I. МИЛЛИЙ ТАРАҚҚИЁТ ТАМОЙИЛЛАРИ
Принципы национального развития
Principals of national development

RECENT CHALLENGES TO THE INTERNATIONAL TRADE REGIME AND POLICY RECOMMENDATIONS

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Abstract: *Since the end of the Second War, the WTO and its predecessor, GATT, have contributed greatly to promoting global trade. Regional Trade Agreements are mainly functioning within the framework of the WTO. Since 2017, however, the international trade regime has faced serious challenges. Major trading countries are increasingly resorting to unilateral trade actions which are prohibited under WTO rules to deal with "unfair practices" by other trading partners. The strategic competition between the two largest economies in the world have been significantly affecting their respective trade policies. In order to understand the current challenges to the international trade regime and how the regime could develop in the future, it would be useful to consider the US trade policy because it has been playing a leadership role in trade liberalization in the post-World War II era.*
Considering the current situation, it is also necessary for WTO members and those countries applying for the membership of the WTO to consider how they can pursue their trade policy to promote trade and economic growth given the limits of the current international trade framework. More active public participation in developing trade agreements, more active use of trade agreements by businesses and more strengthened national expertise in international trade law could be such policy options to deal with today's challenge and the transition.

Keywords: *new international* trade regime, trade war, WTO, RTA, FTA, US trade policy

I. Introduction

The launch of the World Trade Organization (WTO) system in January 1995 as a result of the Uruguay Round negotiations provided new hope for the international trade community, and the results over the past two decades have not disappointed. The international trade volume has risen tremendously, and an increasing number of trade disputes have been resolved through the newly strengthened WTO dispute-settlement mechanism. However, the international community is now witnessing very significant changes in the world trade order.

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Major trading countries have been imposing unilateral actions that are prohibited under WTO rules. They have been taking retaliatory measures against each other, escalating into a trade war. In particular, competition and rivalry between the two largest economies in the world have been significantly affecting their respective trade policies. This article will explore how recent circumstances have been affecting the current legal system of international trade and, eventually, determine what kind of "new wineskins" we will need to store "new wine."

The starting point will be to examine the role of the United States in the formation of the current WTO system. Then, the process of the negotiations leading up to the accession of China to the WTO and the final agreement in 2001 will be reviewed. After analyzing these past events, the current situation of the US trade policy under the Trump and the following Biden administrations will be considered, focusing on general characteristics and then specific issues that the administrations have raised, in particular, against China's allegedly unfair practices. Based on this analysis, a prediction on the future international trade regime will be attempted. Finally, several policy recommendations on how to deal with this time of challenge and transition will be considered.

II. The US and China in the Current International Trade Regime

It is generally acknowledged that the US took the lead in the post-World War II efforts to establish a multilateral trading system, represented by GATT and the WTO. It is true that the US played a leadership role to establish a rules-based multilateral trading system under its broader Bretton Woods system and, as a result, the GATT system commenced in 1947 despite the failure to proceed with the original idea to establish the International Trade Organization (ITO). On behalf of US business interests, the US government also played an active role to achieve expansion of market access and introduce new rules in the areas of agriculture, intellectual-property rights (IPR) and services trade during the Uruguay Round negotiations.

Nevertheless, there were also some cases where the US showed concern over the idea that the emergence of a powerful independent institution supervising the implementation of international trade law might impair its sovereignty. While it was the US administration that took the lead in establishing the ITO, it was also the US Senate that had strongly opposed and finally blocked the idea. The US also

opposed to the proposal of establishing the Multilateral Trade Organization (MTO) throughout the Uruguay Round negotiations but ultimately accepted the idea under the condition that the name be changed to the current WTO. This seemingly conflicting attitude toward the multilateral trading system provides some hint as to understanding the US trade policy towards the WTO regime since the Trump administration.

At the WTO Ministerial Conference in Doha in 2001, two important decisions were made. One was to begin a new round of multilateral trade negotiations, which was called the Doha Development Agenda (DDA),[2] and the other was to accept the accession of China to the WTO.[3] Fifteen years later, the fate of those two decisions ended in complete contrast. The DDA is no longer viewed in a serious manner. On the other hand, China has become the second-largest economy in the world largely due to its active export-oriented growth policy based on WTO membership, and it has now become a hot topic of global debate as to whether the Western countries made a good decision to agree to China's membership.

During the negotiations for China's accession, China and the Western countries, including the US, had both expectations and concerns.[4] With WTO membership, China expected to gain greater access to the rich world's markets for its textiles and invite more foreign direct investment into China. At the same time, there was concern that a sudden increase in foreign imports - in particular, of automobile and agriculture products - might cause its domestic industry to collapse and result in large-scale unemployment. Meanwhile, the US and other Western industrialized countries expected increased market access for their goods and services in China and enhanced IPR protection. Furthermore, once China was incorporated into the world's economic system, the expectation was that its domestic political system would also transform into a more liberalized and democratized one. At the same time, there was serious concern that cheap Chinese products would be dumped into their home markets. Thus, they wanted to maintain the "non-market economy status" of China in order to impose high anti-dumping duties. After long negotiations, both sides approved a 15-year agreement;

[2] WT/MIN(01)/DEC/1 (20 November 2001) para. 11.
[3] WT/MIN(01)/DEC/1 (20 November 2001) para. 9.
[4] WTO, Draft Report of the Working Party on the Accession of China, WT/ACC/SPEC/CHN/1/Rev.8 (31 July 2001).

however, the exact legal interpretation of this agreement is pending since China suspended the related WTO dispute on this issue in June 2019.[5]

Since the 20-plus years of China's accession to the WTO, China is deemed to have overcome most of its concerns and fully achieved the expectations from its accession. In contrast, the concerns of Western countries have become real, with expectations having only been partly achieved. In particular, the expectation for a more liberalized and democratized Chinese political system proved to be utterly off the mark. This disillusionment has greatly contributed to the formation of an antagonistic policy direction against China in Western countries, particularly the US.[6] The absence of progress in the DDA negotiations has also frustrated US and other Western businesses, the most important supporters of a multilateral trading system. Conflicts among the US, the European Union (EU) and developing countries have been the main reason behind the lack of progress. Systemic problems arising from the decision-making process based on a consensus approach have also contributed significantly to the failure of making any progress in the negotiations. With the lack of interest from the business circle in multilateral trade liberalization, the position of the US government has also become increasingly skeptical of the multilateral trade system, even the trade liberalization in general.

III. New US Trade Policy Since the Trump Administration

The start of the Trump administration on 20 January 2017 sent a message to the world that an era of a new international trade order had begun. In many ways, the Trump administration's trade policy was unorthodox. In particular, it implemented a very aggressive trade policy towards China. The policy goal of the trade policy towards China appeared to be multi-dimensional. First, the US was working to reduce its trade deficit with China. This was relatively the easy part to resolve since China was willing to buy more American goods. Second, the US was also trying to resolve the difficulties facing US companies in conducting their business in China. For instance, the US government took US Trade Act Section 301 measures on the grounds that China did not properly protect IPR and its forced transfer of technology. This Section 301 measure itself may be inconsistent

[5] WT/DS516/13 (14 June 2019).
[6] Council on Foreign Relations, "What happened when China joined the WTO" (17 June 2021).

with the WTO agreements, but the pressure to resolve the difficulties of foreign companies in China has positive aspects. It could benefit not only American companies but also third-country companies working in China and, eventually, the Chinese economy as well. However, its policy objective goes beyond these two categories. Facing increasingly fierce competition with China, it aims to sustain American supremacy in terms of technology and geopolitics. This third-category policy measure can be taken even if the US business community does not feel the need for it. Furthermore, the target of the US policy measures is not limited to China. The US has imposed Section 232 tariffs on steel and aluminum even on products from ally countries such as Canada, Japan and Germany for national security reasons.

As a way to pursue these policy objectives, the Trump administration tended to resort to a bilateral approach rather than a multilateral solution. This seemed to be partly due to President Trump's personal character. As a real estate developer, he relies on his bargaining skills,[7] and since the US is more powerful than any other country, he seemed to believe that a bilateral approach would be more effective by using bargaining power. Moreover, America's traditional suspicion of international organizations and growing skepticism about the multilateral system among US government and businesses contributed to this approach.

When the inauguration of Joe Biden as the next president of the United States took place on 20 January 2021, a significant change in the policy direction was expected. In the area of trade policy, however, there seems to be no big change. It is understandable that the trade war with China is getting fiercer considering the strong bipartisan support for this policy, but even those trade measures against countries other than China, such as Section 232 measures, have not been withdrawn. The Biden administration does not want to join the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the centerpiece of President Obama's strategic pivot to Asia, which President Trump decided to leave three days after his inauguration. Instead, the Biden administration is pursuing a new type of economic network called the Indo-Pacific Economic Framework for Prosperity (IPEF).[8] In May 2022, the United States,

[7] Trump, D.J., & Schwarz, T., *The Art of the Deal* (November 1987).
[8] ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef (visited on 7 October 2023).

together with 13 other countries including Korea and Japan, launched the IPEF. The 14 IPEF partners represent 40% of global gross domestic product (GDP) and 28% of global goods and services trade. This framework consists of four pillars: (1) trade, (2) supply chains, (3) clean energy, decarbonization and infrastructure, and (4) tax and anti-corruption. Although it has a pillar of trade, the issue of market access such as tariff elimination or reduction is not discussed in this framework. This is a big difference from the traditional regional trade agreements (RTAs), in which market access is one of the most important elements. There is another difference from the traditional RTAs in terms of approach. Under traditional RTAs, participating countries start negotiations first and, after they agree upon all of the details of the agreement, they declare the launch of the agreement. In contrast, the IPEF was officially launched in 2022 and, since then, members have been negotiating details of each of the four pillars.

Interestingly, it is not China but the US that wishes to reform the current international trade rules although, in overall world politics, it is China that has challenged the established authority of the US. In the area of trade, China seems to be satisfied with the status quo and does not want any significant changes made to this order. To put it simply, we can say the US is on the offensive while China is on the defensive with regard to the international trade regime. Thus, in order to understand the challenges to the current international trade order, it would be useful to carefully consider the "must be corrected" issues raised by the US.

Issues deemed problematic by the US can be divided into two groups: procedural issues and substantive ones. Procedural issues include the WTO dispute-settlement process and rules for developing countries. The US argues that the current WTO dispute-settlement process is working in a way that is very different from what the members originally agreed upon.[9] This discontent by the US appears to have come from several WTO cases where the WTO Appellate Body decided that certain US trade remedies, which the US believes is necessary to deal with unfair foreign practices such as dumping or illegal subsidy, were inconsistent with WTO rules. Another procedural issue concerns the rules for developing-country status: how status is determined and what kind of privileges

[9]ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF (visited on 7 October 2023).

can be provided.[10] Currently, there is no definition or criteria for developing-country status in the WTO. In principle, any country can claim itself as a developing country. During the DDA negotiations, some developing countries, including India, Brazil and Argentina, claimed special treatment as developing countries. Even China continues to claim developing-country status. The US cannot accept the fact that big economies like China, India and Brazil are allowed to escape from bearing legitimate burdens while requesting more burdens on advanced economies including the US.

Substantive issues include strengthening rules on IPR protection, subsidies and state-owned enterprises (SOEs). The issues are related to the efforts of the US to prevent the rise of Chinese technology and competitiveness in an unfair manner. The US has argued that many Chinese SOEs have strong links to the Chinese government and the Communist Party, thus gaining tremendous support and enjoying a competitive advantage against foreign companies. In addition, it is argued that the Chinese government allows IPR infringement by those SOEs and even demands foreign companies wishing to enter the Chinese market to transfer technology to Chinese companies. The US believes current WTO rules and procedures are not strict enough to halt the unfair practices of the Chinese government and SOEs.

Currently the issue of national security is becoming another major stumbling block to consensus among members. It has both procedural and substantive aspects and needs to be examined more in detail. GATT Article XXI provides for a security exception. It does not, however, allow a blanket exception for all the measures taken in the name of national security, but allows basically three categories of measures in relation to the national security. The first category concerns the obligation of submitting information. WTO agreements stipulate obligations of submitting various information, and any member can refuse to submit certain information which it considers contrary to its essential security interests in accordance with Article XXI (a) of GATT. Secondly, Article XXI (c) allows measures to implement members' obligation under the United Nations (UN) Charter. Trade sanctions taken in accordance with the decision by the UN Security Council could belong to this category. Thirdly, Article XXI (b) allows certain

[10]Schofer, T., and Weinhardt, C., "Developing-country Status at the WTO" [2022], *International Affairs* vol.98 Issue 6, pp.1954-1957

measures that a member considers necessary for the protection of its essential security interests.

Article XXI (b) stipulates three cases that belong to this third category: (i) measures related to fissionable materials or the materials from which they are derived, (ii) measures related to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment, and (iii) measures taken in time of war or other emergency in international relations. The first case is to prevent developing nuclear weapons and is relatively clear. In the second case, it is manifestly to control the movement of weapons, but it is disputable whether certain non-military items such as food or medical items are indirectly used for military purposes. The third category is the most problematic. A broad range of exceptional measures can be possible under the situation of "emergency in international relations." Article XIV of the General Agreement on Trade and Services (GATS) and Article 73 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) also provide similar security exceptions.

On 5 April 2019, a WTO Panel made a very important decision regarding the issue of national security. This decision was about the dispute between Russia and Ukraine that had begun in 2014. Russia restricted international transit cargo by road and rail from Ukraine that was destined for Kazakhstan or Kyrgyzstan and justified the decision claiming that these measures were taken for national security in accordance with Article XXI of GATT. The United States, which supported Ukraine in the war but consistently takes the position that it is for the country, not the WTO, to decide whether a certain measure is justified in the name of national security, sided with Russia in this dispute. The Panel decided that the Russian measures were consistent with Article XXI but rejected the Russian argument that national security exceptions are "self-judging." After this Panel decision, Turkey initiated a WTO dispute-settlement procedure against US Section 232 measures in August 2018, and Hong Kong initiated a procedure against US rules of origin. In both cases, the US resorted to Article XXI to justify the measures and argued that whether the measures meet the criteria under the Article XXI is decided by the country that took the measures, not by the WTO. This argument was, however, rejected by the WTO Panel.

The US government appealed the two cases but, since the WTO appellate

mechanism is currently not working, the decisions are not yet officially adopted. In March 2023, at the informal meeting on the reform of the WTO dispute-settlement procedures, the US representative indicated that the interpretation of GATT Article XXI is an agenda for future WTO reform.[11] It is a difficult question. National security is the most essential element of national sovereignty and it is not easy to leave the decision whether a country can take certain actions for national security to the international organizations. At the same time, it is also problematic if any country can take trade-restrictive measures and justify them as measures for national security. If the WTO dispute-settlement system cannot judge whether these measures are in accordance with the relevant WTO agreements, it would be very difficult to control those measures other than political pressure.

IV. Possible Development of the International Trade Regime

Considering the current rivalry between the two largest economies in the world and the new trade policy of the United States, which has led the multilateral trade regime after the World War II, it seems apparent that the current regime cannot continue. There may be three options for the new international trade regime: a multilateral regime based on the current WTO framework, a bilateral or plurilateral regime depending more on RTAs, and new regime composed of economic blocs.

The first option is the multilateral regime based on the current WTO framework. For this to succeed, it is essential to get consensus among WTO members. Thus, in order to explore the possible development of the multilateral regime in the future, it could be useful to review the positions of other major WTO members with regard to the issues that are problematic to the US. For the sake of our discussion, major WTO members other than the US can be divided into three groups: countries with a pro-trade policy such as the EU, Japan and Canada; developing countries such as India and Brazil; and, finally, China. The first group could be called a "reformist" group. This group is keen on reforming but maintaining the multilateral trading system based on WTO rules. It is sympathetic to the US on the issue of strengthening IPR protection, introducing new rules on subsidies and SOEs. However, these countries may not support the idea of

[11] www.wto.org/english/news_e/news23_e/dsb_31mar23_e.htm (visited on 8 October 2023).

weakening the WTO dispute-settlement mechanism or the argument that any trade measure can be justified in the name of national security. Rather, they may want the US to refrain from taking WTO-inconsistent trade remedies and unilateral actions such as the Section 301 measure.

The developing-country group can be called the "development" group. Its basic position is that any discussion on trade liberalization should be aimed at enhancing the economic development of developing countries. Trade liberalization should not hamper the economic development of developing countries by placing too much burden on them. Rich countries should open up their markets in order to allow imports of products and services from poor countries. This group strongly opposes any attempt to differentiate developing countries and to introduce new criteria on developing-country status. Regarding substantive issues such as subsidies or SOEs, individual developing countries may have different views; however, their common position is that those strengthened rules should apply only to developed countries.

China might be the country that is the most satisfied with the status quo. China has not been very active in furthering trade liberalization, since it believes it already did its part during the accession negotiations. China also maintains the position that it is a developing country, so it should be able to enjoy the special privileges given to a developing country in the DDA and subsequent negotiations. Like the reformist group, China opposes the idea of weakening the WTO dispute-settlement mechanism and wants to prevent the US from taking WTO-inconsistent trade remedies and unilateral actions.

Currently, there are ongoing discussions on how to reform the WTO system. If a compromise can be reached that would satisfy all groups - the US, the reformist group, the development group and China - the WTO regime may be able to survive. The reformist group will try to play an active role in reaching an agreement since it is crucial to maintain the current multilateral trading system for the prosperity of their respective economies. However, it may be difficult to expect the same level of leadership from this group as the one that the US has demonstrated thus far. China also has a strong interest in participating in the agreement and is willing to reach some compromise. For China, it would be much better to obtain a deal within the WTO rather than fight with the US bilaterally. For the development group, the countries' willingness to take part in the

agreement is doubtful since they already believe that the current system is biased towards the interests of rich countries and they have no intention to give up the special privileges for developing countries. Although the possibility is still very remote, one potential compromise could be an agreement to strengthen the rules on IPRs, subsidies and SOEs, reflecting the US's request, while the US in turn agrees to accept tougher rules on trade remedies and unilateral actions and developing countries accept certain rules on developing-country status.

If no compromise can be reached at the WTO, countries including the US will seek an alternative solution to the WTO. If countries including the US still think trade liberalization is important for their economy, they may resort to the bilateral or plurilateral regime based on RTAs. During President Trump's term, the US showed its preference for bilateral deals. However, as shown under the Biden administration, the bilateral approach has its limits in terms of achieving its goals and the US is trying to gain support from other like-minded trading countries.

Mega-FTAs, FTAs comprised of many countries and aimed towards a high level of market liberalization, thus can be one alternative to the WTO. For the US, it might reconsider the participation of the CPTPP at an opportune time. The CPTPP is a very good example of how a mega-FTA can achieve further trade liberalization and the introduction of new rules that were not possible at the WTO forum. It bears no legal conflict with the WTO most-favored nation (MFN) rule since it can resort to the GATT Article XXIV exception. It can also minimize the side effects of a general RTA such as the "spaghetti bowl" effect by harmonizing the rules of a relatively large number of countries. However, if a mega-FTA is generated as an alternative to the WTO multilateral system, there is some concern that the world trade system will once again be dominated by a regional bloc, as experienced during the pre-World War II era. Other than a mega-FTA like the CPTPP, the US can also try a plurilateral trade agreement like the Agreement on Government Procurement (GPA) or Information Technology Agreement (ITA). Under the Obama administration, extensive negotiations were already held among some WTO member countries in the area of trade in services and environmental goods. The debate on whether to include China in this plurilateral deal may create political tension or conflict in the international community as well. If the US and major trading countries resort to a mega-FTA or some other plurilateral agreement as their main rules for governing trade, what will happen to the current WTO system? Considering the membership of 160 countries, which cannot all be

included in a mega-FTA or plurilateral agreement, the WTO system would not disappear but its relevance would be severely weakened. It would work only as a basic guideline for trade and supplementary rules for those countries that could not take part in the mega-FTA and plurilateral agreements.

The important condition for the second option is that countries including the US still think trade liberalization is important for their economy. Considering the current debate among politicians,[12] it is very doubtful that this condition is still plausible. In the IPEF, the Biden administration's flagship international economic cooperation project so far, there is no element of market access such as tariff elimination. If the US and other countries continue to prioritize safe supply chains rather than efficiency in international trade, the RTA model cannot work. Instead, economic blocs among like-minded countries will be formed sharing supply chains and regulatory standards. The experience of the 1930s already shows very well how this kind of international trade regime is costly and even politically dangerous making conflicts among nations fiercer. In order to maintain the current trade regime based on the principle of trade liberalization, it is very important for governments to pursue more sound economic policy rather than seek political popularity. Dissatisfaction among working-class people in the advanced economies with the trade liberalization is also an important issue to resolve.

V. Policy Recommendations

More active public participation in developing trade agreements

Under the international legal system, the primary actors are sovereign states. It is the representatives of the states, often government officials, who take part in the negotiations to conclude the international agreements, consultations on the implementation of the agreements and dispute-settlement procedures when there seem to be violations of the agreements. Nevertheless, it is not desirable for individuals and ordinary people to be ignorant of the development of international agreements. In particular, international trade agreements such as the WTO or RTAs are dealing with trade relations between the countries and thus affect the lives of ordinary citizens directly. If we consider how many domestic laws are

[12] Economist, "Are free markets history?" (7 October 2023).

amended or newly enacted in order to implement new trade agreements, we can get an idea how much it is affecting our daily business. In the case of the Korea-US free-trade agreement (FTA), for instance, around 20 Korean domestic laws were amended or newly introduced to implement it.

There is a difference between domestic laws and international trade agreements in how to encourage the public to participate in the legislature process since, in the case of trade agreements, there are other sovereign parties to the agreements. In the domestic legislative process, the legislative branch of the government can consider public opinion and then pass the law. In the process of concluding international agreements, however, the government of a country can consider public opinion and set the initial negotiation position, but the position cannot become law right away. The government should negotiate with the government of the other country to reach a compromise between the two different positions. Once they can find a compromise, they should again consider public opinion. Only when they can find a solution that can satisfy each party to the negotiations and their domestic citizens could it become an international agreement.

The current situation in the international trade regime has made the process of reflecting public opinion all the more important. Recently, there are many cases of unilateral trade measures that appear to be inconsistent with the WTO agreements. The dispute-settlement mechanism to ensure compliance with the WTO agreements is not working properly. In other words, the legitimacy of a certain government decision or action according to the international trade agreements can be more easily challenged without proper participation of a domestic constituency in the law-making and law-implementing process. In fact, some elements of international trade agreements are very divisive and easily arouse conflicts. Most of the benefits from the trade agreements go to a broad range of people, including consumers, so it is not easy to feel the real benefits and support it. Meanwhile, the detriments from the agreements are often concentrated on certain industries or sectors, and so can easily make people in those sectors angry and incite street protests.

Therefore, in order to maintain the legitimacy of international trade agreements, it is very important for people to participate in the process of concluding them. During the process, governments should explain the benefits from the agreements and the necessity of concluding the agreements. It may also

be necessary for the governments to propose appropriate compensation to those people who could suffer from the market liberalization by the trade agreements. The public participation should not stop at the stage of concluding international trade agreements. During the process of implementation and dispute settlement, it is also important to reflect the public opinion. Once a trade agreement enters into force, normally the implementation body is established and there will be regular meetings between or among the parties. This meeting is a forum where government officials from each side meet and exchange views on the implementation by parties to the agreement. On these occasions, it would be useful for governments to have a prior meeting with national stakeholders and seek their opinions. This would not only make the implementation meeting more productive, but would also help gain support from the domestic constituency for the international trade agreements.

In order to facilitate more active public engagement in the process, the Korean National Assembly, the unicameral legislative branch of the Korean government, passed the "Act on the conclusion procedure and implementation of commercial treaties" on the occasion of concluding the Korea-US FTA.[13] This Act stipulates all the necessary procedures before, during and after the negotiations to conclude international trade agreements. The Act provides for procedures through with ordinary citizens can participate in the process. For instance, Article 7 of the Act made it mandatory for the government to hold a public hearing to hear opinions from interested persons and relevant experts before the government starts negotiations. Article 8 also provides that any citizen may present his/her opinion to the government. Even after the conclusion, Article 14 requires the government to hold an information session to give relevant information to interested persons before the agreement enters into force. This Act also stipulates the role of National Assembly and how it would supervise the negotiations and finally consent to the ratification of the agreements.

Thanks to the introduction of this Act, Korean citizens can take part in the conclusion procedure and implementation of the trade agreements not only through legislative body of the government, which is a traditional way of participation, but also directly by taking part in the public hearings or information

[13] Act No. 14840, 26 July 2017.

sessions and by expressing opinions to the government. Of course, from the viewpoint of negotiators, this procedure may be too burdensome and not helpful for effective negotiations. The other party to the negotiations may already know the basic negotiation positions. In addition, since all the people already know the government's initial negotiation positions, it is very difficult to show flexibility during the negotiations. Nevertheless, there was a consensus in Korean society that those problems could be the price to pay to ensure the legitimacy of trade agreements.

More active use of trade agreements by businesses

After concluding a trade agreement, the government usually announces the possible economic effects of the agreement, such as increase in exports or GDP. There is no guarantee, however, that this expectation will eventually materialize. This is because the actual economic effects of a trade agreement depend on how the economic actors, including companies, make use of the agreement. If a trade agreement is an expressway, the drivers who are actually using the expressway are companies. Thus, it is very important for a government to help companies make the best use of the trade agreements.

In order to use the trade agreements, it is a first step for companies to know the substance of the agreements. Although companies can take part in the process of concluding the trade agreements, it is not possible to know and understand the details of the agreements. For the manufacturing industry, the most important aspect is the exact information on tariffs. Companies should know this information when they export their products and import raw materials. Tariff information under RTAs is more complex than under the WTO framework. Under the WTO framework, tariffs on certain products apply to all WTO members according to the MFN principle. Under the RTAs, however, the tariff on the same products varies depending on the RTA with trading partners.

Rules of origin make it more complicated to benefit from the tariff elimination or reduction under the RTA framework. Even if a certain product was departing from a port of a country, the product does not automatically have the status of the product originated from the country under the RTA framework unless the product meets the criteria according to the rules of origin of the RTA. Each RTA has different rules of origin, and even one RTA provides different rules of origin for each product. Accordingly, it is very difficult to find out the exact rules

of origin of the product in the first place. Even when the exporter understands correct rules of origin of the product which he/she wants to export to the other country, it is very burdensome and expensive to adjust its supply chain to meet the criteria and to prepare all the documents necessary to prove that the product meets the criteria. Due to these difficulties, there are many cases where exporters give up the preferential tariff under the RTA and instead pay the WTO MFN tariff even though it is higher than that under the RTA.

In order to help exporters to handle these difficulties, the Korean government has made great efforts. The Korean Customs Office established the FTA portal, which provides all of the necessary information in detail to exporters.[14] After the Korean government concludes an FTA with another country, it usually holds FTA seminars in many cities in Korea, inviting companies and other interested people to inform them of the major substance of the FTAs and provide practical guidance on how to use the FTA.

It is also useful for the government to collect the problem cases from its exporters or other companies and raise those issues with the counterpart at the regular implementation meetings under the international trade regime. Sometimes individual companies may be reluctant to report their problems for fear that they will be targeted and harassed by the government of the other party. In this case, trade associations representing the interests of the companies in certain sectors can raise those issues on behalf of their member companies.

More strengthened national expertise in international trade law

The fact that the current international trade regime is challenged does not mean that international trade lawyers are no longer needed. On the contrary, it is becoming all the more important for a government to develop and be equipped with national expertise in international trade law. In fact, international law firms specialized in trade are very busy these days handling trade disputes.

Some may argue that under the current situation of a trade war, it is useless to defend a country's national interests against other countries' unfair or WTO-inconsistent trade actions through legal solutions. Rather, they may argue that it is better for a country to use its own trade actions as counter-measures. This might

[14] www.customs.go.kr/ftaportalkor/main.do (visited on 8 October 2023).

appeal to public sentiment, but it is necessary to consider carefully which could be the best strategy to deal with the situation where the other country impaired the national interests of a country by certain trade measures. For most of countries with a small or medium-sized economy, it is very costly to take retaliatory actions against other countries' trade actions, in particular if the other countries have large economies. A tariff increase or import ban against products of the other country may not significantly affect the economy of the other country and may even cause serious damage to its own economy, such as inflation or a shortage of supplies. It would be more effective to find a legal solution according to international trade law.

Resorting to the WTO or RTA dispute-settlement mechanism is not the only legal solution. Although the relationship between international law and domestic law varies depending on the Constitution of each country, in most cases international law, which is binding the country, is automatically effective as domestic law, or a domestic legal instrument to implement the international law is enacted[15]. For instance, the US government enacted a domestic law, the Uruguay Round Agreement Act (URAA), to implement the WTO agreements. The US government may ignore the decision by the WTO panel, but it cannot disregard its domestic law. Thus, it is possible to resolve the trade disputes by using the domestic procedure of the other country. For instance, if a certain anti-dumping measure imposed by the US government is deemed a violation of the WTO agreements, the exporter can sue against this measure at the Court of International Trade, a US domestic court. This strategy of using domestic legal procedure is more effective when the other party to the dispute respects the principle of the rule of law and has a well-established domestic legal system.

Just as the effectiveness of the WTO framework was overvalued soon after the conclusion of the Uruguay Round negotiations, it now appears to be underestimated. The fact that a certain country violates WTO agreements several times does not mean that it disregards the WTO framework as a whole. Still, most of the daily operations of international trade are being done according to the WTO agreements as base rule and RTAs as supplementary one. In fact, every sensible country wants a stable and predictable trade environment for its exports and imports, and international trade law is the tool to establish this environment. If

[15] Kim J.G., *International Law* (2010), pp. 143-144.

trading countries are not happy with the current international trade regime, they will create a new regime, bilateral or multilateral, through negotiations among trading partners. The important thing is that such a new international trade regime not be made in a vacuum. It would be a development based on the previous regime. The WTO framework that emerged from the Uruguay Round negotiations is based on the previous GATT framework. Many RTAs, which currently play supplementary roles, are based on the current WTO framework. Therefore, it is necessary for governments to develop national expertise in international trade law in order to prepare for the potential emergence of a new international trade regime.

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