



Torn Between the Two Trade Giants: U.S.-China Trade Disputes and Korea

by Jaemin Lee

An old Korean proverb says that when two whales fight it is the shrimps whose backs are crushed. Maybe that proverb best describes Korea's situation on the trade front these days. The United States and China are engaged in trade disputes on many issues. All countries are holding their breath as they watch the surge of trade friction between the United States and China in various forums.¹ Some of the disputes are pending at the World Trade Organization (WTO) while others are addressed bilaterally through respective domestic proceedings. Any challenge or measure by Washington against a Chinese product has been readily greeted by a comparable challenge or measure by Beijing against another U.S. product. Beijing's confidence was further evidenced when it recently poked one of the sorest spots of the United States: it just initiated a countervailing duty (that is, an anti-subsidy) investigation against the U.S. bailout of the automobile industry, arguably thus far an almost taboo issue in the global trade community. In sum, the traditional scene of U.S. unilateral complaints against and bashing of China is now apparently changing.

Clearly there seems to be a sense of surprise on the part of the United States. It appears that the United States has been taken aback by China's immediate and effective retaliatory measures against U.S. trade remedy measures directed toward China. The growing consensus among trade watchers seems to be that this is just the beginning, with a stronger dose of Sino-American tit for tat looming along the horizon of almost all trade fronts.²

Washington seems to be busy formulating a strategy to deal with the new China, as this is a patch of uncharted territory for the United States. Although the United States has experienced sporadic rivalries in the trade sector with other trade rivals such as the European Union and Japan, none has had the immediacy and the back-and-forth na-

ture of the relationship between the United States and China. The traditional trade tension across the Atlantic and the Pacific could be said to have been benign rather than malign, probably because both Brussels and Tokyo have maintained and tried to maintain stable alliances with the United States in diplomatic and military sectors and because the trade disputes have largely been part of the process of resolving bona fide differences among them. Recent disputes with China thus pose a different kind of challenge to the United States as a military and diplomatic alliance does not exist between the two countries as exist between the United States and the EU and the United States and Japan. In fact, the U.S.-China rivalry is arguably more palpable in the military and diplomatic sectors.

All these disputes and the new environment in the global trade sector also pose difficult questions for Korea. As China is Korea's largest trading partner and the United States the second, the trade friction and disputes between the two inevitably carry a significant impact on the overall trade interest of Korea. That is particularly the case as Korea is closely linked to the United States in all respects, and it is also becoming closer to China in terms of trade and economy. Thus, Korea's position in these intense U.S.-China disputes is necessarily nuanced. As to some issues, Korea seems to share the U.S. position, most notably regarding China's loose protection of intellectual property rights (IPR). As to other issues, Korea seems to share China's position as an export-driven, government-coordinated country, most notably regarding issues falling under the antidumping and countervailing duty investigations sector. Korea's concern becomes more acute because of the surge of Korean investment in China and in the United States. With increasing Korean investment in China and the United States, Chinese trade sanctions against the United States, or vice versa, thus may sometimes amount to indirect, though unintended, trade sanctions of Korea. Korea is therefore cautiously watching the current surge of trade friction between the two trade giants.

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This paper aims to discuss the implications for Korea of U.S.-China trade disputes and how Korea can ensure that these disputes do not unexpectedly disrupt Korea's trade interests. Basically, for Korea there are both negative aspects and positive aspects flowing from the Sino-American trade disputes. The critical question is how Korea manages to ensure that it is not too exposed to negative aspects while it can build upon positive aspects.

Recent U.S.-China Bilateral Disputes

Recently, the United States and China have been quite busy at the WTO, suing each other and criticizing each other. During 2009–10, three main disputes have been decided by panels or the appellate body of the WTO. They are the IPR protection dispute,³ the trading rights and publication dispute,⁴ and the auto parts dispute.⁵ At the same time, four more disputes are currently pending at the WTO. They are the raw materials export restraint dispute,⁶ the AD/CVD simultaneous investigations dispute,⁷ the poultry import restriction dispute,⁸ and the tires safeguards dispute.⁹ In fact, among the six disputes resolved by the WTO in the 2009–10 period, three were disputes between the United States and China.¹⁰ The remaining three disputes are those between Panama and Columbia, between Thailand and the United States, and between the EU and the United States.¹¹ Six out of 14 pending disputes at the WTO at the moment are disputes between the United States and China.¹² All these resolved or pending U.S.-China disputes have occurred since 2009.¹³ Between November 2001—the time that China joined the WTO—and 2009, no dispute-s between the two countries had been brought before the WTO. Not only the numbers but all U.S.-China disputes have been high-profile ones in which many countries have shown strong interest. Korea has also been watching and monitoring these disputes with great interest.

At the same time, the United States and China are also active on the bilateral front. China has been a perennial target of U.S. domestic trade remedy investigations, and the United States is becoming a new frequent target of Chinese investigations. Statistics show this trend: In terms of antidumping investigations by the United States, 14 out of 20 cases in the first half of 2009 were against China, making China the most frequent target of the United States during the period.¹⁴ In comparison, 6 out of 31 antidumping investigations initiated by China in the second half of 2009 were lodged against the United States, which also makes the United States the number one target of China in the same period.¹⁵ In terms of countervailing duty investigations, which aim at foreign governments' illegal subsidization policies, 12 out of 17 U.S. investigations in the second half of 2009 were against China, making Beijing Washington's most frequent target.¹⁶ During the same period, China initiated four countervailing duty

investigations, and all of them were lodged against the United States.¹⁷ In short, on both the multilateral and the bilateral fronts, the two countries seem to be engaged in all-out trade battles.

In addition, there are other major U.S.-China disputes that take place outside the WTO proceedings or the domestic trade remedy investigation context. They include Google's confrontation with the Chinese government regarding censorship of Internet materials¹⁸ and China's alleged manipulation of the renminbi, its currency, to sustain its economy and exports.¹⁹

Same Rules, Different Thinking

One could argue that there is a unique aspect in U.S.-China trade disputes that differentiates them from other trade disputes. The uniqueness does not simply lie in the drastic surge of the number of disputes in recent days or in the fact that they are the two largest players in the global trading regime. A clash between these two trade giants does merit a different stature. But disputes between the United States and the European Union, another giant on the trade front, do not necessarily involve such a level of intensity and confrontation.²⁰ Likewise, the uniqueness of U.S.-China disputes does not lie in the fact that one is developed and the other is developing. The United States has had high-profile trade disputes with other major developing countries such as Brazil and Mexico, but they have not registered this level of intensity and confrontation.²¹

Given the positions and arguments on both sides in some of recent disputes, it may be the case that sometimes the uniqueness of U.S.-China trade disputes arguably lies in the fundamental difference in perspectives between the two countries in terms of various trade-related economic policies. Of course, there are some easy disputes between the two where one could relatively easily determine which side is right or wrong, but increasingly some of the recent disputes between Washington and Beijing concern issues that possibly touch on the fundamental difference between the two in terms of formulating and implementing national economic policies. A proper role of a sovereign government in times of economic crisis,²² a permissible policy boundary for a government to preserve key raw materials, legitimate administration of the criminal justice system of a government, and outer parameters of foreign exchange policies are some of the examples of issues raised in recent U.S.-China trade disputes. As one can imagine, disputes involving these issues defy a simple finding of violation by one country in a particular trade agreement.

Most of the time, the text of an agreement rarely provides sufficient norms on these rather philosophical issues, and the outcome pretty much depends on perspective, point of

view, context, or intention of the government concerned.²³ The problem is that, in the area of these perspective-oriented issues, textual language sometimes fails to provide clear-cut guidance and leaves open the possibility of future constructive interpretation and application. In these circumstances, it is entirely possible that the disputing parties may have different opinions, believing in good faith that their positions are vindicated according to the textual language: they may simply have different perspectives in doing business and carrying out obligations under a trade agreement. If trade agreements explicitly spelled out the norms, there would not be a problem. But sometimes in some areas trade agreements opt not to provide specific norms and guidelines. This is not the problem of sloppy work of treaty negotiators; instead, this is probably caused by the lack of sufficient time for negotiations, the necessity for strategic ambiguity during the negotiations, and increasing interaction between trade norms and other international legal regimes.²⁴

Specific Implications for Korea

Against this backdrop, this new trade environment of U.S.-China trade conflict is currently causing specific implications for Korea. These implications include both negative and positive aspects, and they are discussed below.

Negative Implications

Negative implications for Korea arising from Sino-American trade disputes include the collateral damage effect, protectionism-stoking effect, trade politicization effect, perspective mismatch effect, and free trade agreement (FTA) complication effect. Of course, there may be other negative implications as well, but these examples at least offer a silhouette of such implications.

Collateral damage effect. Korean companies sometimes become victims of collateral damage from the U.S.-China trade disputes. As the Sino-American trade disputes continue to escalate in quantity and quality, both Washington and Beijing are quick and eager to initiate their respective trade remedy investigations against products from each other through their domestic proceedings. These domestic investigations are usually the easiest trade weapons at the fingertips of the two governments for addressing a particular problem posed. From time to time, however, Korean companies get snared in these investigations as they are unknowingly caught in the cross fire, as explained below. This could happen either when a Korean product is dragged into an investigation by Washington or Beijing or when U.S. or Chinese products produced from factories established by Korean investment become subject to an investigation by the other side. Then Korean companies producing these products or having made such investments are directly implicated.

Dragging Korean products into an investigation. An increasing tendency in Washington seems to be that a petition filed by a U.S. domestic industry for a trade remedy investigation against China can easily include Korea as a companion target as well.²⁵ In other words, the real motivation and target of the petition is apparently China, but it nonetheless tends to include Korea or other countries to make the case easier to go forward because of some of the unique legal requirements applicable to such investigations. The same situation is also observed in investigations initiated by Beijing against U.S. products. When an investigation is leveled at U.S. companies and products, it increasingly includes Korean counterparts as well.²⁶

China's fast change of status in this regard is indeed noteworthy. For a long time, China has been by far the most frequent target of global antidumping investigations, but it has now become one of the most frequent users of such investigations. During the period 1995–2009, China had been a leading target of foreign antidumping investigations; its trading partners filed a total of 544 investigations against it. Korea follows China in second place, with 167 investigations. The huge difference in number between China in the first place and Korea in second place indicates the sheer intensity of global investigations against China.

During the same period, China registered itself as the sixth most frequent filer of antidumping investigations, by filing 130 investigations against foreign countries, while the United States is the second most frequent filer, with 333 investigations in the same period.²⁷ What is noteworthy here is that, while the number of investigations of the United States is evenly spread out during the period, investigations of China are back-loaded, indicating the surge of investigations of Chinese practices in recent years.²⁸

Through its hard-earned experience, China has apparently understood the importance of initiating and utilizing trade remedy investigations in order to protect its domestic interests.²⁹ Unlike Korea, China has been able to turn itself into a major user of antidumping investigations as it has a sizable domestic market, which is one of the essentials for having an effective trade investigation mechanism in place. So, one could assume that both the United States and China are active users of trade remedy investigations at the moment and will remain so at least for the time being.

Domestic industries in the United States and China apparently enjoy benefits from this multiple targeting strategy because in this way they can address multiple foreign competitors from different countries in single investigations. Legally speaking, it becomes much easier to satisfy the so-called material injury standard, which is one of the mandatory requirements for imposing most of the trade

remedy measures.³⁰ In an effort to dilute the nature of U.S.-specific or China-specific trade remedy investigations, both countries seem to have an incentive to include Korean products and Korean exporters (and also products and exporters from other countries, for that matter) in the mix of targets, as Korea is a main exporter of almost all items destined for both countries and yet is not necessarily such a major power in the trade sector that the two countries would have to be cautious in dealing with it.

In fact, any U.S. trade measure against China and any Chinese measure against the United States could be equally applicable to Korea with some modifications and adjustments. For instance, considering the U.S. argument against China in the alleged renminbi manipulation dispute and its argument against Korea regarding Korea's regulation of the financial system, the United States seems to call on a similar logic, which is a government's allegedly illegitimate intervention in the financial market to sustain overall export performance.³¹ Granted, there are stark differences in context between the two cases and generally between Korea and China, but one of the common underlying themes for both cases from the U.S. perspective seems to be that government-coordinated, export-driven, domestic company-supporting economic policies could be utilized as disguised trade measures and thus should not be permitted.

For its part, Korea has disagreed with such characterizations and perspectives by the United States and has argued that a foreign government's general financial policy should not be amenable to trade disputes.³² This difference in perspective between Korea and the United States has led to WTO disputes and a domestic countervailing duty investigation by the United States against Korea, and the latter proceeding is now entering its ninth year.³³ This indicates that any prospective action of the United States against China on these grounds might prompt U.S. domestic industries to revisit these old issues involving Korea.

Likewise, the logic behind China's own antidumping and countervailing duty investigations against the United States could also be used against Korea with some modifications. As such, Korean companies, which probably would not be selected for investigations on their own, are now being included as sidekicks in investigations aimed at Chinese or U.S. companies to facilitate these investigations. By no means is this a good sign for Korea. As bilateral trade disputes between the United States and China intensify and as more and more trade investigations ensue, this problem will further stand out.

Furthermore, the fact that the two countries are currently turning their focus from the traditional antidumping investigations to subsidy investigations is more alarming to

Korea. The United States, after long domestic controversies, has recently started to conduct subsidy investigations against China because apparently antidumping measures alone are not able to address the China problem;³⁴ remarkably, China is also responding in kind by initiating its own subsidy investigations against the United States regarding the automobile company bailout in the United States in 2008–09.³⁵ Subsidy disputes involve domestic economic policies of the other country and thus carry much wider impact. Because of its government-coordinated and export-oriented economic structure and policies, Korea has been a perennial target of foreign subsidy investigations and has suffered a great deal of agony.³⁶ The fact that both the United States and China are becoming more active in subsidy investigations is therefore ominous news for Korea.

U.S. and Chinese products with a Korean interest. Korean companies and products could also be implicated in the respective trade remedy investigations initiated by the United States and China when the products subject to investigations are produced by manufacturing facilities established by Korean investment. It is not uncommon that Korean companies relocate their manufacturing facilities to China or establish new investment in China. Products manufactured by these facilities are Chinese origin and can be captured by any U.S. investigation against the product.³⁷ It is true that these products occupy only a fraction of Chinese products, but to the Korean companies implicated in the investigations, this would be of significant consequence.

It is also possible that U.S. products subject to Chinese investigations reflect the interest of Korean investors. China's recent subsidy investigation against the automobile industry of the United States shows this possibility. If China expands its investigation or initiates a new investigation against automobiles from the United States and if Korean automobile manufacturers in the United States start to export their products to China in the future, these U.S.-manufactured Korean automobiles will become the target of the Chinese investigations. As Korean investment in the United States is expected to grow, particularly if the Korea-U.S. FTA (KORUS FTA) goes into effect, Korea can expect to see more of this problem in the future.

Protectionism stoking effect. The surge of trade disputes between the United States and China may also help stoke the protectionist tendency in Korea. Viewing the surge of Sino-American bilateral trade disputes as evidence that these two countries also employ various measures to protect their domestic industries, Korean government agencies have been tempted to consider adopting policies to protect and support domestic industries and companies.³⁸ This has also prompted some of the Korean

companies to request that the Korean government adopt policies to support domestic industries. In other words, to the extent that U.S.-China trade disputes reveal the various protectionist measures of the two trade giants, the domestic pressure in Korea to introduce similar measures to help Korean companies maintain their competitiveness edge has mounted. This could easily develop into a situation where other trading partners claim that Korea introduces illegitimate protectionist measures, which may then lead to Korea's own trade disputes with them. This will cause a long-term negative effect for Korea.

A recent example in Korea that attracted foreign investors' attention is the discussion about introducing a measure to restrict foreign investment in areas involving national security and the ensuing legislative changes. The discussions and changes were prompted by Korean companies that have seen and faced similar legislation in other trading partners, mainly the United States and China.³⁹

Politicizing trade effect. At the same time, the surge of U.S.-China trade disputes could politicize Korea's own bilateral trade issues with China. The acute sensitivity of the U.S.-China trade disputes has apparently made China more defensive to trade issues to be raised by other countries, including Korea. It is then feared that any bilateral trade conflict with Korea could elicit a harsher response from China than it otherwise would. These circumstances would make Korea more cautious in addressing trade issues with China and force Korea to increase its consideration of political sensitivities when it approaches what are essentially trade issues.

Perception mismatch effect. Korea is torn between the two different perspectives held by the United States and China. On the one hand, Korea clearly espouses the perspective held by the United States, which supports fuller promotion of private activity, further protection of private property rights, and more liberalization and deregulation of the market. Over time, Korea has made significant efforts to harmonize its perspectives and views with those of the United States in terms of economic regulation and policies. The effort originally started with the financial and regulatory reform following 1997 financial crisis, and it has been further expedited during the course of the FTA negotiations with the United States.

On the other hand, however, there are some economic or trade issues in the spectrum for which Korea's perspectives are closer to those of China. These issues may include the role of the government in regulating private activity in the market and the appropriateness of the government's intervention in the private sector.⁴⁰ This does not mean that Korea supports China in specific disputes involving these issues; in fact, Korea may well have views different from

China, and in specific disputes more often than not Korea has supported the U.S. position when it comes to a determination of a violation of trade agreements such as WTO agreements. Instead, it simply means that, irrespective of the possible violation of international trade agreements in technical terms, an argument can be made that Korea may at least understand the basic rationale of China in introducing certain economic or trade measures.

The clash between the United States and China regarding alleged manipulation of the renminbi may provide an example. For a long time, foreign governments have claimed that the government of Korea is managing the Korean financial market for the benefit of Korean companies.⁴¹ This regulation of the financial market has caused constant concern on the part of foreign countries, particularly Western entities such as the United States and the European Union.⁴² They argue that when it comes to regulation of financial markets, the government of Korea has traditionally had a hands-on policy in order to achieve governmental goals. In their view, the government of Korea is orchestrating the financial market for the purpose of artificially inflating the competitiveness of Korean companies while putting foreign companies in a disadvantageous position or sometimes keeping them out of the Korean market. Korea has countered that it is simply adopting and implementing legitimate governmental policies, as does any other government. These interactions between Korea and other countries resemble those between China and the United States.

As such, U.S.-China disputes present instances in which Korea realizes the existence of a mismatch between the different perspectives looking at the same issue. After an official determination is rendered by authoritative forums such as the WTO dispute settlement proceedings, more guidance will be available for Korea. Because such an authoritative answer takes a long time to come and because, even if it does, satisfactory clarity is usually missing, it is indeed difficult for Korea to adjust itself in the middle of conflicting perspectives. Sharp confrontation between the United States and China will continue to test these perspective-related trade issues over and over again. Each time, Korea will certainly monitor the disputes carefully, but Korea may face difficult moments in fine-tuning its perspective in between the two trade giants.

FTA complication effect. Another negative effect in this regard is the complication that Korea would feel as a result of the different approaches and models of the FTAs that the United States and China pursue. The KORUS FTA is waiting for congressional approval, and negotiations for the Korea-China FTA are now starting. The general speculation is that the China FTA will be among the top priorities for Korea in the near future. There are FTAs with

other countries, but FTAs with the United States and China stand ready to affect Korea's economy and trade interests to a significant degree through economic integration.

Escalating trade disputes between the United States and China have prompted the two countries to solidify their respective FTA approaches and models to preserve their trade interests. As Korea currently pursues FTAs with the two countries, these discrepancies could complicate Korea's coordination of domestic policies following the conclusion of these FTAs. For instance, China has a program, called the Early Harvest Program (EHP), to provide preferential benefits even before an official FTA is signed, which is an integral part of China's FTA strategy.⁴³ This program, however, could be a violation of relevant WTO rules when viewed from the FTAs that the United States is concluding. Furthermore, the difference in approaches and models of the KORUS FTA and Korea-China FTA could complicate Korea's implementation of these agreements when they go into effect.

Positive Implications

The bilateral trade disputes between the United States and China do not merely cause headaches for Korea. They also bring unexpected benefit as well. Korea can gather further factual information on the situation in China, and the positions and arguments of the United States and China regarding some key issues in which Korea has potentially strong interest are revealed in this process.

Clarification of facts and situations in China. One of the most important benefits that Korea has been enjoying from the surge of U.S.-China trade disputes is gaining knowledge of factual information and clarification from China. As recent disputes and cases demonstrate, any dispute against China is an introduction into a myriad of complex Chinese laws, regulations, and overlapping jurisdictions of governmental agencies.⁴⁴ In many disputes, China has claimed that the United States mischaracterized the true meaning of the relevant Chinese laws and regulations.⁴⁵ Furthermore, China sometimes refers to legislative changes in relevant regulations⁴⁶ and revocation of the existing measure.⁴⁷

With respect to each claim, the respective explanations of both China and the United States of the operating mechanisms of the measures and the alleged impact on the market show significant gaps and discrepancies. Thus, in any dispute involving China, clarification of key factual situations has become critical to the resolution of the dispute. Although official trade disputes between Korea and China are still quite rare because of the two countries' cautious approaches and desire to avoid disputes, the Korean government and companies increasingly face a wide range of

trade issues as the trade volume explodes. In addressing these trade issues in China, the most difficult task for the Korean government and companies seems to be to gather facts and confirm the true situation.

New information gathered by the United States or that otherwise turns up in the course of trade disputes between the United States and China helps Korea to have a better glimpse of the facts and situations in China. Korea would probably not be privy to this kind of information but for robust bilateral disputes between the United States and China.

U.S. claims reflect Korean concerns. Another benefit for Korea flowing from U.S.-China bilateral disputes is more substantive. The United States has raised issues that Korea could raise on its own but has not done so for various reasons. Ever since the garlic dispute back in 2000, when Korea and China imposed tit-for-tat trade sanctions,⁴⁸ Korea has been careful not to repeat the same experience if at all possible, but the rapid growth of Korea-China trade volume has constantly presented new issues and problems.

Under these circumstances, the U.S. effort to identify issues and raise claims has addressed at least some of the concerns that Korea has had. The successful challenge by the United States of China's loose IPR protections offers a good example.⁴⁹ Legally speaking, China's obligation from these disputes with the United States is directed only to the opposing party, the United States. But other countries, including Korea, can also benefit because China's subsequent change of system or law also directly affects other countries as well. In other words, Korea stands ready to benefit from these changes as an unintended third-party beneficiary, so to speak.

Although Korea might gain from changes on the part of China, these gains alone will not allow Korea to deal sufficiently with all its outstanding trade issues with China. Key issues and core concerns of Korea can be addressed only through Korea's own initiation of discussions, negotiations, and proceedings with China.

Learning by example and policy adjustment. From time to time, the rationale of the United States when it raises a particular trade issue against another country sometimes reflects Korea's position on the same or a similar issue against that country. U.S.-China trade disputes sometimes create such a situation, and they can serve as a barometer for prospective Korea-China disputes.

China's alleged failure to vigorously enforce IPR domestically could reflect the same concern on the part of Korea vis-à-vis China in the area of IPR. In these circumstances,

the U.S. pursuit of trade issues could offer Korea a glimpse of Beijing's explanations and arguments regarding specific issues. If Korea ends up raising the issue in the future in prospective trade negotiations or disputes with China, chances are that China will resort to the same or similar explanations and arguments. Korea's evaluation of China's explanations and arguments through U.S.-China disputes will offer Korea a valuable guideline.

In fact, what particularly intrigues Korea at this juncture is seeing how China implements adverse rulings from the WTO or its other promises that it made when it joined the WTO in 2001. Successful U.S. challenges at the WTO against some of China's measures have made China face this difficult task. Losing a dispute at the WTO is one thing, and implementing an adverse ruling (that is, changing domestic laws and regulations) is quite another. China's ultimate implementation of adverse rulings may affect considerably Korea's prospective decision to challenge Chinese trade measures against Korean companies and investors through formal proceedings.

Given that China has been critical of the WTO's possible infringement on its sovereignty,⁵⁰ it is difficult to predict how China will implement these adverse rulings.⁵¹ In "China—Measures Affecting Trading Rights and Distribution Services (DS363)," China referred to the *UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted in October 2005, to stress that cultural goods are different from other noncultural goods and that the members preserve more leeway in regulating these goods.⁵² China's point was that it could regulate foreign goods and services when it has legitimate concern about preserving its cultural identity; this argument was effectively rejected by the WTO's panel.

Likewise, recent U.S.-China disputes have also made Korea realize a considerable gap exists between the United States and China in perceiving some of the fundamental issues in the trade sector. This realization could also help Korea prepare itself to respond to Korea-U.S. disputes. Although the context and backgrounds are quite different, some of the issues raised by the United States vis-à-vis China could apply to Korea with some modification. For example, the recent extensive U.S. search for China's subsidy programs in both its central government and provincial governments could also function as an advance warning for Korea, which to some extent adopts similar programs in various sectors.

Exclusion of competitors in major markets. Another important benefit for Korea flowing from U.S.-China trade disputes is the possible exclusion of competitors from the respective markets. China's exclusion of U.S. products or the U.S. exclusion of Chinese products from their home

markets through various trade measures may create an environment in which Korean companies could capture the lost market share. As long as Korean companies are not included in the same trade remedy investigations, Korean companies could take advantage of a situation in which one of Korea's major competitors is driven out of the market.

What Next for Korea?

Ever since the 1998 financial crisis and the 2008 financial crisis, Korea has been on a roller coaster in terms of its economy. Many times Korea's robust trade performance led Korea out of the trenches. These events again etched in the minds of Koreans the importance of trade for maintaining its economy and led Korea to continue to pursue its trade market expansion policy, most notably through FTAs. The intensifying U.S.-China disputes may turn out to be yet another important variable for Korea's effort to navigate the uncharted territory.

For Korea, the implications of the Washington-Beijing trade battles are quite mixed. On the one hand, they tend to help Korea on its trade front, while on the other they further complicate Korea's position in all these complex issues. It would be difficult to quantify these mixed implications, but the final score will depend on how Korea manages to maximize the positive side and minimize the negative side. The following issues will play a critical role for Korea's successful management of the ultimate calculus.

Managing Korea-China Trade Disputes

For some time Korea and China have been cautious and have not created any major disputes on the trade front. At the same time, however, it is also true that the two countries have reached the point where trade disputes are increasingly becoming an inevitable element of business, given the exploding volume of their bilateral trade.⁵³ The prospective Korea-China FTA will bring this situation to yet another level, and chances of disputes will proportionally increase. The problem is that any major dispute between Korea and China will not be simply resolved through a treaty interpretation or rules-based system.

As the recent *Cheonan* incident has shown, Northeast Asia is a volatile place, and the trade and economic environments cannot be fully separated from the political environment. One of Korea's strategies in the future will be to continue to manage a relatively stable relationship with China. Vigorously pursuing a trade issue probably will not necessarily square with this strategy. Under these circumstances, Korea will most likely make efforts to avoid situations where Korea-China bilateral relationships go sour because of trade disputes. Trying as much as possible

to avoid any major conflict, Korea will certainly endeavor to resolve a trade dispute through political settlement. It is likely, however, that Korea will be short-changed in this process on account of the imbalance of power between the two countries.

The surge of trade volume between Korea and China will foster more trade issues. Particularly when a core trade interest is on the line or the domestic situation requires it, Korea will be forced to pursue all avenues available as it does with any other trading partner.⁵⁴ If Korea ends up going down this path, any dispute could become quite ugly, increasing the tension between the two countries. The fallout from this confrontation could also negatively affect Korea. Whether Korea makes an effort to avoid trade disputes or face them, chances are that Korea will end up having a shorter end of the deal unless Korea is determined to pursue its trade agenda with China somewhat independent of various nontrade considerations, as it has done with the United States. Korea faces a dilemma. How Korea will fare in an era of U.S.-China disputes will be significantly affected by how Korea manages its current relative stability with China on the trade front. Korea will probably seek to enjoy an indirect benefit and free-riding from U.S. efforts in its disputes with China.

Managing the Role of a Trade Forward Base

After the KORUS FTA and Korea-China FTA go into effect, U.S. investment and Chinese investment in Korea will also increase. If U.S.-China trade disputes intensify, some U.S. and Chinese investment will be made for the purpose of establishing production platforms in Korea in order to avoid trade restriction measures against products manufactured in the United States and China. Products manufactured in Korea with U.S. investment or Chinese investment would be treated as Korean products in these markets; thus, they could be subject to trade remedy measures against Korea but not against the United States or China.⁵⁵ Korea would operate as a forward base for U.S. and Chinese companies.

If Korea manages this new environment effectively, it might attract foreign investment, which is one of Korea's national objectives.⁵⁶ But this could also bring another risk to Korea: Korea might be more directly involved in Sino-American trade disputes. In other words, if in the future major Chinese manufacturers establish a manufacturing facility in Korea to use as their platform for export to the United States, then the aim of U.S. trade remedy measures would settle on Korea, the country of manufacture, and the situation would then become a trade dispute between Korea and the United States. How Korea manages this new role under the new environment would affect significantly how Korea will fare in the U.S.-China trade dispute era.

Adjusting Differences in Perspectives

At least for the time being it seems unlikely that the United States and China will be able to find common ground in the trade sector and avoid disputes. These disputes seem to be deeply rooted in the difference in perspectives, and these perspectives are hard to change. Maybe merely counting the number of antidumping measures, countervailing duty measures, or safeguards measures shows only the tip of the iceberg. A legalistic approach based on WTO agreements and, if necessary, following WTO litigation, which the two countries seem to be pursuing these days, is always important, but it should not be the central pillar of dealing with the current problem of the increasing number of trade disputes between the two countries. WTO norms are not sufficient and detailed enough, so disputes between major trading partners (such as China, the United States, and the EU) addressing WTO norms regarding new issues (such as trade and environment, trade and security, trade and financial sovereignty, and trade and culture) are bound to intensify, and the losing party will do whatever it takes to reject a ruling or to find an excuse to delay implementation of the ruling.

These disputes cannot be effectively resolved by simply relying on WTO agreements or through a conventional procedure such as the WTO dispute settlement procedure. Generally speaking, these new disputes will be controlled only when major trading partners will be able to assure each other that various domestic measures are bona fide public policy measures and not disguised trade measures. This is to build a consensus that, by refraining from introducing disguised measures, all of them will benefit in the long run. It may take a considerable amount of time for this consensus to build between the United States and China.

If it takes time to build such consensus between the two trade giants, Korea's positioning in the interim will continue to be precarious. How Korea manages this precarious situation will be an important determinant for how Korea will fare in the era of U.S.-China trade disputes.

Conclusion

The United States and China are engaged in a range of high-profile trade disputes. As it currently stands, the bilateral trade disputes between the two countries seem likely to continue to intensify in the future. For instance, if the Trans-Pacific Partnership—apparently one of the policy priorities of the United States in the trade sector—emerges in the Pacific basin region, the level of intensity of the disputes will increase as China might as well feel contained by this U.S.-led trade bloc in the region. China might try to form a similar bloc of its own.

The disputes between China and the United States, Korea's number one and number two trading partners, present a new trade environment for Korea. On the one hand this new environment brings incidental benefits to Korea, but on the other this poses new challenges for Korea. Although it is difficult to quantify which aspect outweighs which, what is clear is that Korea cannot simply remain insulated from this new environment, and it is exposed to various indirect effects. Furthermore, what makes the situation more complicated is that Korea is currently pursuing further economic integration with the United States and China, though with varying degrees, through its respective FTAs with the two countries. Under these circumstances, any effect for Korea from this environment has the potential to become more direct than before. Unless Korea manages this new challenge successfully, its position in the global community in terms of trade and its performance in the trade sector will become more precarious. If Korea cannot get itself out of the collision entirely, we had better buckle up tight.

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Notes

1. For instance, at a recent conference held in Washington, D.C., the 2010 International Trade Update, hosted by Georgetown University Law Center on 25–26 February 2010, to predict the Obama administration's trade policy in 2010, much of the discussion from the speakers and in the audience was focused on U.S.-China trade disputes. See the conference materials at <https://www.law.georgetown.edu/cle/pdfs/227.pdf>; see also Michael Pettis, "U.S.-China Trade Relations—The Next Dispute?" Carnegie Endowment for International Peace, 17 February 2010, www.carnegieendowment.org/publications/index.cfm?fa=view&id=30975; Anthony Mason, "U.S.-China Trade Dispute Key Issue at G-20," *CBS Evening News*, 24 September 2009.

2. *Ibid.*; see also Ariana Eunjung Cha, "U.S., China Locked in Trade Disputes," *Washington Post*, 4 January 2010, www.washingtonpost.com/wp-dyn/content/article/2010/01/03/AR2010010301961.html. In the *Washington Post* article, Michael Pettis, a senior associate at the Carnegie Endowment for International Peace and a professor of finance at Beijing University, was quoted as saying that "a further increase in trade disputes in the next few years is 'inevitable.'" As for the increasing intensity of disputes between the United States and China through the WTO dispute settlement system and the relevant background, see Chad P. Bown, "U.S.-China Trade Conflicts and Future of the WTO," *Fletcher Forum of World Affairs* 33, no. 1 (Winter/Spring 2009): 28–32.

3. The official title of this dispute is "China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362)." In this controversial dispute, the United States alleged that the criminal enforcement system of China regarding violations of intellectual property rights failed to carry out China's obligation

under the TRIPs, most notably Article 61 of the agreement. China, in turn, argued that each member has considerable leeway in formulating and administering its own criminal enforcement mechanism under international law and under the TRIPs, and that the TRIPs do not allow intervention by a state with an issue that is reserved to a purely domestic domain of another state.

4. The official title of this dispute is "China—Measures Affecting Trading Rights and Distribution Services (DS363)." In this dispute, the United States basically claimed that, through various measures, China restricted imports of certain products into China and their distribution in China. More specifically, the United States claimed that China has various measures in place limiting the right to import reading materials, sound recordings, and films for theatrical release to certain Chinese state-owned enterprises, prohibiting foreign-invested enterprises and privately owned Chinese enterprises from engaging in these activities.

5. This official title of this dispute is "China—Measures Affecting Imports of Automobile Parts (DS339, 340, 342)." In particular, the issue was whether certain imported auto parts could be characterized, for customs purposes, as completed motor vehicles and would thus be subject to a higher tariff. China's tariff rate for motor vehicles was 25 percent, whereas its tariff on auto parts was 10 percent. The United States argued that 10 percent was appropriate because they are imported into China as parts, but China counterargued that 25 percent should be imposed because they were assembled into a car immediately after the import.

6. This dispute is "China—Measures Related to the Exportation of Various Raw Materials (DS394/395/398)."

7. This dispute is "United States—Definitive Antidumping and Countervailing Duties on Certain Products from China (DS379)."

8. This dispute is "United States—Measures Affecting Imports of Poultry from China (DS392)."

9. This dispute is "United States—Measures Affecting Imports of Certain Passenger Vehicles and Light Truck Tyres from China (DS399)."

10. See "Dispute Settlement Commentary of WTO Panel and Appellate Body Reports," WorldTradeLaw.net, www.worldtradelaw.net/dsc/dscpage.htm. Two implementation disputes have been excluded as they are an extension of existing disputes.

11. *Ibid.*

12. See "Ongoing WTO Dispute Settlement Proceedings under the DSU," WorldTradeLaw.net, www.worldtradelaw.net/dsc/currentcases.htm.

13. *Ibid.*; also "Dispute Settlement Commentary of WTO Panel and Appellate Body Reports."

14. See "Semi-Annual Report under Article 16.4 of the Agreement" (U.S. report to the WTO Committee on Anti-Dumping Practices), Report no. G/ADP/N/188/USA, 18 September 2009.

15. See "Semi-Annual Report under Article 16.4 of the Agreement" (China's report to the WTO Committee on Anti-Dumping Practices), Report no. G/ADP/N/195/CHN, 19 March 2010.

16. See "Semi-Annual Report under Article 25.11 of the Agreement" (U.S. report to the WTO Committee on Subsidies and Countervailing Measures), Report no. G/SCM/N/203/USA, 18 March 2010.

17. See "Semi-Annual Report under Article 25.11 of the Agreement" (China's report to the WTO Committee on Subsidies and

Countervailing Measures), Report no. G/SCM/N/203/CHN, 29 March 2010.

18. Miguel Helft and David Barboza, “Google Shuts China Site in Dispute over Censorship,” *New York Times*, 22 March 2010, www.nytimes.com/2010/03/23/technology/23google.html.

19. Howard Schneider, “Obama Urged to Act on China’s Currency Manipulation,” *Washington Post*, 26 March 2010, www.washingtonpost.com/wp-dyn/content/article/2010/03/25/AR2010032503772.html.

20. The United States and the European Union have been engaged in a high-profile seven-year dispute at the WTO called “United States—Laws, Regulations and Methodology for Calculating Dumping Margins (‘Zeroing’), Recourse to Article 21.5 of the DSU by the European Communities (WT/DS294/AB/RW),” 11 June 2009. Despite the political sensitivity involving this dispute and conflicting views between the two countries, the United States and the European Union have not shown the intensity and confrontation that are being observed in U.S.-China disputes. At the same time, there has been no new dispute initiated since 2009 when the U.S.-China disputes heated up.

21. In “United States—Subsidies on Upland Cotton (WT/DS267/AB/R)/DSR 2005:1, 3” (21 March 2005), Brazil challenged agricultural subsidies of the United States for its cotton industry. In “Mexico—Measures Affecting Telecommunications Services (WT/DS204/R)/DSR 2004:1V, 1579” (1 June 2004), the United States challenged Mexico’s discriminatory telecommunications policy for the benefit of a domestic carrier. These disputes were also high-profile disputes and attracted a great deal of international attention, but neither involved the animosity found in U.S.-China disputes these days. Since 2009, there is only one dispute pending between the United States and Brazil (“United States—Anti-Dumping Administrative Review and Other Measures Related to Imports of Certain Orange Juice from Brazil, WT/DS382/4” [21 August 2009]) and two disputes pending between the United States and Mexico (“United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/4” [10 March 2009] and “United States—Certain Country of Origin Labeling Requirements, WT/DS386/7” [13 October 2009]). See “Ongoing WTO Dispute Settlement Proceedings under the DSU.”

22. As a matter of fact, the controversy and ensuing legal disputes are to a great extent premised upon the cultural context: that is, different notions on the role of the government and different relationships between the governmental sector and the private sector. One of the unique traits of the Asian culture is for people to view the government in the context of a paternal authority and role. This trait still remains and also appears in economic regulation as well.

23. It has been said that “law is a form of cultural expression and is not readily transplantable from one culture to another without going through some process of indigenization. French law is as much a reflection of the French culture as Russian law is a reflection of Russian culture.” See Mary Ann Glendon, Michael Wallace Gordon, and Christopher Osakwe, *Comparative Legal Traditions in a Nutshell* (St. Paul, Minn.: West, 1982), 10.

24. For instance, trade norms and environmental norms are increasingly in tension. Some countries’ consideration of border measures to protect domestic producers from unfair foreign competition in relation to climate change legislation raises a concern about possible WTO violations. See Jonathan Lynn, “Carbon Border Measures Seen Breaking WTO Trade Rules,” Reuters, 3 December 2009, www.reuters.com/article/idUSGEE5B22A1.

25. See, for example, “Diamond Sawblades and Parts Thereof from the People’s Republic of China and the Republic of Korea: Anti-

dumping Duty Orders,” *Federal Register* 74, no. 212 (4 November 2009); “Certain Circular Welded Carbon Quality Steel Line Pipe from the Republic of Korea and the People’s Republic of China: Initiation of Antidumping Duty Investigations,” *Federal Register* 73, no. 83 (29 April 2008); “Coated Free Sheet Paper From China, Indonesia, and Korea,” *Federal Register* 71, no. 214 (6 November 2006). It is difficult to confirm the underlying intention of foreign companies and governments in initiating antidumping investigations and deciding to include certain countries, but the general view of the trade experts in Korea is that a majority of antidumping investigations against Korean products are simply companion or supplementary investigations of foreign governments whose real targets are China and Chinese companies.

26. *Ibid.*

27. See “Statistics on Global Trade Remedy Measures” (presentation by WTO officials at Seoul Trade Remedy Forum, organized by Korea Trade Commission, Seoul, Korea, 4 June 2010,

28. During the period 1995–2008, the United States and China initiated antidumping investigations against Korea 29 times and 27 times, respectively, placing the two countries in second place and third place among Korea’s trading partners. Among the antidumping duty orders following from these investigations, 11 orders from the United States and 20 orders from China are still in place, which indicates that most investigations by China have been conducted relatively recently. See “Foreign Trade Remedy Investigations Statistics [in Korean],” Korea Trade Commission, 29 April 2010, www.ktc.go.kr/kboard/view.jsp?bm=15&pg=1&bd=999999925.

29. See the China section of *2010 National Trade Estimate Report on Foreign Trade Barriers*, Office of the United States Trade Representative, 5, www.ustr.gov/sites/default/files/uploads/reports/2010/NTE/2010_NTE_China_final.pdf.

30. Tariff Act of 1930, as amended, Section 771(7)(A).

31. Schneider, “Obama Urged to Act on China’s Currency Manipulation”; “U.S. Takes Aim in Trade Barrier Reports,” Reuters, 31 March 2010, www.reuters.com/article/idUSTRE62U4TQ20100331; also compare the U.S. argument generally in “United States—Countervailing Duty Investigations on Dynamic Random Access Memory Semiconductors from Korea, WT/DS296/R” (21 February 2005); “Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea,” 68 FR 37122 (23 June 2003), comments 1, 2, 4, and 6.

32. See Korea’s argument generally in “United States—Countervailing Duty Investigations on Dynamic Random Access Memory Semiconductors from Korea, WT/DS296/R” and, more specifically, Korea’s argument in “Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea,” comments 1, 2, 4, and 6.

33. See “Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part,” *Federal Register* 74, no. 182 (22 September 2009), 48224. This is the initiation of final annual review of the countervailing duty order against semiconductors from Korea, an investigation that started in November 2002. Under the current schedule, this proceeding is scheduled to terminate sometime in early 2011.

34. See “Press Release: Commerce Applies Anti-Subsidy Law to China,” U.S. Department of Commerce, 30 March 2007.

35. China section of *2010 National Trade Estimate Report on Foreign Trade Barriers*, 6.

36. See “United States—Countervailing Duty Investigations on Dynamic Random Access Memory Semiconductors from Korea, WT/DS296/R” (21 February 2005), and “European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea.”

37. See, for example, “LG’s Air Conditioner from China Is Fearing Antidumping Investigations from the United States,” Trade Remedy Information Database, Korea International Trade Association, 18 April 2005.

38. “Korea Is Lagging Behind in Electricity Car,” *Chosun Daily*, 13 June 2010.

39. In 2009, Korea amended Article 5 of its Enforcement Decree of Foreign Investment Promotion Act to clarify situations in which it can monitor and restrict, when necessary, foreign investment planning to engage in hostile takeovers of Korean companies relating to national security areas. This reflected the Exon-Florio legislation in the United States and similar protective actions by China.

40. For instance, in a speech during his visit to Harvard University on 10 December 2003, Premier Wen Jiabao stated that the traditional Chinese culture, both extensive and profound, starts far back and runs a long, long course. More than 2,000 years ago, there emerged in China Confucianism, represented by Confucius and Mencius, Taoism represented by Lao Zi and Zhuang Zi, and many other theories and doctrines that figured prominently in the history of Chinese thought, all being covered by the famous term “the masters’ hundred schools.” From Confucius to Sun Yat-sen, the traditional Chinese culture presents many precious ideas and qualities, which are essentially populist and democratic. For example, they lay stress on the importance of kindness and love in human relations, *on the interest of the community, on seeking harmony without uniformity and on the idea that the world is for all*. Especially, patriotism as embodied in the saying, “Everybody is responsible for the rise or fall of the country”; the populist ideas that “people are the foundation of the country” and that “people are more important than the monarch”; the code of conduct of “Don’t do to others what you don’t want others to do to you”; and the traditional virtues taught from generation to generation: suffer long and work hard, diligence and frugality in household management, and respect teachers and value education. All these have played a great role in binding and regulating the family, the country, and the society [emphasis added]. See also, generally, Alex Inkeles, “Continuity and Change: Popular Values on the Pacific Rim,” *Stanford Journal of International Relations* 1, no. 1 (Summer/Fall 1998). With respect to the role of culture and societal traits in terms of trade disputes, see “Japan—Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R” (22 April 1998), paras. 10.43–10.46.

41. See “United States—Countervailing Duty Investigations on Dynamic Random Access Memory Semiconductors from Korea, WT/DS296/R” (21 February 2005), paras. 7.6–7.8, 7.49–7.50, 7.59; “European Communities—Countervailing Measures on Dynamic Random Access Memory Chips from Korea, WT/DS299/R” (17 June 2005), paras. 7.38–7.46.

42. *Ibid.*

43. See “Substantial Progress Made in Cross-Strait Economic Pact Talks,” Ministry of Commerce of China, 25 June 2010, <http://ccne.mofcom.gov.cn/bulletin/index.php?flag=4861>; for information on the China-Taiwan EHP discussions and the China-ASEAN EHP agreement, see “China, ASEAN to Strengthen Agricultural Cooperation,” *Xinhua News*, 19 October 2009, http://news.xinhuanet.com/english/2009-10/19/content_12270645.htm.

44. The complexity of the Chinese regulatory framework indeed poses a significant challenge for other countries. Sometimes China attempts to resort to foreign countries’ inaccurate description of its

regulatory framework as a strategy to defend itself during litigation. Thus, in “China—Measures Affecting Trading Rights and Distribution Services (DS363),” China claimed that the United States did not provide adequate and accurate factual information about its legislative framework and asked the WTO panel to dismiss the case. Regarding the difficulty of identifying and confirming government regulations in China, the USTR, on page 34 of the China section of *2010 National Trade Estimate Report on Foreign Trade Barriers*, also stated:

In China, regulations are also promulgated by a host of different ministries and governments at the central, provincial, and local levels; and it is not unusual for the resulting regulations to be at odds with one another. Even though finalized regulations are now routinely published in China, they often leave room for discretionary application and inconsistencies.

45. “China—Measures Affecting Trading Rights and Distribution Services (DS363),” para. 187.

46. “China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362),” paras. 7.186, 7.660.

47. *Ibid.*, paras. 7.728–7.629.

48. Scott Snyder, “Insatiable Sino-Korean Economic Relationship: Too Much for Seoul to Swallow?” Center for Strategic and International Studies, http://csis.org/files/media/isis/pubs/0003qchina_korea.pdf; “China, Korea Discuss Garlic Dispute,” *People’s Daily*, 30 June 2000, http://english.peopledaily.com.cn/english/200006/30/eng20000630_44380.html.

49. “China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS362),” para. 7.669.

50. *Ibid.*, paras. 7.499–7.501; in the China-IPR dispute, China argued that the WTO panel should not illegitimately intrude into an issue that is reserved to the domestic jurisdiction.

51. *Ibid.*, paras. 8.1–8.2.

52. *Ibid.*

53. “Strategy Paper for Korea-China FTA Negotiations [in Korean],” Korea Trade Commission, chap. 7, sec. 2 (Lessons from Korea-China Trade Disputes), www.ktc.go.kr/db/cl/kdc_ReportPart_view.jsp?seq=285&sn=2; “KITA Conference on Dealing with Korea-China Trade Disputes,” *Yonhap News*, 17 November 2006.

54. *Ibid.*

55. Trade disputes are already arising from this relocation of factories from China and the United States to Korea. In January 2007 the EU imposed antidumping duties for silicon from Korea based on the determination that Chinese silicon producers are using Korean factories to illegitimately circumvent an existing antidumping order against silicon from China. See Council Regulation (EC) no. 42/2007 of 15 January 2007 extending the definitive antidumping duty imposed by Regulation (EC) no. 398/2004 on imports of silicon originating in the People’s Republic of China to imports of silicon consigned from the Republic of Korea whether declared as originating in the Republic of Korea or not. The EU also recently initiated similar investigations of Chinese circumvention using Korean production facilities: see Commission Regulation (EC) no. 734/2009 of 11 August 2009 initiating an investigation concerning the possible circumvention of antidumping measures imposed by Council Regulation (EC) no. 1858/2005 on imports of steel ropes and cables originating in the People’s Republic of China by imports of steel ropes and cables consigned from the Republic of Korea and Malaysia, whether declared as originating in the Republic of Korea and Malaysia or not, and making such imports subject to registration.

56. The Korean government is operating a one-stop service called Invest Korea, which deals with problems foreign investors encounter when they contemplate investment in Korea. All government agencies are now mobilized to boost foreign investment in Korea. See the Web site, Invest Korea, www.investkorea.org/InvestKoreaWork/ik/eng/.

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