

Does the international trade help to enhance national security?

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I. Introduction

The linkage between international trade and national security has a long history that may date back at least to the inception of the General Agreement on Tariffs and Trade (GATT) in 1947. Since then, the national security issue had been often at the center of trade disputes because some Members imposed unilaterally trade sanctions against another Members on the ground of national security. But, to date, the outcomes of disputes did not successfully give useful guidance on how to implement the national security-related trade rules.

Recent developments in international political and economic environment have made the national security issue more complicated. In particular, the September 11th terror brought additional dimension to the scope of national security. Thus, the national security could be expanded to cover the so-called human security² in the context of international trade. We are going to examine how the human security measures or efforts affect international trade flow and to make policy suggestions for the more trade-friendly measures, if there is a conflict between them.

In addition to the multilateral rules at the World Trade Organization (WTO) and the United Nations (UN), national security also enters into free trade agreement (FTA) as well as national dimension. FTAs acknowledge in general the need for national security consideration in pursuing for the economic integration and then permit national security exceptions. Also many countries enact a variety of legislations that allow export and import control for the protection of national security. The United States is the leading and active user of national security laws. Here we would discuss major national laws and regulations of Korea and the United States, which are deemed to have impact on international trade.

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² While there is no consensus on the definition of human security, Asia-Pacific Economic Cooperation (APEC) has discussed this issue extensively with some tangible outcome. It is understood that human security covers protection human from terrorism and avian and pandemic influenza.

Several researchers have studied trade sanctions, which were imposed for the national security purpose. There are two main approaches: economic and legal approach. Since early 1980s, Hufbauer and Schott have had a seminal study on whether or not trade sanctions are effective.³ On the other hand, Jackson (1989), Jackson, et. al. (2002) and Lowenfeld (2002) analyze comprehensively national security issue in international trade law context, focusing on whether certain trade sanctions are justified under relevant GATT/WTO rules. However, it appears that they paid less attention to policy aspects which help to fulfill both trade liberalization and national security objective.

Thus, we touch upon how international trade and national security element interact each other with an aim of exploring the policy recommendations. To the aim, we are going to seek for more well-defined criteria for trade sanctions and how to implement the national security provisions in a less trade-restrictive manner. We analyze three issues. First, we analyze the development of international trade rules, mainly WTO rules, concerning the national security. Second, we analyze the national legislations relating to the national security in Korea and the United States that affect international trade. Third, we analyze the role of national security in the regional trade agreements. Regarding this RTA issue, we identify the national security issues that may be raised in the possible Korea-US FTA negotiations.

Our paper consists of as follows. Section II discusses definition of national security, taking into account the newly emerging developments. Section III analyzes the relationship between international trade and national security. Section IV examines multilateral, regional and national rules and efforts which regulate international trade on the ground of national security. Section V analyzes Korean trade control regime for national security. Section VI presents policy recommendations for more trade-friendly national security measures. Finally, we conclude with some future issues in Section VII.

II. What is national security?

We start with discussing how national security enters into the international trade dimension. While international trade is one way to achieve a nation's economic prosperity, national security is one objective for which a nation shall seek in the

³ Bhagwati (2004) also discusses the efficacy of trade sanctions.

presence of external threat, actual or potential. Thus, it seems at a glance that there exists no substantial relationship between them. National security, however, has often been referred in attempts or efforts to request for or to justify protection of certain import-competing industries. According to the so-called national security argument, if a product in question is used by the military, regardless of whether they are arms or necessities such as shoes and clothes, the industries concerned may claim that they are vital to national security and then that they need protection from foreign competition.⁴

National security concerns also affect export side. Trade sanctions have been used as a major means to counteract external threat to national security, mainly in the form of export controls. When a nation judges that a foreign country took or will take actions against its national security, it entitles to take measures to diffuse the threat under the international laws. The invoking country may use export-restricting measures solely or coupled with other diplomatic or political means.

It is argued that the absence of an objective definition of national security could lead to abusive use of national security provisions. Thus, it may result in adverse effects on international trade. Recognizing these concerns, we discuss the various concepts of national security. They are of military and of economic nature in a broad term. When we classify them in detail, they include energy security, security against economic espionage, and human security against terrorism.

1. National security against military threat

The most familiar concept of national security is that national security is a safeguard to secure a nation against external military threat. This concept had been pervasive during the Cold War period. Certain trade-restricting measures were imposed simply to put pressure on countries of the other side with an aim of changing their practices to our advantage or getting political concessions in the world politics, regardless of their effectiveness. Thus, the United States had sometimes introduced its own trade sanctions or supported multilateral ones on the Communist countries.

Even after the collapse of the Soviet Union, the military threat remains, but in different forms with different degree. While the military threat means primarily a direct one during the Cold War, the indirect threat has been increasingly important in recent years. The indirect threat means the threat to a nation's ally or allies. For example, when Iraq invaded Kuwait, a US ally in the Middle East, in 1990, the US

⁴ Brown and Hogendorn (1994, pp. 229-230) and Appleyard and Field (1995, pp. 285-286) discuss the national security argument with a numerous examples.

considered the Iraqi action as a threat to its national security as well as to international peace. Then, it took a leading role in making concerted efforts by many countries to impose trade sanctions on Iraq in addition to efforts to defeat Iraq with military forces.

2. Economic security

Beginning 1980s, the concept of national security has been expanded, emphasizing the economic aspects. They include economic security, energy security, security against economic espionage and food security⁵. Recognizing the importance of securing supply of essential energy such as oil, the US includes oil imports as one of the conditions for invocation of Section 232 of the Trade Expansion Act of 1962 which is one of the major international trade rules relating to national security. Also the North America Free Trade Agreement (NAFTA) permits energy security exceptions.⁶ In this regard, Mathews (1989) argues for a need to redefine the concept of national security by including resource and environmental issues.

Since the end of Cold War, countries have increasingly attached importance to the economic espionage, recognizing intellectual property rights (IPRs) as vital sources of a nation's international competitiveness and then as essential to national security. Thus, they have introduced more comprehensive systems to protect sophisticated technologies from foreign countries' espionage attempts. As part of anti-espionage efforts, the United States enacted the Economic Espionage Act of 1996. The Act enforces primarily trade secret espionage.⁷ Faced with fierce competition in the world market, Korean government also has implemented a variety of anti-economic espionage systems, including relevant regulations. Korean intelligence agency has reportedly launched an extensive campaign to enforce attempts to steal vital technologies by or for certain foreign nations, in cooperation with other enforcement agencies.

Another element of economic security is one related to the Internet. The Internet has been increasingly important to a wide range of economic activities in the world economy. It also carries out invaluable information or becomes vital means of financial transactions. Being concerned about the possible use of Internet transactions by terrorist groups or adversaries, some countries have intention to put restrictions on the Internet transactions or international trade of the Internet technology to safeguard

⁵ It may be debatable whether food security is considered as a part of national security. But we will discuss how food security contains national security element.

⁶ Chapter Six of NAFTA provides exceptions under the title of "energy and basic petrochemicals".

⁷ The definition of trade secret under the Economic Espionage Act of 1996 is different from that under the WTO TRIPS Agreement.

national security. For example, while the US government had introduced policies to place certain restriction on trade of encryption technology for national security concerns⁸, the EU and the industry groups have expressed concerns about the US approach with different views. The recent controversy over who controls the Internet may result from implicit national security concerns by some countries.⁹

3. Human security

Since the terror on September 11, 2001, terrorism has emerged one of major threat to national security. Thus, under the initiation by or leadership of the United States, many countries have made every effort to fight terrorism at the national as well as at the multilateral level. These anti-terrorism measures are called “human security” measures which may be deemed to have adverse effects on international trade.

Recognizing terrorist acts as a clear challenge to its goal of advancing prosperity¹⁰, APEC has discussed human security issues extensively with tangible commitments. While there is no consensus on the concept of human security yet, the term of human security used at the APEC fora includes protection against terrorism and against infectious diseases.

The United Nations also is of a view that terrorist acts are a threat to security. Thus, the UN Security Council established the Counter-Terrorism Committee (CTC) based right after the September 11 terror.¹¹ CTC is responsible mainly for two things: monitoring the implementation of Resolution 1373 by all states and increasing the states’ capacity to fight terrorism.

Finally, we want to emphasize that it is difficult to draw a line between economic security and human security, because they are interrelated each other under certain circumstances. For example, some nations intensify their intellectual property enforcement in combination of anti-terrorism efforts because certain terrorist groups are known to involve in the production, distribution of counterfeit products to finance their

⁸ Under rules operating in 1998, US companies would be allowed to export products that use a 56-bit data encryption standard or equivalent; in exchange these companies had to develop more powerful encryption products that protect public safety and national security. But, the US guidelines of July 1998 permit the export of encryption products of any bit-length for the use of financial institutions in countries with sufficient anti-money laundering protections. (Bar and Murase (1999), pp. 55-57)

⁹ While the United States has maintained a position that the Internet Corporation for Assigned Names and Numbers (ICANN) shall continue to control the Internet, some countries argue that a new multilateral organization shall govern the Internet.

¹⁰ The Busan Declaration, the 2005 APEC Leaders’ Declaration.

¹¹ The CTC was established based on Resolution 1373.

terror activities.¹²

III. Linkage between international trade and national security

No one could cast doubt to the fact that the international trade and national security affect each other. While they seem to be in conflict, they support mutually. The substantive questions, however, may be raised such as how closely they are related, how they interact each other in practice and whether there exist reasonable institutional frameworks. In this Section we will discuss the first two questions together, while we will touch upon the last question in next Sections.

1. National security affecting international trade

National security affects international trade. In particular, trade measures have been often used as a means to protect national security. Trade sanctions have been applied in various forms: complete or partial embargo on exports and imports, restrictions on air and sea transportation, prohibition on financial transaction and freeze the target country's assets the invoking or the participating countries' territories.

Quite often trade sanctions imposed for national security purpose are said to result in adverse effects on international trade without achieving the intended goals. Thus, expressing concerns about the negative trade effects, industry groups called for the governments and the multilateral organizations to take trade measures with special caution. They also emphasize that those measures are to be imposed in conformity with the relevant international laws including the WTO agreements.

2. International trade enhancing national security

On the other hand, international trade helps to enhance national security. Regardless of whether they are driven by the economic or political goals¹³, regional trade agreements (RTAs)¹⁴ can enhance national security because it enlarges the level of

¹² Cyberterrorism may be another example.

¹³ Security-driven RTAs include the Gulf Cooperation Council and the Eastern European nations' joining in the European Union.

¹⁴ Regional trade agreements include free trade agreements (FTAs), customs union and the regional integration such as the European Union (EU).

trade between member countries and, in so doing, increases familiarity between the people of the member countries and lessens the degree of misconceptions. Enlarged economic integration could discourage war because it makes war more costly. Thus security issues provide a rationale for discriminating against non-members and limiting trade preferences to member countries.¹⁵

National security element is expected to play a substantial role in trade between Korea and the United States, especially concerning the possible Korea-US free trade agreement (KUFTA) negotiations. National security issue may help to accelerate the KUFTA negotiation process with a hope to contribute to stabilization of the geopolitically intricate Northeast Asia region. It also could be one of the obstacles to the agreement because the U.S. is expected to demand for special security safeguards measures against or different treatment for certain Korean goods to be exported to the U.S.. The security concerns could come from in part a seemingly thorny issue of how to treat the goods which the South Korean companies produce in Kaesung and other North Korean areas.

To conclude the relationship between international trade and national security, it is worth of referring to arguments by Stokes (1998). He argues that prospects for spending on defense and diplomacy depend as never before on the performance of the economy and that the economic performance is increasingly dependent upon exports and earnings from investments abroad. He also emphasizes that the U.S. foreign policy and security policy-makers shall recognize that foreign economic policy - opening markets for U.S. exports and investment in order to sustain domestic economic growth - is a tool to achieve their foreign policy ends.¹⁶

IV. International trade rules relating to national security

1. WTO Agreements

Various laws and regulations provide legal basis for the trade measures for national security purpose. One of the basic international rules are WTO Agreements. They permit trade restrictions for the protection of national security. GATT, GATS and TRIPS Agreement contain separate national security exception provisions: Article XXI

¹⁵ Hoekman, et. al. (2002, p. 554).

¹⁶ Stokes (1998, pp 165-166).

of GATS, Article XIV *bis* of GATS and Article 73 of TRIPS.

GATT Article XXI provides that

[n]othing in this Agreement shall be construed

- (a) to require any Member to furnish any information the disclosure of which it considers contrary to the essential security interests; or
- (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to fissionable material or the material from which they are derived;
 - (ii) relating 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;
 - (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

There are several disputes regarding Article XXI of GATT. But the most controversial issue has been who judges whether the trade-restricting measures in question is *necessary* for the protection of the invoking Member's essential security pursuant to paragraph (b). Case laws establish that the invoking Member has authority to determine the necessity.¹⁷ This interpretation of self-judging authority has become another source of disputes. GATS Article XIV *bis*¹⁸ and TRIPS Article 73¹⁹ are

¹⁷ Regarding the case by the Czechoslovakia against the US export control measure in 1949, it was ruled that every country must have the last resort on questions relating to its own security. (Jackson, et. al. (2002), p. 1046)

¹⁸ 1. Nothing in this Agreement shall be construed

- (a) to require any Member to furnish any information the disclosure of which it considers contrary to the essential security interests; or
- (b) to prevent any Member from taking any action which it considers necessary for the protection of its essential security interests
 - (i) relating to the supply of services as carried out directly or indirectly for the purpose of provisioning a military establishment;
 - (ii) relating to fissionable and fusionable materials or the materials from which they are derived;
 - (iii) taken in time of war or other emergency in international relations; or

similar to GATT Article XXI.

The Agreement on Technical Barriers to Trade (TBT) also provides national security exception. Unlike national security provisions of GATT, GATS and TRIPS, Article 2.2 of TBT specifies the extent to which trade-restricting technical regulations are permitted. In particular, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Under Article 2.2, national security is deemed to be one of legitimate objectives²⁰ which justify certain trade-restrictive technical regulations.

Agreement on Agriculture can be said to contain a security provision if food security is considered as national security. Its preamble refers food security as an example for non-trade concerns²¹ along with environment protection.²² Finally, Agreement on Government Procurement (GPA) allows national security exceptions.²³

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- (c) to prevent any Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.
2. The Council for Trade in Services shall be informed to the fullest extent possible of measures taken under paragraphs 1(b) and (c) and of their termination.

¹⁹ Nothing in this Agreement shall be construed

- (a) to require a Member to furnish any information the disclosure of which it considers contrary to the essential security interests; or
- (b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests
- (i) relating to fissionable material or the material from which they are derived;
- (ii) relating 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;
- (iii) taken in time of war or other emergency in international relations; or
- (c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

²⁰ They include also the prevention of deceptive practices, protection of human health or safety, animal or plant life or health, or the environment.

²¹ Article 20 of the Agriculture Agreement stipulates the non-trade concerns in detail.

²² "Noting that commitments under the reform programme should be made in an equitable way among all Members, having regard to non-trade concerns, including food security and the need to protect the environment, having regard to the agreement that special and differential treatment for developing countries in an integral element of the negotiations, and taking into account the possible negative effects of the implementation of the reform programme on least-developed and net food-importing countries."

²³ Article XXII:1 provides that nothing in GPA shall be construed to prevent any Party from taking any action or not disclosing any information which it considers necessary for the protection of its essential

2. United Nations Charter and other multilateral rules

The UN has imposed and considered a variety of trade sanctions under certain provisions of the UN Charter. The relevant provisions are Articles 39, 41 and 42. Under Article 39, the UN Security Council has authority to determine whether there exists any threat to the peace, breach of the peace, or act of aggression. If it determines the existence of one of the situations, it shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security.

Articles 41 and 42 specify the forms of measures under Article 39. Article 41 stipulates the types of measures that the Security Council may take, but they are limited to ones not involving the use of armed forces.²⁴ On the other hand, military action is permissible under Article 42, provided that the Security Council considers that measures provided for in Article 41 would be inadequate or have proved to be inadequate. More important, the UN Charter is one of bases for trade-restricting measures to be taken for the security purpose under several WTO agreements.²⁵

Other international organizations also adopted anti-terrorism measures that have effects on trade in goods and services. One of them is the International Ship and Port Facilities Security Code (ISPS Code) by the International Maritime Organization (IMO) in 2003. IMO adopted a number of amendments to the 1974 Safety of Life at Sea Convention (SOLAS) including ISPS Code. The Code's primary purpose is to enhance the maritime security level at port and vessels around the world. On the other hand, the Organization of Economic Cooperation and Development (OECD) established the Financial Action Task Force (FATF). Its main purpose is to fight money laundering activities which also are known to be substantial financial sources of terrorist groups. By adopting nine recommendations²⁶, FATF regulates wire transfers, remittance system and non-profit organizations' financial transactions.²⁷

At the regional stage, APEC is one of the leading organizations which have made proactive and concerted efforts to prevent terror acts. APEC adopted the Secure Trade

security interests relating to the procurement of indispensable for national security or for national defense purposes.

²⁴ They include complete or partial interruption of economic relations, of rail, sea, air postal, telegraphic, radio, or other means of communications, and the severance of diplomatic relations.

²⁵ GATT Article XXI(c), GATS Article XIV *bis*:1(c) and TRIPS Article 73(c).

²⁶ As of October 2005, 15 countries have committed to implementing these recommendations.

²⁷ *The Economist*, October 22, 2005, p. 72.

in the APEC Region (STAR) initiative in October 2002 with an aim of securing and enhancing the flow of goods and people. STAR III conference, held in Incheon, Korea in February 2005, recommended the adoption of Advance Passenger Information (API) system. Under API system, a new computerized system is to be established to prevent aviation terrorism. Also APEC has contributed to the introduction and implementation of the ISPS Code in a close cooperation with IMO. Recently, APEC leaders agreed to take various measures²⁸ for secure trade which are reflected in the Busan Declaration.²⁹

3. US trade rules

The United States has enacted continuously laws and regulations to protect its national security. Under certain national security rules, it has imposed trade sanctions against foreign nations. It is no secret that those trade restrictions resulted in adverse effects on trade in goods and services, and investment. On the widely-accepted facts, a number of scholars, including Hufbauer and Schott, assessed whether those measures were effective in achieving their intended goals. Most of the analyses ended up with negative assessments. Those outcome do not necessarily mean that trade sanctions shall not be imposed. Rather, it is fair to say that they imply that there is a need to seek for better policy alternatives which we will discuss at length in Section VI. Here we examine what kinds of national security-related trade rules the United States has applied with a view to figuring out their trade implications.

One of the most famous US security-trade rules may be the Jones Act of 1920. Though it appears that the law does not contain any national security element, when you take a look at its legislative background and its contents, it is clear that it was enacted mainly to protect domestic industries for the national security purpose. To put it simply, ships are vital transportation means which are to be used during war. The law puts three requirements on the customers of maritime transport services.³⁰ First, all ships used in domestic trade shall be built in U.S. shipyards. Second, the ships must be manned by American crews. Finally, they must be owned and registered in the United States. As a result, the US manufacturers should bear the extra costs such as ship construction costs and operating costs. Therefore, they are known to suffer from

²⁸ They include the reduction of airport vulnerability to Man-Portable Air Defense System (MANPADS), Total Supply Chain Security and the APEC Framework for the Security and Facilitation of Global Trade.

²⁹ Prior to the Summit Declaration, APEC foreign and trade ministers expressed their strong will for anti-terrorism efforts with a number of initiatives in their Joint Statement of 15-16 November, 2005.

³⁰ Despite its trade-restrictive characteristics, the Jones Act of 1920 is allowed to apply continuously under the so-called grandfather clause even after the WTO agreements entered into force.

losing their competitiveness.

When the Cold War was reached at its peak, the US amended existing rules and introduced new rules. Among them are Section 232 of the Trade Expansion Act of 1962, the Export Administration Act³¹ in 1969 and the International Emergency Economic Powers Act (IEEPA) in 1977. Pursuant to Section 232, a domestic industry may submit a petition for an investigation on whether its competing imports impair national security. Then after reviewing the petition, the Secretary of Commerce may initiate an investigation. When the Secretary determines that the imports in question threaten to impair the national security, he or she releases recommendations to the president. The president has the discretion to decide whether to restrict imports and, if so, the types of measures so that such imports will not threaten to impair the national security. In the course of investigation, the Secretary of Commerce considers (1) the quantity, quality, and availability of imports; (2) the requirements of the nation's defense and civilian sectors; (3) the maximum domestic mobilization capacity; (4) the import of foreign competition on the economic welfare of an essential domestic industry; and (5) other factors relevant to the unique circumstances.³²

Under IEEPA, the president has a very broad discretionary power to regulate international economic relations with other countries, once he declares a national emergency exists. The measure under IEEPA includes banning a range of financial transactions with the target country.³³ It is noted that before the enactment of IEEPA, the Trading with the Enemy Act (TWEA) had been the basis for a wide range of trade sanctions.³⁴

Since the early 1980s, the US enacted various national security legislations which have direct effects on not only trade in goods, but also trade in services and investment. We would like to put stress on the fact that the US has made considerable works to fight terrorism since the September 11, 2001 terror. Thus, national security has become an even stronger priority and preoccupation of US foreign policy.³⁵ Among the regulations are the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (Helms-Burton Act), the Iran-Libya Sanctions Act of 1996 (D'Amato Act), the Exon-Florio Amendment of 1988, the Economic Espionage Act of 1996 and the Patriot Act of 2001.

³¹ This Act replaced the Export Control Act of 1949.

³² Lash (1998), p. 83.

³³ Jackson et. al. (2002), p. 1051.

³⁴ Just before IEEPA was introduced, TWEA was amended such that the Act is applicable only in wartime.

³⁵ Trebilcock and Howse (2005), p. 448.

Table 1: The US Trade Rules Relating to National Security

- o Cuban Liberty and Democratic Solidarity (Liberted) Act of 1996 (Helms-Burton Act)
- o Iran-Libya Sanctions Act of 1996 (D'Amato Act)
- o Exon-Florio Amendment of 1988
- o Trading with the Enemy Act
- o International Emergency Economic Powers Act (IEEPA)
- o Export Administration Act
- o Foreign Assets Control Regulations (by Dept of Treasury)
- o Section 232 of the Trade Expansion Act of 1962
- o Economic Espionage Act of 1996
- o Patriot Act of 2001

The Helms-Burton Act provides that persons from third countries that did business with Cuba and trafficked in proper confiscated from US nationals could be held liable in an action in the United States for the value of the property in question, and if the trafficking continued, for three times the value of the property. The European Union brought a case against US to the WTO dispute settlement body, claiming that the Helms-Burton Act violated provisions of the GATT and of the GATS. After a series of consultation, both parties reached settlement before the Panel delivered its findings.

The Exon-Florio Amendment is considered one of the laws which restrict foreign investment the United States for the national security concerns. Under the Amendment, the president has the authority to block mergers or acquisitions involving foreign firms on the ground that US national security interests would be impaired by the resulting foreign ownership.³⁶ The Committee on Foreign Investment in the United States (CFIUS) carries out investigations of mergers, acquisitions and takeovers that may threaten US national security. On its completion of investigations, CFIUS makes recommendations to the president as to whether national security interests justify blocking a transaction or altering the terms. However, until recently, there have been a few investigations, and even fewer instances where the president exercised his

³⁶ Because the president's exercise of discretion in approving or blocking a foreign investment is not reviewable, the Congress amended the Amendment so as to create a presumption against allowing foreign government controlled entities to make acquisitions in the US defense industry in 1992.

discretion.³⁷ In addition, the Trading with Enemy Act had been used from 1968 to 1974 to regulate foreign direct investments by U.S. citizens in “unfriendly” countries such as Cuba, North Korea and Vietnam.³⁸

V. Korean Trade Control Regime for National Security

1. Korean export control system for strategic goods

Export Controls refer to government regulations that restrict the transfer of goods and services that are both commercial and military in scope to foreign entity or foreigner. Although there are multilateral arrangements for export controls, particularly restricting strategic items, none of them has decision authority over specific transfer. Instead each country regulates exports through its own legal system for export control. In Korea, export control system for strategic goods rests on Foreign Trade Act and its enforcement ordinances, while it is basically established under the international export control regime. Korea’s export control system is shaped on four pillars as follows: a comprehensive legal framework, an effective enforcement system, an efficient licensing system, and a close international cooperation.

(1) Legal Framework

Even though the Korean government enacted several legal codes for trade control, the legal framework for the Korean export control system rests on the Foreign Trade Act (Law No. 6417). According to the article 21 of the Foreign Trade Act (hereinafter the Act) the government can restrict the transfer to the prohibited nations of strategic items and technologies specified in the national control list. While the article 39~45 of the Enforcement Ordinance for the Act include procedures of export license, the Public Notice on Trade of Strategic items contains control list. The Goods on the control list specified under multilateral export control regime are subject to export licenses The article 54 of the Act and article 45 of the Enforcement Ordinance for the Act specify penalties for violations of Article 21 of the Act.

³⁷ Of 805 notifications of proposed foreign acquisitions from 1988 to 1995, only 15 have been subject to full investigations, and only 1 has been blocked. The president blocked an attempt by a foreign company owned by China’s Ministry of Aerospace Industry to acquire MAMCO, a Seattle-based producer of metal commercial aircraft components. (Graham and Richardson (1997), p. 262).

³⁸ Jackson (1989), p.76.

(2) Enforcement system

The administrative authority of Korea's export control system is the Minister of Commerce, Industry and Energy (hereinafter MOCIE). MOCIE is responsible for setting up trade policy on strategic goods, monitoring the operation and management of the export control system, and administering export control. For the maintenance of international peace and security as well as the national security, MOCIE regulates exports of such goods, etc. as determined and publicly announced by MOCIE (hereinafter referred to as the "strategic goods") regardless of destination by means of licensing system. Also, MOCIE defines the general criteria of the transfers of strategic items and technologies by the Korean firms. The MOCIE implements the Foreign Trade Act through the implementation decree and public notice. However, under the guidance of MOCIE, Strategic Trade Information Center (STIC) of Korea International Trade Association (KITA) actually determines whether export goods or technologies correspond to strategic items, operates strategic trade information system, and supports exports of strategic materials for business firms.

Besides MOCIE, five other ministries are involved with export controls of strategic items and technologies: the Ministry of National Defense (MND) is concerned with transfer of arms and munitions across borders, the Ministry of Science and Technology (MOST) manages to regulate international flows of nuclear material and technology, the Ministry of Foreign Affairs and Trade (MOFAT) deals with foreign relations concerning multilateral arrangements on strategic goods and technologies. The Ministry of Unification (MOU) monitors inter-Korea exchanges and review license for items carried out to North Korea. If there are any risks for concerned use, MOU don't issue license. The Customs office is responsible for clearance of individual exports, as it participates in implementation process for export control by inspecting trade documents and items at border. The President Office and the Ministry of Finance and Economy also have some peripheral interests in export controls of strategic goods.

(3) International cooperation

Five key multilateral arrangements were established to coordinate export control activities for nonproliferation and national security purposes. One of the important multilateral arrangements is the Wassenaar Arrangement (WA) on Export Controls for conventional Arms and Dual-use Goods and Technologies. As a descendant of the cold-

war era's COCOM (Coordinating Committee for Export Control to Communist Area), the WA was founded in 1996 to contribute for regional and international security and stability, by promoting transparency and greater responsibility in transfers of conventional arms and dual-use goods and technologies, thus preventing destabilizing accumulations. The member states is required to ensure not to support and contribute to the development or enhancement of military capacities through their national policies.

The other arrangements are the Nuclear Suppliers Group (NSG) for nuclear and related dual-use items, the Australian Group (AG) for chemical, biological and related dual-items, the Missile Technology Control Regime (MTCR) for missiles and related dual-use items, and the Chemical Weapons Conventions (CWC) for chemical related dual-use items.

In a harmony with international commitments for export control, Korea became a member state of the Nuclear Nonproliferation treaty (NPT) in 1975. More recently, Korea began to join the multilateral arrangements: NSG in 1995, AG and WA in 1996, and MTCR in 2001. The Korean export control system is shaped according to those multilateral arrangements to keep international obligations.

(4) Control list and export licensing

Korean government requires exporters to submit request for export approval, if they wants to export strategic materials in class 1 to foreign country of concern. Strategic materials in class 1 refer to goods, software, and technology classified as controlled materials in the multilateral arrangements. The MOCIE categorizes these items into five groups and announces them on the public notice table, annexed table 2 through 6. These items are derived from the lists of the multilateral arrangement for export controls. For example, the items on the annexed table 2 are subject to the Wassenaar Arrangement for munitions and related dual-use items (the WA items). The exports of the WA items are prohibited to area that might obstruct international peace and regional security.

To transfer strategic materials in class 1 from Korea to foreign countries of concern, the exporters must judge for themselves whether their exports are controlled by the Trade Act before completing customs declarations. If the exporters understand that the export items are on the control lists, they must submit a license application to the government because Korean government requires them to obtain an export permit for items on the control list. The government makes decisions case by case.

Some items including HS 25-40, 54-59, 63, 68-93, 95, and related technology are grouped in the public notice annexed table, annexed table 7. These items are called

strategic materials in class 2 which refer to goods or technology that can be possibly used for WMD (Weapons of Mass Destruction) development and manufacturing and transferable missiles. Although these materials are not classified as controlled items by multilateral regimes, export license may be required if its end-use or end-user is unidentified or doubtful by any means. Particularly, exporters must apply for license, if the destination country for export belongs group B other than the 28 nations listed in group A such as U.S. Japan, U.K., etc. This kind of export control regime is called catch-all control system.

The authority of issuing export licenses differs based on the nature of item. Therefore, the exporters must submit licensing applications to the relevant ministries. For example, while export licenses for dual-use items under WA, NSG, AG, MTCR, and CWC are issued by the MOCIE, export licenses for WA radiation material, munitions and related items for military end-users on the MTCR, AG, and CWC lists are controlled by the MND. The MOST authorizes exports for radiation, nuclear, and strategic technology under WA and NSG.

2. Korean regulations of economic espionage

Recently, economic espionage has been a globally common phenomenon and then became a growing concern to national security. It is argued that the end of cold war has contributed a perceived increase in economic espionage. Louis Freeh, former FBI director, stated, “Economic espionage is the greatest threat to our national security since the Cold War.” As a result of global shift toward economic and technological competition, many countries have been engaged in economic and industrial espionage. Pierre Marion, former director of French intelligence services, argues that in the economic competition, in the technology competition countries become more vigorous economic competitors, even if they are military-allied.

Economic and industrial espionage by foreign entities, both government-sponsored and private, threatens country’s economic competitiveness and results in the loss of billions and thousands of jobs annually. According the FBI report, the largest business crisis in the U.S. is appeared economic espionage. Virtually, in the United States economic espionage and theft of trade secrets cost U.S. business firms more than 250 billion dollars in 2000 alone and \$1.2 trillion for a decade of 1990s. More than 56 percent of the Fortune 1000 admit to having been victimized and the other 44 percent are either too reticent to admit it or simply haven’t yet discovered that they have been targeted by corporate spies or thieves, domestic or foreign.

Also, some countries have been engaged in collecting proprietary information and critical technologies through open and legal means as well as through clandestine efforts. They target industries, government, and individual persons in an effort to support their nation's economic and military priorities and to avoid the time and expense of advanced research and development. Therefore, the protection of trade secret information, critical technologies, and proprietary information is an integral part of country's economic security. Due to the importance of maintaining economic competitiveness, many countries treat foreign threats to their economic well-being as a national security issue. As a result, economic security is directly linked to, and inseparable from, national security.

Thus it is imperative that the intelligence agency should stop economic and industrial espionage as well as protect trade secrets and proprietary information in order to help strengthen the nation's competitiveness in cooperation with domestic businesses. In the United States, the FBI is a responsible authority for prevention of economic espionage and thefts of trade secret information, while the economic espionage act of 1996 provides legal framework, penalties, and sanctions. In Korea, the National Intelligence Service (NIS) is engaged in monitoring illegal transactions of strategic items and technologies and preventing industrial espionage from stealing classified business secret and core technologies. Also, the Korean government revised the Unfair Competition Prevention and Trade Secret Protection Act to provide the legal framework for keeping pace with the advance of Internet and information technology.

Recently, the NIS has built up its capability to gather industrial information overseas and protect domestic businesses from foreign espionage agents. In 2004, the NIS detected 26 cases of industrial espionage or technology leaks, which could have cost the Korean industries up to 32.9 trillion won (32 billion US dollars). Up to November 2005, the NIS has uncovered 29 industrial espionage cases, thus protecting an estimated loss of 35.5 trillion won (34 billion US dollars) for the domestic industries. According to a report from Samsung Economic Research Institute, China was the most favored destination for technology smugglers, accounting for 39% of such cases. Also, about 70% of technology leak took place from the firms in the information-communication technology and electronics industry.

3. Inter-Korea transactions

In November 2004, Korea concluded a Free Trade Agreement (FTA) with Singapore. This agreement is the second FTA for Korea, but more comprehensive in scope than the

one with Chile. Particularly, this trade pact is the first FTA containing what is called 'the Kaesung provision', which is aimed at helping North Korea export goods produced in the Kaesung Industrial Complex in the North. Singapore agreed to offer products made at an industrial complex being built in the North Korean border city of Kaesung equal status as those made in South Korea. This provision is expected to provide an export channel for firms in the complex, so boosting inter-Korean economic transactions.

However, the Korean government has had a serious problem when the South Korea proceeded to establish the Kaesung industrial complex with the North Korea. The U.S. government demanded that the Korean government regulate the speed of development of the industrial complex in Kaesung, expressing worries that North Korea might use 'strategic items' for military purposes. Currently, the U.S. categorizes Pentium-III or more advanced computers and precision instruments as 'strategic items'. According to the Wassenaar Arrangement, Korea is banned from sending strategic facilities and items to North Korea because North Korea is categorized as a 'dangerous country'. In addition, Korea is not allowed to re-export of U.S. origin controlled strategic items which have been imported into Korea without any written approval, states the Memorandum of Understanding between Korea and the United States on the Protection of Strategic Commodities and Technical Data.

So far, there is no sign of change in the U.S. positions. Therefore, experts suggested that in order to solve the problem, the business in Kaesung complex should be first focused on labor-intensive industry, which doesn't require use of strategic items and technologies. Actually, the South Korean firms already began to produce cheap, labor-intensive products in Kaesung complex. They assume that although the U.S. is outwardly worried that permitting shipment of advanced machines and technologies might be used for military purposes, the real reason for U.S. concerns is that Kaesung Industrial projects will bring North Korea large sum of foreign capital. According to the Bank of Korea, if Kaesung industrial project is built along the current schedule, an annual inflow of foreign capital to North Korea will reach 600 million dollars by 2012 and more than 2 billion dollars by 2020.

Other than the problem regarding strategic items and technologies, high tariffs on North Korean products are also considered an obstacle to the progress of Kaesung industrial complex. Even if the South Korean firms manufacture products in Kaesung industrial complex, it is actually hard to sell them in world markets due to high tariffs imposed on North Korean products. Sometimes, it is almost impossible for the Products to compete with products from other countries in the market of western countries.

At present, the South Korean government has been taking considerable efforts to

solve this problem. One solution is that the South Korean firms make half-finished products in Kaesung complex and complete to manufacture products in South Korea at the end. The other solution is that the Korean government intends to conclude on ‘the Kaesung provision’ when it forms multiple FTAs with major trading partners. The South Korean government persuades the potential FTA partners to accept the Kaesung provision on the ground that the transactions between South and North Korea are purely inter-Korea economic exchanges among the same nationals. However, the reality is that Korea’s FTA partners are very reluctant to allow the Kaesung provision in the process of FTA negotiation. ASEAN has been maintaining its position to refuse the Kaesung provision in the negotiation of Korean-ASEAN FTA. So do other countries.

VI. Policy recommendations

As we discussed above, the international trade and national security have a close link between them. Then, most previous studies focus on assessing the efficacy of and GATT/WTO-consistency of trade sanctions which are imposed for national security purpose. But they failed to analyze how the international trade enhances the national security. Some people may wonder whether we can provide any answer or at least any clue to the question. The main reasons for their attitude may come from that only one-side story has been told such that the national security concerns have affected international trade negatively. Here, recalling the fact that national security has increasingly depended upon international trade especially after the collapse of the Cold War, we are going to explore how the trade-distorting effects of national security measures are minimized and then how to promote trade while fulfilling national security objective.

1. Objective definition of national security

There are several areas to be improved to achieve the secure trade. First, it is vital to define well the concept of national security for the purpose of trade measures. It is understood that one of reasons for GATT/WTO trade disputes was the absence of an objective definition of key terms such as “essential security interests.”³⁹ Besides the

³⁹ Article XXI(a) and (b) of the GATT 1994, Article XIV *bis* (a) and (b) of the GATS, and Article 73(a) and (b) of the TRIPS Agreement.

multilateral rules, national legislations such as the Exon-Florio Amendment also fail to define the national security clearly. Therefore, since the failure may cause trade disputes, it is critical to develop a reasonable, objective definition with an aim of promoting trade or of discouraging the abusive use of national security provisions.

One of the related works is to classify types of national security such that different forms of sanctions, if necessary, apply. In addition, there is a need to specify the scope of national security provision, because there is no limit on the scope under the existing 'catch-all' provisions which may lead to the abusive use. The negotiating history of the WTO Subsidies Agreement may provide a useful guidance. The subsidy agreement provides the definition of a subsidy and three categories of subsidies which require different invoking conditions and different remedies.

2. Reasonable and transparent investigation procedures

The WTO rules do not provide what kinds of procedures to apply in invoking trade sanctions for the security reason. In particular, it may be essential to specify the factors to be evaluated in determining whether a nation's security interests are under threat. Multilateral rules do not specify factors to be taken into account in making a decision of a trade sanction. Similarly most national legislations fail to specify the factors, either. Though section 232 of the Trade Expansion Act of 1962 specifies the factors to be examined, the factors are deemed to have little connection with international trade.

The investigation procedures for anti-dumping duty, countervailing duty and safeguards may be helpful in developing the appropriate provision. In particular, since the WTO rules permit trade restrictions facing with threat to national security, the threat of injury provisions may apply.

Well-defined notification provisions are recommended for the transparent administration. Article III of GATS could be a useful guidance for the notification procedures.

3. Necessity

GATT Article XXI, GATS Article XIV *bis* and TRIPS Article 73 all provide that the trade-restricting action shall be necessary for the protection of a Member's essential security interests. But they do not specify criteria for determination of necessity. This lack of criteria has become at the center of trade disputes. Thus, there is a need to

develop necessity criteria which are applicable to national security measures.

Since several provisions of the WTO Agreements place necessity requirements, they could provide useful guidance. The provisions include Article XX of GATT, Article 2.1 of SPS, Article 5.1 and Article VI:4 of GATS. Though they do not provide specific criteria, the case laws involving them provide a good guidance.

4. Extraterritorial Application

It is useful to clarify the territorial extent to apply trade restrictions. In particular, there is a need to discuss whether the extraterritorial application is permissive and, if permitted, how far they can be applied. The extraterritorial application issue was raised in the dispute between EU and US concerning the Helms-Burton Act. There is a need to consider whether the positive comity rule may apply.

5. Alternative policy instruments

Most export controls and import controls are taken in the form of quantitative restrictions. It, however, is widely recognized that the quantitative restrictions are inferior policy instruments to price ones such as subsidies. Certain types of subsidies may be granted to a domestic industry which is competing with foreign industries that are found to impair national security. Under the existing WTO Subsidies Agreement, it is not allowed to provide these kinds of specific subsidies. However, it is worth of raising this issue in discussion of non-actionable subsidies under DDA rules negotiations. Also government procurement could be used for the national security.

Also there is a need to pay special regard to developing countries. In other words, individual nations shall design trade sanctions, if necessary, which grant the special and differential treatment to developing countries. Under the S&D treatment, different types of sanctions could apply to the lax extent compared with them against developed nations.

VII. Concluding remarks

Analyzing linkage between international trade and national security, we recommend several policies which are implemented in a less trade-restrictive manner while fulfilling

national security objective. But we left some issue untouched which are to be explored further in the future.

The future issues include the Doha Development Agenda (DDA) negotiations of Trade Facilitation, the electronic commerce and other countries' national security rules such as the EU anti-terrorism legislations.

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