

# **Comments and Advice Regarding the Proposed Draft for Trade Remedy Legislation**

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# ❖ Order of Presentation

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- Practical Tasks to be Implemented
- Korea's Experience and Its Implication
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WTO



**Introduction: Long-Term Importance  
of Trade Remedy Legislation**

## ❖ Adopting and Adjusting Legislations

- Generally speaking, joining the WTO requires significant change of the new Member's economic structure
- To guarantee that the new Member changes its economic structure, the WTO requires introduction of new legislation and amendment of existing legislation
- This usually is the most onerous tasks for any new Member
  - Tariffs and market opening conditions can all be completed at the time of accession, but the legislative change requirement continues to haunt the country after the accession

## ❖ Adopting and Adjusting Legislations

- Therefore, it is essential to adopt new legislations and adjust existing legislations to make all laws of Azerbaijan consistent with WTO norms
  - Some need to be done before the entry but most of them need to be done after the entry
  - If not, other countries will bring an action against GOA any time once Azerbaijan becomes a member
  - See the examples of China
  - This will remain the one of the most significant headache for the Government of Azerbaijan (“GOA”) for the future

## ❖ Adopting and Adjusting Legislations

- Legislation in this context is not simply confined to statutes and enactment by the congress
  - It also includes regulations and directives that are adopted in accordance with the statutes
- In fact, in most situations, it is government regulations and directives that is more important in actual practice
- In that sense, government practice (not even appearing in the text) is also important and that also should be consistent with WTO obligations

## ❖ Adopting and Adjusting Legislations

- This is also true in the trade remedy sector as well
  - Not only the legislation, but also any policy directives, guidelines, or bulletin, if there is any, need to be repealed, adjusted or created
- The full alignment cannot be done overnight, but at least it is necessary to initiate contemplating the long-term plan at this stage
  - This is also directly related to the basic plan on how and where to establish the Investigating Authority (“IA”)

## ❖ Importance of the IA

- An IA is essential in the WTO regime
  - Because it provides the only legal mechanism to protect domestic market from unfair trade
  - It also allows the GOA to regulate foreign imports as necessary
  - It also operates as a counter-weight for trade remedy investigations by foreign IA against Azerbaijan exporters
  - It is also directly related to the GOA's successful engagement in various negotiations and discussions at the WTO on a continued basis

## ❖ Importance of the IA

- Experience of China and India
  - They used to be and currently are one of the major targets of AD investigations by other countries
  - They themselves now resort to the AD investigations more increasingly
  - This has contributed to protecting domestic market effectively
  - They also benefit from increased revenue

## ❖ Importance of the IA

- So, it is necessary to enact laws and regulations to make sure that the IA operates efficiently inside the GOA in accordance with the WTO Agreements
- Wrong or deficient legislation or regulation means not only the violation of the WTO obligations as such, but also losing an effective defense mechanism under the WTO regime

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# **Legislative Work to be Implemented**

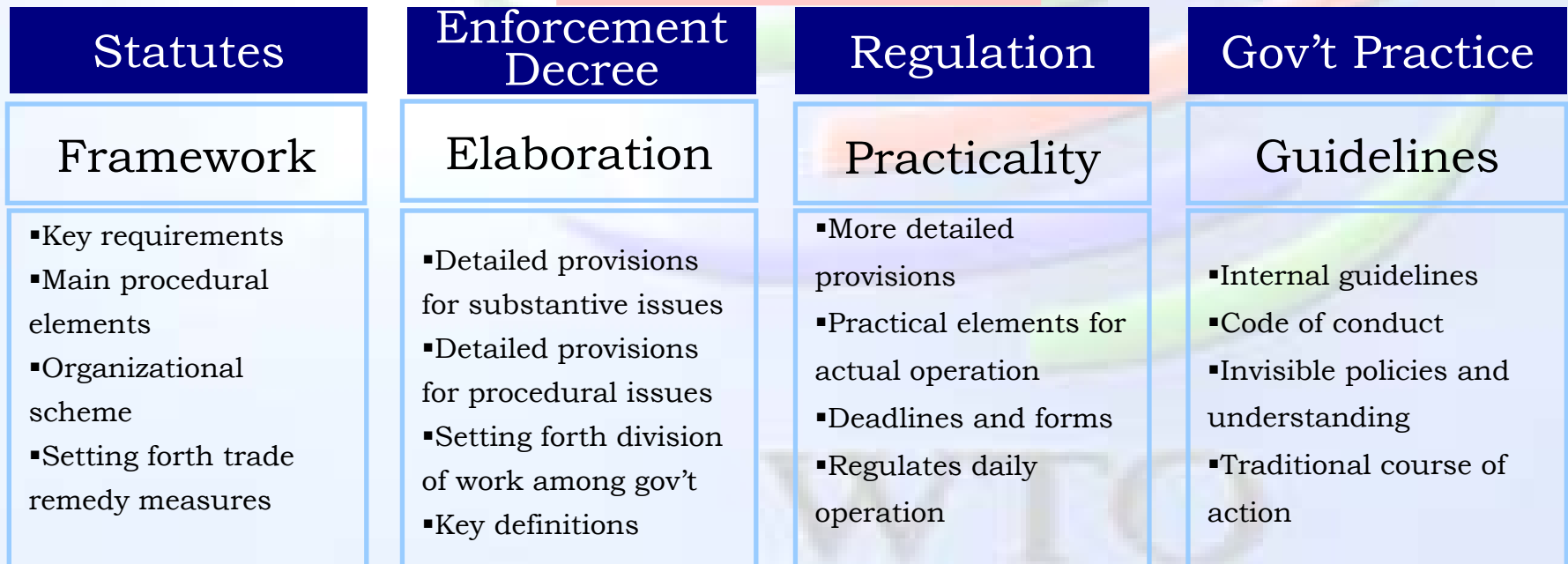
WTO

# Structure of Trade Remedy Legislation

- Legislative work should be planned ahead and implemented step-by-step
- Both vertical and horizontal coordination is necessary
  - To minimize confusion
  - To avoid repeated amendment
  - To reduce possibility of complaints from other countries and foreign exporters
  - To avoid legal friction

# Structure of Trade Remedy Legislation

## Accomplishment of Legislative Changes



## ❖ Preparation for the Enforcement Decree

- ❖ As such, it is necessary for the GOA to prepare and enact the enforcement decree together with the law
  - That way, the GOA can contemplate which is stipulated in the law and which in the enforcement decree
- ❖ The current draft however does not indicate that an enforcement decree will provide detailed items

# Purpose of Trade Remedy Legislation

- Clarification of WTO Rights and Obligations
  - Legislative work should be implemented to clarify rights and obligations of GOA as much as possible, for GOA to move in the right direction
- To remain compatible with the WTO norms
  - Reduce the possibility of the WTO legal challenges both “as applied” and “as such”
- Maintain discretion of the GOA IA
  - The legislation should also lay out statutory discretion for the IA officials, so that any future investigation accomplishes its objective

# Purpose of Trade Remedy Legislation

- Careful not to unnecessarily restrict the IA's authority
  - No reason to impose more restriction on the IA than is required by the WTO Agreements
  - As long as the legislation stays within the WTO Agreements, it usually does not create a legal problem
- Reflecting practical aspects of investigations
  - Legislative work should be conducted so as to be practically feasible and workable
  - Providing for a statutory requirement would be easy but its implication in practical terms would be more complex

# Translation of Trade Remedy Legislation

- Key legislations need to be translated into English fully
  - To notify the WTO of them in accordance with the WTO Agreements
  - To also inform foreign exporters
- To some extent, it is usually the English translation that ultimately counts
  - Thus mis-translation will cause unnecessary trade friction
  - Sometimes a provision in the original statute is proper but its translation is not

# Translation of Trade Remedy Legislation

- In translation, following problems usually arise
  - Failure to deliver the exact meaning
  - Inadvertent error in using the right words
  - Inconsistent use of words for the same terms
- To address these problems:
  - Preparing a list of words and their translation for continued reference
  - Inserting subjects and avoiding passive forms
  - Using the terms with right legal meaning

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# **Practical Tasks to be Implemented**

# Customs Infrastructure Enhancement

- An effective trade remedy system is inseparable from the general customs system
- What the proposed draft legislation focuses on is only the investigation stage
  - The maintenance of the trade remedy measure only becomes possible through a reliable customs regime
- Thus, trade remedy legislation needs to be discussed with customs issues at the same time

## ❖ Creation of the Investigating Authority

- ❖ In the draft law, there is no mention about the investigating authority (Other than Article 60)
  - Maybe in a different law, there should be provisions regarding the creation, operation and management of the investigating authority
  - Regardless of the law, adopting a basic strategy on the establishment of the investigating authority should be the first step in formulating the trade remedy regime

## ❖ Creation of the Investigating Authority

- ❖ Practical issues also need to be contemplated more carefully
  - The IA will be established within a particular ministry, or as an independent entity?
  - Who will be in charge of dumping or subsidy, and who will be in charge of injury in the IA?
  - Will the decision making body be separated from the investigative arm?
- ❖ Expertise will be accumulated later, but the basic structure needs to be confirmed before the accession

# ❖ Creation of the Investigating Authority

## ❖ Building Up the Investigation Capacity

- Introducing a system to retain and train investigation officials
- Dispatching the investigation official to the Geneva mission on a regular basis
- Careful study of investigations of IAs of other countries
- Cooperation with IAs from other countries
- Participation in WTO trade disputes as a third party

## ❖ Aligning the Review System

- ❖ The law should deal with review systems of various kinds
  - Sunset reviews, periodic reviews, changed circumstances reviews, etc.
  - In the law, however, how the GOA plans to maintain these review systems does not appear
  - Refund of the duty has been extensively explained, but it is not clear whether this is done through a review or some other mechanism
  - It is not clear what “control review” means in the law

# ❖ How to Prepare & Publish Determinations

- ❖ At the same time, the real question is how to prepare and publish official determinations
- Even if not specifically addressed in the law, this issue needs to be considered as well
  - ✓ After all, what is challenged ultimately is the determination of dumping or subsidy
- It appears that the current draft requires a prior request from parties for the release of information
  - ✓ However, WTO Agreements require publication of the determination even without a request

## ❖ Exclusion of Certain Subsidies

- ❖ Article 27 of the draft provides for exclusion of certain subsidies from the countervailing measures
  - It is not clear why the GOA has decided to exempt these subsidies, so the rationale needs to be checked before finalized
  - If it decides to leave them as they are, the terms and languages need to be fine-tuned so as not be abused by other countries
  - Categorical exclusion of certain subsidies may not necessarily in the best interest of the GOA

## ❖ Refining Judicial System

- Another key requirement under WTO is to adopt a domestic judicial system to protect foreign exporters' interest
- Although the GOA has a basic judicial system similar to that of other countries, it needs to adjust its judicial organization to be consistent with the WTO norm
  - Removing statutory or *de facto* obstacle to foreign companies' access to courts
  - Translation of key statutes and regulations into English, etc.

## ❖ Refining Judicial System

- How to align the trade remedy system with the judicial review mechanism is also one key issue to be considered in the trade remedy legislation
  - Any trade remedy determination should be appealed to the court and reviewed
- But it is not entirely clear whether such review mechanism exists or being contemplated in the course of the trade remedy legislation

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# **Korea's Experience and Its Implication**

WTO

# ❖ Full Utilization of Investigatory Authority

- As time passes by, Korea has realized the importance of the role of the IA
  - As an export-oriented country, Korea has been less concerned about imports than its exports
- WTO regime and FTA regime all mean gradual increase of foreign imports, so Korea has also realized that regulating import is increasingly critical
  - The only legitimate import regulation is through the trade remedy mechanism

## ❖ Full Utilization of Investigatory Authority

- Korea thus has continuously expanded the infrastructure of its IA
  - [Korea Trade Commission](#) plays more important role than before
- It has also turned out that having an active IA means more effectively responding to illegitimate or dubious investigations by another country
- Korea will continue to increase its IA's logistical and personnel infrastructure

## ❖ Importance of maintaining due process principle

- As the number of investigations increases, Korea has also realized the importance of maintaining various due process requirements
  - Such as providing equal opportunities to both parties at all times
  - Responding to comments from interested parties
  - Explaining fully all small decisions the IA makes
  - Avoiding *ex parte* contacts
  - Maintaining independence of decision making process from investigation process

## ❖ Importance of maintaining due process principle

- Minor breach has led defeat of the Korean government in a recent WTO dispute
  - Korea's AD investigations against paper product from Indonesia
  - One of the reasons for Korea's violation of the WTO norms was that it failed to respond adequately to the comments from Indonesian producers
  - The main part of the investigation was completely consistent with the WTO Agreements, but the trivial violation led to the finding of Korea's defeat

## ❖ Cooperation and Exchange Enhancement

- The KTC has also significantly increased its network with foreign IAs
- This has provided various practical benefits
  - Provided opportunities to learn about the laws and procedures of the other trading member
  - Provided opportunities to establish affiliation on both personal and institutional levels
  - Particularly, the exchanges with IAs of developed countries helped the KTC enhance its investigatory capacity

## ❖ Informing Companies of the Role of the IA

- For a long time, only a few Korean companies were aware of the role and function of the KTC
  - Thus, the Korean companies were not aware that they could initiate an investigation against foreign unfair imports
  - This was one of the reasons for less-than-optimal utilization of the KTC
- Korea has recently increased its effort to disseminate relevant information so that Korean companies can resort to the system

## ❖ Informing Companies of the Role of the IA

- The GOA also needs to adopt a similar policy to inform the public of the new system
  - Holding seminars
  - Publishing pamphlets
  - Establishing a public fund to assist Azerbaijan companies in this regard
  - Increasing discussions and contacts between government officials and company officials

## ❖ Utilization of Self-Initiation

- In the early stage of the WTO entry, it would also be helpful if the GOA resorts to “self-initiated” investigations
  - This is the investigation which is conducted without prior request from the companies
  - As the Azerbaijani companies are not well accustomed the system, the government may consider initiating investigations on its own
- The option of self-initiation also requires capacity building on the part of the IA

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## **Other Related Issues in Trade Remedy Sector**

# Non-Market Economy (“NME”) Status Issue

- Major markets designates and will continue to designate Azerbaijan as a non-market economy (“NME”)
- For instance, the U.S. Department of Commerce classifies China, Vietnam and former Soviet republics as NME countries
  - Refer to recent U.S. DOC determinations
  - This decision is discretionary
  - Thus, any WTO member may classify any other member that does not operate on market principles “so that sales of merchandise in such country do not reflect the fair value of the merchandise” as an NME

## ❖ NME Issue

- In the trade remedy sector (outbound), NME designation and duration would be one of the most important issues for Azerbaijan in the bilateral negotiations
  - ✓ Common problem for all former CIS countries
- Other countries will attempt to designate Azerbaijan as an NME country for a long time
  - ✓ Particularly, the U.S. and the EC would make efforts to keep Azerbaijan as an NME country for as long a period as possible

## ❖ NME Issue

- It is possible that these countries will be threatened by Azeri imports in the future, so they would like to install a “safety valve”
  - ✓ Azerbaijan does not pose a significant trade problem for them at the moment, but they would like to reserve a “control mechanism” just in case
- NME country designation will provide such a safety valve for them by permitting an easier trade restriction measure against Azerbaijan in the future

- Why NME designation negatively affects the Azerbaijan's exports in the future
  - Once Azerbaijan joins the WTO, antidumping (“AD”) investigations will probably increase than before
  - The NME country designation allows other WTO members to apply AD measures more easily
    - It lowers legal threshold in AD investigation and easy to find dumping margins for the same product

- For instance:
  - In the context of AD cases, NME status is disadvantageous for Azeri exporters because NME “surrogate country” methodology can be subjective, unpredictable, and unfair
  - The “surrogate country” methodology provides a rough approximation (not actual) of costs and prices in the home market, and leads to inflated AD margins
  - So, in the same hypothetical investigation in the United States, Korean exporters can get 10% AD margin while Azeri exporters get 30% margin

## ❖ NME Issue

- The problem is the NME status does not protect one country from the CVD any more
  - Before, the NME status used to offer one positive aspect
  - That is, in exchange for the discrimination in the AD side, NME countries were exempted from the more onerous CVD side
  - This trend has changed recently due to the continued surge of the Chinese exports
  - Now NME country is subject to a CVD investigation as well
- Negative impact from NME has increased

## ❖ NME Issue

- Given the legacy of the Azerbaijan's centrally planned economic structure, it seems likely that other countries will try to designate Azerbaijan as an NME country
- The more practical issue, therefore, is to assume that Azerbaijan is designated as an NME country and to consider how to minimize the negative impact from the NME designation
- It is necessary that these issues are to be fully discussed with the major trading partners

## ❖ NME Issue

- To contain negative impact from NME designation, long-term efforts for revocation is required
  - In the bilateral negotiations (particularly with U.S. and the EC), make sure that Azerbaijan can request for revocation of the NME status at any time through relevant domestic procedures
  - Also make sure that once a request is filed the investigating authorities of these countries review the application in “good faith”
  - At least, Azerbaijan should not be discriminated vis-à-vis other former CIS states

## ❖ Conclusion

- In addressing the trade remedy legislation, it is necessary to grasp some of the technical, though important, aspect of trade remedy regime under the WTO
- The key task here is how to minimize the negative effects and smoothly be integrated into the world body
- A lot of work over a long period of time will be required, so the GOA's continued efforts before and after WTO entry is essential

## ❖ Conclusion

- In this regard, coordination and cooperation among relevant government agencies are critical

“Governments seeking accession need first, to establish a central co-ordination point to provide direction and manage the multiplicity of legislative and regulatory changes in their foreign trade regime that are necessary for accession”

(Constantine Michalopoulos, WTO Accession for Countries in Transition)

**Thank you**