/Brazil(WT/ DS46/1)	19.06.96	14.04.99	20.08.99
Certain Measures Affecting the Automobile Industry	EC/Indonesia (WT/ DS54/1)	03.10.96	02.07.98	23.07.98
Certain Measures Affecting the Automobile Industry	Japan/ Indonesia(WT/ DS55/1)	04.10.96	02.07.98	23.07.98
Certain Measures Affecting the Automobile Industry	U.S./Indonesia(WT/ DS59/1)	08.10.96	02.07.98	23.07.98
Customs Classification of Certain Computer Equipment	U.S/EC(WT/ DS62/1)	08.11.96	05.02.98	22.06.98
Certain Measures Affecting the Automobile Industry	Japan/ Indonesia(WT/ DS64/1)	29 .11.96	02.07.98	23.07.98
Customs Classification of Certain Computer Equipment	U.S./U.K. (WT/ DS67/1)	14 .02.97	05.02.98	22.06.98
Customs Classification of Certain Computer Equipment	U.S./Ireland(WT/ DS68/1)	14.02.97	05.02.98	22.06.98
Certain Measures Affecting the Automotive Industry	Japan/Canada(WT/ DS139/1)	03.07.98	11.02.00	19.06.00
Anti-Dumping Duties on Imports of Cotton-Type Bed Linen	India/EC (WT/ DS141/13/Rev.1)	07.05.02	29.11.02	24.04.03
Certain Measures Affecting the Automotive Industry	EC/Canada (WT/ DS142/1)	17.08.98	11.02.00	19.06.00

89. Table 3 is composed by the authors by checking the cases listed the WTO official website.

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
Sections 301-310 of the Trade Act of 1994	EC/U.S. (WT/ DS152/1)	25.11.98	22.12.99	27.01.00
Anti-Dumping Measures on Certain Hot-Rolled Steel Products	Japan/U.S. (WT/ DS184/1)	18.11.99	28.02.01	23.08.01
Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe	EC/U.S. (WT/ DS214/1)	01.12.00	10.09.01 (Panel not yet composed)	
Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products	Japan/U.S. (WT/ DS244/1)	30.01.02	14.08.03	09.01.04
Export Finance Programme for Aircraft – Second Recourse to Article 21.5	Canada/Brazil (WT/ DS46/26)	19.01.01 (recourse to Article 21.5)	26.07.01	23.08.01
Provisional Safeguard Measures on Imports of Certain Steel products	U.S./EC (WT/ DS260/10	30.05.02	16.09.02 (Panel not yet composed)	
Sunset Reviews of Anti-Dumping Measures on Oil Country Tabular Goods	Argentina/U.S. (WT/DS268/1)	07.10.02	19.05.03	
Investigation of the International Trade Commission in Softwood Lumber	Canada/U.S. (WT/ DS277/1)	20.12.02	07.05.03	
Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")	EC/U.S. (WT/ DS294/1)	12/06/03	31.10.05	09.05.06

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
European Communities – Selected customs matters	United States (WT/DS315/1)	21.09.04	16.06.06	11.12.06
European Communities and certain member States – Measures affecting trade in large civil aircraft	United States (WT/DS316/1)	06.10.04		
United States – Measures affecting trade in large civil aircraft	European Communities (WT/DS317/1)	06.10.04		
United States – Measures relating to zeroing and sunset reviews	Japan (WT/DS322/1)	24.11.04	20.09.06	23.01.07
Brazil – Measures affecting imports of retreaded tyres	European Communities (WT/DS332/1)	20.06.05	12.06.07	17.12.07
Turkey – Measures affecting the importation of rice	United States (WT/DS334/1)	02.11.05	21.09.07	22.10.07
United States – Anti-dumping measure on shrimp from Ecuador	Ecuador (WT/DS335/1)	17.11.05	30.01.07	20.02.07
European Communities – Anti-dumping measure on farmed salmon from Norway	Norway (WT/DS337/1)	17.03.06	16.11.07	15.01.08
United States – Measures relating to shrimp from Thailand	Thailand (WT/DS343/1)	24.04.06	29.02.08	01.08.08

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
European Communities and certain member States – Measures affecting trade in large civil aircraft (second complaint)	United States (WT/DS347/1)	31.01.06	20.04.06, the DSB deferred the establishment of a panel.	
United States – Continued existence and application of zeroing methodology	European Communities (WT/DS350/1)	02.10.06	01.10.08	19.02.09
United States – Measures affecting trade in large civil aircraft (second complaint)	European Communities (WT/DS353/1)	27.06.05	31 .03.11	23.03.12
China – Measures affecting the protection and enforcement of intellectual property rights	United States (WT/DS362/1)	10.04.07	13.11.08	20.03.09
China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products	United States (WT/DS363/1)	10.04.07	12.08.09	19.01.10
European Communities — Tariff Treatment of Certain Information Technology Products	United States(WT/DS375/1) Japan(WT/DS376/1) Chinese Taipei(WT/DS375/1)	28.05.08	16.08.10	21.09.10
United States — Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products	Mexico(WT/DS381/1)	24.10.08	15.09.11	13.06.12

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
United States — Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil	(Complainant: Brazil)DS382	27.11.08	25.03.11	17 .06.11
United States — Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand	(Complainant: Thailand)DS383	26.11.08	22.01.10	18.02.10
United States — Certain Country of Origin Labelling (Cool) Requirements	(Complainant: Canada)DS384	01.12.08	18.11.11	23.07.12
United States — Certain Country of Origin Labelling Requirements	(Complainant: Mexico)DS386	17.12.08	18.11.11	23.07.12
European Communities — Certain Measures Affecting Poultry Meat and Poultry Meat Products from the United States	United States) DS389	16.01.09	Panel established, but not yet composed on 19.11.09	
United States — Certain Measures Affecting Imports of Poultry from China	Complainant: China)DS392	17.04.09	17.04.09	25.10.10
China — Measures Related to the Exportation of Various Raw Materials	Complainant: United States DS394 Complainant: European Communities DS395 Complainant: Mexico DS398	23.06.09	05.07.11	22.02.12

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
United States — Anti-dumping Measures on Certain Shrimp from Viet Nam	Complainant: Viet NamDS404	01.02.10	11.07.11	02.09.11
Canada — Certain Measures Affecting the Renewable Energy Generation Sector	Complainant: Japan) DS412	13.09.10	19.12.12	
China — Certain Measures Affecting Electronic Payment Services	(Complainant: United States)DS413	15.09.10	16.07.12	31.08.12
China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States	Complainant: United States)DS414	15.09.10	15.06.12	16.11.12
United States — Anti-Dumping Measures on Shrimp and Diamond Sawblades from China	Complainant: China)DS422	28.02.11	08.06.12	23.07.12
Canada — Measures Relating to the Feed-in Tariff Program	Complainant: European Union)DS426	11.08.11	19.12.12	
China — Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum	(Complainant: United States)DS431 Complainant: European Union) DS432 Complainant: Japan) DS433	13.03.12	Panel composed on 24 .09.12	

Dispute	Complainant/ respondent (WTO document)	Request for consultation	Panel report circulated	Panel/ Appellate Body Report adopted
Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging	Complainant: Ukraine)DS434	13.03.12	Panel established, but not yet composed on 28.09.12	
United States — Countervailing Duty Measures on Certain Products from China	(Complainant: China)DS437	25.05.12	Panel composed on 26.11.12	
China — Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States	Complainant: United States)DS440	0507.12	23.10.12, the DSB established a panel.	

Korea has submitted in the Doha Round of trade negotiations a proposal for reform of the WTO dispute settlement system. Korea submitted a proposal relating to the prompt compliance with the recommendations or rulings of the Dispute Settlement Body in 2002.[90]

The dispute settlement system and TPRM in accordance with their terms are in the WTO distinct and serve formally different purposes. The former's resolution of disputes and adherence to WTO agreements and the latter are both essentially transparency mechanisms wherein a member's trade policies and practices are evaluated regularly[91] by the membership as a whole 'against the background of the wider economic and developmental needs, policies and

90. WTO, Contribution of the Republic of Korea to the Improvement of the Dispute Settlement Understanding of the WTO: Communication from the Republic of Korea, TN/DS/W/11 (July 11, 2002). *See* Trade Policy Review Mechanism, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 3, 1869 U.N.T.S. 480 (1994) [hereinafter "TPRM"].

91. *See* WTO, Trade Policy Review, *available at* http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm.

objectives of the Member concerned, as well as of its external environment'.[92] While the frequency of the trade policy reviews depends on the country's size, Korea has been reviewed every four years.[93] Until now, there have been five reviews of the Republic of Korea – in 1996, 2000, 2004, 2008, and lastly, 2012. The first TPR in 1996 emphasized Korea's strong economic growth through trade liberalization and attraction of foreign investment.[94] In the second TPR in 2000, the Korean restraint in introducing protectionist measures in the face of a recession, along with the introduction of far-reaching market-based reforms were appreciated.[95] The third TPR in 2004 focused on Korea's recovery from the economic crisis through the introduction of some "wide-ranging structural reforms and the maintenance of outward-oriented trade and investment policies."[96] In the fourth TPR in 2008, it was observed that Korea's export-oriented strategy had shifted somewhat from the unilateral MFN tariff liberalization to the intensive pursuit of bilateral free-trade agreements.[97] Finally, in the most recent TPR in 2012, it has been observed that Korea escaped from the sharp depreciation of the exchange rate during 2008 and that its export-driven economy had 'rebounded without resorting to restrictive trade measures.'[98]

For each review, two documents are prepared: a policy statement by the government of the member under review, and a detailed report written independently by the WTO Secretariat. These reports are then discussed by the Trade Policy Review Body (TPRB) of the WTO. The appraisal of the TPRB is also set against the background specific written questions put to the member under review by interested/concerned members of the WTO.

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92. *See* Marrakesh Agreement, *supra* note 6, at annex 3.
93. MOFAT, *supra* note 20.
94. Trade Policy Review Body, Trade Policy Review-Republic of Korea: Minutes of Meeting/Addendum, WT/TPR/S/19 (Aug. 28, 1996).
95. Trade Policy Review Body, *Trade Policy Review*, *Report by the Secretariat*, *Republic of Korea*, WT/TPR/S/73 at vii (Aug. 28, 2000).
96. Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat, Republic of Korea*, WT/TPR/S/137 at xi (Aug. 18, 2004).
97. Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat, Republic of Korea*, WT/TPR/S/204 at 23 (Sept. 3, 2008).
98. Trade Policy Review Body, *Trade Policy Review: Report by the Secretariat, Republic of Korea*, WT/TPR/S/268 at vii (Aug. 15, 2012).

III. Part Two: Analysis

A. Concerns Raised in the Trade Policy Review Mechanism

From the perspective of the non-state actor trade policy, reviews are important for a number of reasons. First, the reports are a rich source of general information about a member's foreign trade regime, in this case, Korea. They cover the general economic environment; the foreign trade regime, including the constitutional and institutional framework; trade laws, regulations and international trade agreements; trade policy by measures such as customs procedures and tariffs; and finally, trade policy by sectors. Moreover, they also touch upon trade related issues such as competition policy, labor standards and banking supervision. Second, trade policies bring to bear the collective assessment of the membership on issues of specific interest to non-state actors including the responses of the member being reviewed to that analysis. Third, trade policy reviews can be a medium through which the non-state actor can more readily advance their stand points. Thus, members are less likely to deny the communication of the particular concern of the non-state actor in the forum of the review then instigate a costly dispute settlement proceeding to resolve that concern. Korean trade policy reviews present a good opportunity for non-state foreign actors within Korea to bring to bear their concerns through their respective home State in the forum of the review. By the same token the Korean government is doubtless open to channel the concerns of Korean non-state actors in the respective reviews of other members of the WTO implicated in the concern. However, there is nothing stopping a Korean non-state actor to directly provide material to the Trade Policy Review Division of the WTO information that may inform the WTO Secretariat's Report where a direct approach has not been effective.

The review process involves not only a focus on trade policy but also on trade law and practice. Indeed, members do raise questions that are specific in terms of measures and practices and their consistency with the WTO agreements. Moreover, these questions are directly of concern to the non-state actors. For example in the recent 2012 trade policy review of Korea, Korea responded to the following questions[99] arising from the WTO Secre-

99. *See* Trade Policy Review Body, *Trade Policy Review: Republic of Korea*, *Record of the Meeting/Addendum*, WT/TPR/M/268/Add.1 at 23 (Nov. 23, 2012).

tariat Report, as follows.

With respect to concerns expressed by Canada on agricultural tariff quotas:[100]

> It is noted that Korea's fill ratios were low for tariff quotas of several agricultural products. The consistently low fill ratios even with low in-quota tariffs, suggests that their administration and allocation may be restricting imports. Lack of sufficient domestic demand has been cited as one of important factors for these low fill ratios. However, The Secretariat Report explains that tariff quotas are administered or allocated by twenty four different organizations, including some state-trading enterprises and industry associations that are often owned or controlled by domestic producers who compete with the imported products in question.
>
> 5. *In light of the potential conflict of interest that can arise from this situation, could Korea please explain what measures it takes to ensure that tariff quotas are administered in a fair, open and transparent manner that does not constitute a restriction on international trade?*
>
> **Answer**: TRQ administration is carried out in 3 ways: state trading, quota auction, and allocations to end-users.
>
> - The state-trading and quota auctions ensure open competitive bidding by applying the corresponding provisions on the competitive bidding under the Act on Contracts to which the State is a Party.
>
> - Under the system of Allocations to end-users, the TRQ is allocated based on a first-come-first-serve basis or import history. Allocation standards and procedures are being implemented in a transparent and fair manner.
>
> The Korean government frequently monitors TRQ fill rates and the

100. *See also* similar concerns expressed by Australia.

administrative system in an effort to enhance transparency, fairness and efficiency in TRQ administration that includes TRQ allocation standards and procedures.

With respect to concerns by China in relation to anti-dumping:

China believes that there is unfair and unjust practice in Korea's decision of the sunset review on *the Chinese ceramic tile anti-dumping case. Please explain in this respect.*

In June 2011, the Korean Trade Commission carried out the sunset review on the antidumping case about the ceramic tiles originating from China. The HS codes of the products involved in the case were 69071010.00, 69071090.00, 69079010.00, 69079090.00, 69081010.00, 69081090.00, 69089010.00 and 69089090.00. In June, 2011, the Korean Trade Commission issued a decision on levying anti-dumping duties on Chinese ceramic tile manufacturing enterprises that range from 9.14% to 29.41%. Other suppliers were levied at rate of 16.07%. And this anti-dumping measure was extended for another three years.

In this anti-dumping investigation against Chinese ceramic tiles, Korea judged that some Chinese enterprises that actively responded to the complaint be levied duties of higher rates than those did not respond. Please explain the reason for such a decision.

Answer: The Korea Trade Commission (KTC) calculates individual dumping margins for suppliers who were selected to be investigated, whereas it applies the weighted average margin of dumping established with respect to the selected suppliers to the 'other suppliers' (who were not selected to be investigated or exported the subject merchandise after the period of investigation) in accordance with the Article 9.4 of the WTO Antidumping Agreement and the Article 17.2 of Enforcement Regulation of the Customs Law of Korea. Therefore, a dumping margin of 'other suppliers' is in its nature supposed to be determined between the highest and lowest dumping margins of selected suppliers. Hence, the methodology used to cal-

culate the dumping margin of 'other suppliers' was consistent to the related legislation and, thus, does not fall into an unfair and unreasonable practice.

With respect to concerns in relation to Korean tax law relating to foreign banks and import duties on coal raised by China:

12. Korean tax law requires that an unincorporated branch of a foreign bank should select the application of either capital adequacy ratio or capital-to-assets ratio. Are such measures consistent with the WTO national treatment principle? If a branch selects the application of capital adequacy, is it reasonable that Korea only accepts that such branch of a foreign bank adopts the same high-level approach of its parent bank? If it selects the application of capital-to-assets ratio, will the Korean practice in which tax is levied on a branch of a foreign bank, whenever such a ratio of a branch exceeds that of its head office, cause substantial unfairness between the institutions? In practice, does the requirement that application be made before year-end take into account the availability of relevant data? In sum, does Korea consider the cancellation or adjustment of relevant measures?

Answer: The requirement reflects the OECD's 2010 Report on the Attribution of Profits to Permanent Establishment, and Korea does not deem its requirement in violation of the national treatment obligations under the WTO Agreement.Coal imports are duty free but a 10% VAT is levied on imported bituminous coal while domestic anthracite coal is exempt.

<u>*Question 14*</u>*: Korea levies VAT on import of bituminous coal, but not on domestic coal of the same type, which is inconsistent with WTO's principle of national treatment. Please explain the reason.*

Answer: While Korea imposes a 10% VAT on bituminous coal, anthracite coal is subject to no taxation regardless of whether it is domestically produced or imported. Since bituminous and anthracite coal are different products, Korea's VAT taxation on bituminous coal does not constitute a violation of the WTO principle of national

treatment.

With respect to concerns relating to GMO labelling raised by Canada.

Korea notes that as of January 2012, genetically modified corn, soybeans, cotton, rape and sugar beet (including sprouts originating from these items) as well as foods suitable for consumption containing these products and notified as such by the KFDA, are subject to mandatory GMO labelling requirements.

1. *Would Korea please confirm that all its GMO labelling requirements are aligned* with *its WTO obligations and based on science? Would Korea please provide a list of all its Regulations requesting GMO labelling requirements?*

Answer : Korea's GMO labelling requirements for foods and agro-fishery products, aligned with Korea's international obligations, are mainly controlled by the following laws and regulations: the Food Sanitation Act, the Labeling Standards for Genetically Modified Foods, the Agricultural and Fishery Products Quality Control Act, the Enforcement Decree of the Agricultural and Fishery Products Quality Control Act, and the Guidance on the Labelling of Genetically Modified Agricultural and Fishery Products.

There are two observations that need to be made here with respect to these kinds of specific issues raised by members of the WTO in the review process. First, the focus on trade policy reviews in the framework of a consideration of trade disputes calls for an explanation as to the nature of trade policy reviews. There has been much focus on the TPRM in this respect and perhaps the most recent and relevant analysis is that of Marc D. Froese's echoing observations made by Asif H. Qureshi in his earlier writing as follows:[101]

101. *See* Marc D. Froese, *Between Surveillance and Transparency: Trade Policy Review and North American Dispute Settlement at the WTO* (Apr. 1, 2012), *available at* SSRN: http://ssrn.com/abstract=2038036 or http://dx.doi.org/10.2139/ssrn.2038036 (last visited Jan. 13, 2013) and Asif H. Qureshi, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or Enforcement*, 24 J. World Trade 147-160 (1990).

> The Trade Policy Review Mechanism has been conceptualized as a body for enhancing multilateral transparency that encourages access to information and voluntary compliance with dispute settlement and as an institution of surveillance that attempts to induce compliance with treaty obligation.

Thus, the issues raised in the Korean trade policy reviews by members with respect to the consistency with WTO obligations can be considered as ends in themselves in as much as they demonstrate the manner in which certain issues of concern can be explained and ironed out as between members and the subject member of the review. These concerns find their day in the TPRM and may never be followed up further. The whole process, however, encapsulates in reality, a manner in which member concerns relating to the consistency with the WTO obligations are shared and discussed. Second, the juxtaposition of trade policy reviews and dispute settlements in the WTO focuses attention on the relationship between the two mechanisms. In other words, the specific concerns raised by members in the reviews could be seen in terms of their relationship with dispute settlement– somewhat like 'potential or nascent disputes.' The relationship between trade policy reviews and dispute settlement however has been analyzed in one study as follows. First, generally in practice in terms of specific issues raised in the reviews it has been observed that there is a weak correlation between the discussion of the issue in the review and it being taken up further through the WTO dispute settlement system.[102] This does not however imply necessarily that issues raised in the reviews are not taken up subsequently in dispute settlement or will not be taken up in future or are precluded from being taken up in the future.

Certainly in the case of some of the Korean reviews and subsequent cases, there are examples of a positive correlation. Thus, first in the in the 1996 Korean Trade Policy Review set of Questions and Answers the EU queried the difference in Liquor Tax rates and Education Tax rates applied to various types of alcohols requesting Korea to indicate how this difference will be reduced in future.[103] This issue was the cause for the EU to bring subsequently

102. *See* Froese, *supra* 101, at 77.

103. Trade Policy Review Body, *supra* note 94, at 35 ¶ 24.

the dispute, *Korea-Taxes on Alcoholic Beverages,*[104] before the DSB in 1997. A second, example is *Korea-Measures Affecting Imports of Fresh, Chilled and Frozen Beef* case in 1999. The claimant of the case, Australia, had already raised the issues related with deregulation of the beef industry in the Korean Trade Policy Review of 1996 set of Questions and Answers.[105] Third, in the 2008 Korean Trade Policy Review set of Questions and Answers,[106] Canada had raised a question on Korea's "Measures Directly Affecting Imports: Standards and other technical requirements" especially related with meat products.[107] Subsequently in 2009, Canada requested a consultation in the WTO dispute settlement system with respect to the matter raised in the case *Korea-Measures Affecting the Importation of Bovine Meat and Meat Products from Canada.*[108]

Second, general concerns that preoccupy the members in the particular review, for instance the manner of the use of trade remedies generally are more likely to be the kind of issues that will be raised further in the dispute settlement system.[109]Thus, in passing here it may be noted that in the latest 2012 Trade Policy Review of Korea many questions were raised in relation to the Korean agricultural sector[110], subsidies and telecommunication services.[111]

In terms of the nature of the Korean responses in the reviews to particular issues raised by members of the WTO it is difficult to proffer any clear conclusions. The Korean responses are in some ways typical of general responses made by subjects of reviews in the WTO. The responses tend to be

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104. Panel Report, *Korea-Taxes on Alcoholic Beverages,* WT/DS75/1 (Sept. 17, 1998) (*adopted* Feb. 17, 1999).

105. Trade Policy Review Body, *supra* note 94, at 2, question 2.

106. Trade Policy Review Body, *Trade Policy Review-Republic of Korea: Minutes of Meeting / Addendum*, WT/TPR/M/204/Add.1 (Dec. 1, 2008).

107. *Id.* at 34.

108. Request for Consultations by Canada, *Measures Affecting the Importation of Bovine Meat and Meat Products from Canada,* WT/DS391/1 (July 3, 2012) (notified Mutually Agreed Solution June 19, 2012).

109. *See* Froese, *supra* note 101, at 77; Qureshi *supra* note 101, at 77.

110 'The agriculture sector remains sensitive and subject to self-sufficiency policies aimed at addressing food security, especially for rice, and other "non-trade" concerns through, *inter alia,* the modernization of agricultural facilities and R&D. Trade Policy Review Body, *supra* note 98, at 111.

111. For example, questions by Australia, Singapore, Brazil, etc. *See* Trade Policy Review Body, *supra* note 99.

general, economical and generally defensive. Nevertheless, the responses could in some measure be of value to non-state actors in subsequent dealings with the member in question.

B. Recent disputes involving Korea in the WTO Dispute Settlement System - 2003-2012

The focus herein on the recent disputes in which Korea has been a respondent, is intended mainly to illustrate how seemingly diverse cases, impact upon, even in the manner of the conduct of a defense, the interests of the non-state actors. In such circumstances, the responding member State is a custodian of the non-state interests, as much as the overall interests of the State. This custodianship involves not merely the domestic non-State economic and non-economic interests but also extends to interests that have a universal value or interests of non-state non-nationals whose vulnerability within the State, where this is the case, calls for a special responsibility on the part of the State, for the overseeing of, at any rate a minimum level of level playing fields, as for instance of due process, in the conduct of anti-dumping proceedings.

Korea – Measures Affecting Trade in Commercial Vessels (WT/DS273) (2005)

This case seems to have been conducted with some vigor with a number of procedural points raised by Korea at the outset. It was not however appealed. The case has important elements which touch upon the framework within which non-state actors exist and operate in international trade. One particular feature of note is the focus in the case on the criteria to distinguish between public and private entities along with the scope of the market within which they operate. First, from the perspective of the non-state actor the need for clarity in the identification as between a public body and a private enterprise is important. The particular genre of entity operating in the market can raise presumptive capacities of the entities in the manner in which they are able to operate and therefore compete in the market. Level playing fields call for transparency with respect to the kind of actors non-state actors are competing with – whether or not there is an existing non-state constituency or one that is potential. The Agreement on Subsidies and Countervailing Measures

(the SCM Agreement) serves to afford fair competition not only to foreign competitors but also domestic competitors affected as well as foreign competitors operating within the domestic market. Moreover, the object of fair competition is to ensure efficiency within the sector, thus lessening the general burden of taxation. Competition affords greater choice and quality to consumers. The SCM also ensures competitive opportunities for all those engaged in the economy, not just those in the particular sector, to compete for the scarce resources within the country. State revenue saved from subsidies, albeit subsidies that are specific,[112] become the subject of claims for use in other respects, in which all sectors engaged in the economy (including those not actively engaged) can compete equally for its re-distribution.

Thus, the spectrum of the constituency of non-state actors that the SCM is concerned with ranges from foreign competitors to domestic competitors to consumers and tax payers. And the kind of interests of this spectrum of the relevant constituency ranges from fair opportunity to compete, greater choice and quality of merchandise or service; to lesser burdens of taxation to the fulfillment of legitimate welfare expectations through appropriate governmental expenditure. Therefore it would be reasonable to infer from this that reasonably responding to claims under the SCM Agreement need to take into account this spectrum of relevant constituency and interests. The danger with disputes involving the SCM Agreement is that the claims there under strike at the very heart of the State apparatus; the State conduct is at the front line of the claim. There is therefore the need for some degree of care and detachment for the conduct of a defense in defending such a claim such that the full range of the interests of the relevant constituency of the State is taken into account in the management of the particular conflict.

In this case Korea argued that KEXIM (the Export-Import Bank of Korea) the entity the EU alleged was involved in subsidization in the Korean shipbuilding industry in contravention of the SCM Agreement was not a 'public body'. According to Korea a public body is one which:[113]

(i) does not carry "a business equivalent to that of a private operator";

112. *See* Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R at ¶ 363 (Oct. 22, 2010).

113. *See* Panel Report, *Korea- Measures Affecting Trade in Commercial Vessels,* WT/DS273/R (Mar. 7, 2005) (*adopted* Apr. 11, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/273r_a_e.pdf.

(ii) "acts in an official capacity, or is engaged in governmental functions";

(iii) has not been "set up for the specific purpose of meeting needs of an industrial or commercial nature through the supply of goods and services on markets which are open to other public or private operators under fully competitive conditions." Thus, "if financing is offered as part of a commercial program by a para-statal entity, it is presumptively non-governmental…";

(iv) according to Article 5 of the International Law Commission's Articles on State Responsibility "is empowered by the law of the State to exercise elements of the governmental authority." According to Korea this test is "based on the substance of what an entity is required to do rather than on questions of form such as whether a statute is a 'public statute' or not."

(v) is under government control;

(vi) does not include "an entity principally engaged in supplying financial services on commercial terms" as per paragraph 5 (c)(i) of the GATS Annex on Financial Services.

In short Korea argued for criteria to distinguish between a public body and a private entity that emphasized the nature of the engagement/functions performed by the entity in question. The Panel on the other hand deliberated as follows:[114]

> We cannot accept Korea's approach because it would mean that at different times, the same financial entity could be both a public and a private body, depending on how that entity were conducting itself in the market. Thus, on one day the entity could provide financing on market terms and constitute a 'private' entity, whereas on the next day it could provide financing on market terms and constitute a 'public' body.

From the perspective of the non-state actor this must surely be the right approach. The enforcement of all the rights of relevant stakeholders configured under the SCM is best served by transparent and predictable criteria for the

114. Panel Report, *supra* note 113, at ¶ 7.45.

identification of market and non-market based entities. A shape shifting entity that criss-crosses the private and public domain is more difficult to take to account in terms of the interests' configured under the SCM and which the member is a custodian of during the process of conducting its defense. The Panel concluded with respect to the criteria as follows:[115]

> In our view, an entity will constitute a 'public body' if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1 (a) (1) of the SCM Agreement.

Since this case the Appellate Body has deliberated at length on the meaning of public body in the *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (Oct. 22, 2010).[116] Briefly, the Appellate Body adumbrated the following considerations as being relevant in expounding on the meaning of 'public body.' First, the Appellate Body observed that the concept of 'public body' shares certain commonalities in its meaning with that of the term 'government.'[117] Second, that 'the performance of governmental functions, or the fact of being vested with, and exercizing, the authority to perform such functions are core commonalities between government and public body.'[118] The focus of this criterion enunciated is not merely *de jure* but also *de facto*. The Appellate Body thus expanded on the meaning of 'public body' to include any entity that performed governmental functions regardless of how it was vested with those functions; if this was borne out by an examination of the relationship as be-

115. *Id.* at ¶ 7.50.

116. *See* Panel Report, *supra* note 112, at ¶ 363 onwards. It should be made clear the Appellate Body's actual pronouncement here is not relevant to the point being made in this article namely that there is a non-state dimension here which the member needs to take on board in managing its defense. If the Appellate Body's pronouncement in substance on the meaning of 'public body' here detracts from taking the non-state actors' interests into consideration it is equally flawed if this is the case. This is not the case here though.

117. *Id.* at ¶ 286-89.

118. *Id.* at ¶ 290.

tween the government and the entity.[119] However, the Appellate Body does not appear to endorse the displacement of a characterization as a public body 'depending on how that entity was conducting itself in the market.'

Korea - Antidumping duties on Imports of Certain Paper from Indonesia, WT/DS312/R (Oct. 28, 2005) & Korea–Anti-Dumping Duties on Imports of Certain Paper from Indonesia. Recourse to Article 21.5 of the DSU by Indonesia, WT/DS312/RW (Sept. 28, 2007)

This case raises no significant questions of law as such. The subject matter however is directly towards the consequence to non-state actors as it is focused on the manner of the imposition of anti-dumping duties by Korea at the instigation of the Korean domestic industry on the imports of certain types of paper from certain enterprises in Indonesia. One domestic constituency that anti-dumping redress is aimed at is of course the affected domestic industry. However, the Anti-dumping Agreement (AD Agreement) acknowledges the legitimacy of consumer voice in the anti-dumping determinations. Moreover, the AD Agreement is an act of 'empowerment' arming the State to protect domestic non-state actors against 'foreign non-state actors' without the inter-face of an 'independent' intermediary involved in the investigation and determination of dumping and the imposition of anti-dumping duties. There is therefore a heavy burden on the part of the State in the exercise of its role in the anti-dumping process to act judiciously – with due process and under the rule of law. This is essentially the import of the myriad of detailed technical and procedural provisions of the AD Agreement aimed at safeguarding due process for the foreign non-state entities potentially in a vulnerable position at the behest of a foreign regime with vested interests in the proceedings. The discharge of this heavy burden is the import of the AD Agreement. Moreover, counter-intuitively, the AD Agreement is also configured so as not to shelter the domestic industry from fair competition. Thus, the beneficiary of the heavy burden of the 'judicious' office is also the domestic industry. The defense therefore in anti-dumping litigation in the WTO, indeed at the domestic level of the conduct of the anti-dumping investigation, calls for a nuanced defense that takes into account this configuration of interests and responsibilities.

119. *Id.* at ¶¶ 317-18.

In this case the Panel engaged in examining the manner of the investigation and the calculation of the dumping margin by the Korea Trade Commission (KTC). The Panel rejected the majority of claims made by Indonesia but concluded on four claims against Korea. The latter involved the failure by the KTC to corroborate information when it was obtained from secondary sources in the calculation of dumping margins; failure to disclose certain information to the foreign exporting companies the subject of anti-dumping investigation; the failure on the part of the KTC to evaluate adequately the factors that caused injury to the domestic Korean industry; and finally by failing to require good cause to be shown with respect to information submitted by the Korean domestic industry in its application for the imposition of anti-dumping duties.[120] In short, KTC's response was found wanting in the manner in which it processed information and the manner in which it afforded the Indonesian companies the subject of investigation the opportunity to explain their corporate behavior.

In order to implement the Panel decision KTC engaged in a new anti-dumping proceeding. Indonesia claimed that these new anti-dumping proceedings were also flawed in a number of ways in terms of the AD Agreement and the original Panel decision and it therefore commenced further proceedings in the WTO for the non-implementation of the original Panel decision. The new Panel found again the KTC proceedings wanting in that KTC had not judiciously processed some of the relevant information, and not afforded adequate opportunity to some Indonesian exporters to defend their interests. Some of the other claims made by Indonesia were dismissed.

Korea – Measures Affecting the Importation of Bovine Meat & Meat Products from Canada, WT/DS391/R (July 3, 2012)

This was a case arising as a consequence of a complaint made by Canada in 2009 with respect to a Korean ban on the importation of Canadian bovine meat and meat products, in order to protect against bovine spongiform encephalopathy (BSE).[121] Canada alleged that the ban was contrary to the

120. *See* Panel Report, *Korea -Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R (Oct. 28, 2005) (*adopted* Nov. 29, 2005), *available at* http://www.wto.org/english/tratop_e/dispu_e/312r-a_e.pdf.

121. BeobRyeong [Administrative Order], No.51584-476, May 21, 2003 and Gachukjeonyeomyebangbeop Ilbugaejeongbeomnyul [Amending Korea Act No. 9130 on the Prevention of Contagious Animal Diseases (Livestock Epidemic Prevention Act)], Act No. 9130, Sept. 9, 2008 (S. Kor.).

Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and Articles I, III and XI of GATT 1994. In 2009, a Panel was established and in 2010 a draft interim report was issued to the parties. However, in June 2012 the parties notified to the Dispute Settlement Body a mutually agreed solution[122] which involved a lifting of the ban. The mutually agreed solution read in relevant part reads as follows:

> In accordance with this mutually agreed solution, Korea confirms that it is applying the Import Health Requirements for Canadian Beef published in the Korean Gazette on January 20, 2012, as Notice 2012-3. Canada and Korea confirm that these requirements embody those on which they agreed prior to the suspension of the above-referenced dispute on July 4, 2011, which were notified to the DSB and circulated to WTO Members as document WT/DS391/8.

On the face of it this case is about the potential risk posed to the health of people generally and individually from BSE. One might suppose that in such cases the State is relatively free from the pressure of vested domestic economic interests, in particular the domestic industry, in the process of the management of the conflict under the WTO dispute settlement system. The value defended in such cases is of non-trade concern; and whilst requiring rigor in its defense it also has to be responsive to rational discourse. The health interests of the individual, and the people as a whole, are set in the WTO agreements, and can be invoked at the option of the State to trump its trade obligations in the WTO.

However, once the State has in its domestic system opted for the particular non-trade value that is recognized in the WTO as an exception to trade obligations – does this not raise a responsibility on the part of the State to defend the value it has enacted in its domestic system? The option to invoke the exception as a defense arguably crystallizes into something more compelling in its invocation when there is a domestic measure that sets out to realize it. The interests of the individual to be free from health risks are formulated against the background of the permissive rules for the realization of such objectives in the WTO. There is a legitimate expectation therefore on the part of indi-

122. Mutually Agreed Solution, *Measures Affecting the Importation of Bovine Meat and Meat Products from Canada*, WT/DS391/9 (June 21, 2012).

viduals that the State will not allow the erosion of such rights through the non-invocation of such a defense within the context of managing conflicts in the WTO. Is the member not estopped from not invoking the exception when in its domestic system it has sought to achieve the particular objective? Does the good faith obligation[123] to perform international undertakings not involve the implementation of those undertakings as informed and qualified by the exceptions? Would only being bound by the trade obligations whilst ignoring the rights to invoke certain exceptions not partake of a distorted and biased manner of performing the undertakings which are set within a framework of a balance as between general obligations and exceptions? In any event, be that as it may, in this case Korea defended its position and eventually was persuaded to take a different course.

In conclusion it would not be appropriate to draw any firm conclusions about the manner in which Korea tends to act as a respondent. Indeed, it would be inappropriate to ascribe attributes or traits to the Korean practice of responding in dispute settlement. The cases are too few in the period covered. Each case is set in its own epoch and milieu. Moreover, there are information deficits with respect to the pressures from within and outside which may or may not have informed the ultimate conduct of the cases. Two observations may nevertheless be made. First, that Korea has on occasions fought vigorously its corner; has dragged its feet in the implementation process; and shown willingness to settle. Second, the cases illustrate in varying degrees, as diverse as they may be, that that there are values that implicate the interests of non-state actors both within and out of the State's constituency, which the State is the custodian of, and with which it needs to tamper and inform the conduct of its defense.

IV. Conclusions

This paper has focused on the Korean foreign trade regime in terms of how the State apparatus receives inputs in trade policy from the non-state sector; in terms of how the Korean constitution receives the WTO agreements in the

123. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 art. 26: "Pacta sunt servanda" 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

domestic legal system; in terms of how the Korean courts have considered the question of the direct applicability of WTO law in the Korean domestic legal system from challenges brought by non-state actors; in terms of the relevance of the issues raised in trade policy reviews of Korea to non-state actors; in terms of the relationship of the trade policies to disputes raised in the dispute settlement system; and finally, in terms of the relevance to non-state actors of issues considered in the disputes in which Korea has acted as a respondent.

This theme of reception and response from the perspective of the non-state actor has yielded the following conclusions. First, that the Korean domestic jurisprudence is not very clear as to the direct effect of WTO law in the domestic legal system, although seemingly, there appears to be hope, scope and evidence for such effect. Second, the trade policy reviews do have relevance for non-state actors and there is a case for public awareness and debate within Korea of the trade policy reviews before and after the conclusion of the reviews, as indeed in all member States of the WTO. Third, the management of disputes in the WTO, in particular, the conduct of a defense of a case, must be measured, such that the interests of the non-state actors also inform the conduct of the defense of a case. The member state is the custodian of all the interests that are configured in the WTO agreements and therefore has a responsibility in ensuring that the management of conflicts by the State, whether in the DSB or the TPRB, involves the due consideration that the interests of the non-state actors calls for. Finally, the process of conflict management exists in a continuum that includes domestic litigation, trade policy reviews and the dispute settlement process in the WTO.

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