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Heng WANG

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The Challenges of China's Recent FTA: An Anatomy of the China-Korea FTA

Heng WANG^{*}

As the biggest Chinese free trade agreement (FTA) to the date of its signature, the China-Korea FTA provides an amazing case study for the development of China's recent FTAs. This paper analyzes major challenges in its rule development, implementation, and interpretation. The author argues, first, that rule development encounters market liberalization, regulatory cooperation and coherence, as well as sectoral challenges. Second, the fundamental issue for rule implementation and interpretation is the lack of a 'systemic' response to the relationship among FTA chapters, and to the relationship among the China-Korea FTA, domestic law, and international law. Finally, the relationship between the China-Korea FTA and World Trade Organization (WTO) law deserves special attention, which consists of five categories of circumstances. A number of questions are analyzed: which WTO rules apply to the China-Korea FTA? Do WTO rules apply to WTO-plus obligations? Can WTO jurisprudence be applied to the China-Korea FTA? The issue of the applicability of WTO rules and jurisprudence to FTA obligations including WTO-plus obligations remains open. These challenges are not unique to the China-Korea FTA and are likely to exist in other Chinese FTAs.

1 INTRODUCTION

In the context of burgeoning free trade agreements (FTAs), China has established FTAs with over twenty countries and regions, covering nearly 30% of China's international trade.¹ Signed in June 2015, the China-Korea FTA marks the development of China's FTA for a number of reasons. First, China's FTA with Korea is the biggest one signed by China to the date of its signature.² Affecting a huge trade volume, the China-Korea FTA is regarded as one that China has

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¹ Xinhua, *China to Accelerate China-Japan-ROK FTA Talks* (Mar. 11, 2015), http://www.npc.gov.cn/pc/12_3/2015-03/07/content_1918509.htm.

² Yonhap, *S. Korea, China Formally Sign Free Trade Deal* (Jun. 1, 2015), <http://english.yonhapnews.co.kr/national/2015/06/01/95/0301000000AEN20150601001552320Ehtml>.

concluded involving ‘the largest trade value and most comprehensive areas.’³ Korea is the third largest trading-partner-country of China,⁴ and China has been the largest trade partner of Korea.⁵ This marks significant development in terms of economic size of an FTA partner. Moreover, China-Korea trade volume exceeds the sum of the volume of Korea-U.S. and Korea-EU trade.⁶

Second, rules of the China-Korea FTA are generally more developed than other FTAs of China, although it is not a ‘deep’ FTA.⁷ Comprising twenty-two chapters and eighteen annexes,⁸ it not only covers stereotypical chapters of China’s FTAs (e.g., trade in goods, services, investment, intellectual property, cooperation, dispute settlement), but also contains new chapters (e.g., electronic commerce, competition, environment, transparency, exceptions) whose rules are excluded from or scattered in previous FTAs. New areas, such as electronic commerce and local economic cooperation, are not heretofore addressed in China’s FTA. In traditional areas, the China-Korea FTA contains more detailed (e.g., investment, intellectual property) or new rules (e.g., services-investment linkage), or establishes new chapters (e.g., financial services, telecommunications). It is more complex than China’s older FTAs, including the imposition of higher requirements on border measures and behind-the-border regulatory issues.

Third, the China-Korea FTA envisages further negotiation with guidelines. In particular, it is the first time that China will commit to conduct FTA negotiations on a negative list approach for services and investment. Therefore, the China-Korea FTA provides an amazing case study for the development of China’s recent FTAs. This paper examines the challenges posed by rule development, implementation, and interpretation of the China-Korea FTA in sections 2 and 3. Section 4 will conclude. As the China-Korea FTA develops from the World Trade Organization (WTO) norms, special attention is given to its relationship with WTO law.

³ China FTA Network, *China-ROK FTA Negotiations Completed* (Mar. 11, 2015), http://fta.mofcom.gov.cn/enarticle/enrelease/201503/20754_1.html.

⁴ CCTV News, *50 Questions of China-Korea FTA* (Jun. 1, 2015), <http://m.news.cntv.cn/2015/06/01/ARTI1433136728385679.shtml>.

⁵ Xinhua, *China, South Korea sign FTA deal* (Jun. 1, 2015), http://www.china.org.cn/world/2015-06/01/content_35708706.htm.

⁶ China FTA Network, *Gao Hucheng to Cooperate for the Prosperity of Regional Development with the Help of the China-Korea Free Trade Agreement* (Jun. 12, 2015), http://fta.mofcom.gov.cn/enarticle/enkorea/enkoreanews/201506/22055_1.html.

⁷ For the features of the China-Korea FTA, see Heng Wang, *The Features of China’s Recent FTA and Their Implications an Anatomy of the China-Korea FTA*, 11 *ASIAN JOURNAL OF WTO & INTERNATIONAL HEALTH LAW AND POLICY* 115-154 (2016).

⁸ *Supra* note 4.

2 RULE DEVELOPMENT

2.1 NEGOTIATIONS ON SERVICES, INVESTMENT AND BEYOND

Subsequent negotiations are to start within two years, at the latest, after the entry into force of the China-Korea FTA.⁹ Both parties undertake the standstill obligation of not decreasing their commitment level, which applies to every aspect of the China-Korea FTA.¹⁰ Subsequent negotiations will cover chapters on services trade, financial services, and investment, including their annexes, as well as 'related provisions concerning rules' in other chapters.¹¹ They will constitute the amendments to the FTA.¹² Several aspects of further negotiations deserve attention.

First, services and investment will be further integrated. As a landmark step, the negative list approach does not emerge in China's FTAs until the China-Korea FTA. Combining services trade, financial services, and investment, it will cover the pre-establishment stage of investment and services trade in commercial presence.¹³ The negotiations will lead to a combined reservation lists concerning chapters on services trade, financial services, and investment.¹⁴ Combined reservation lists related to chapters on cross-border trade in services, financial services, and investment will be created; these include: (i) Annex I containing the list of current non-conforming measures; (ii) Annex II presenting a list of (sub)sectors or activities for which a party may maintain current or adopt new restrictive non-conforming measures; and (iii) Annex III providing a list similar to that in Annexes I and II for financial services.¹⁵ By the same token, investment rules will be extended to the pre-establishment stage of the investment covering 'all kinds of investment' including services provided through commercial presence.¹⁶

Second, new services trade rules will be made. For services trade supplied in modes 1 (cross-border supply) and 2 (consumption abroad), a chapter on cross-border trade in services is to be established that will incorporate a future most-favored-nation (MFN) provision.¹⁷ In parallel, such a MFN provision, along with provisions on transfer of information and new financial services, will be inserted into the financial services chapter. The China-Korea FTA may

⁹ Free Trade Agreement between the Government of the Republic of Korea and the Government of the People's Republic of China, China-S. Kor., Annex 22-A, para. 8, Jun. 1, <http://fta.mofcom.gov.cn/topic/enkorea.shtml> (hereinafter China-Korea FTA).

¹⁰ *Ibid.* Annex 22-A, para. 5.

¹¹ *Ibid.* Annex 22-A, para. 2.

¹² *Ibid.* Art. 22.2.

¹³ *Ibid.* Annex 22-A, para. 3.

¹⁴ *Ibid.* Annex 22-A, para. 4.

¹⁵ *Ibid.* Annex 22-A, paras. 4, 13.

¹⁶ *Ibid.* Annex 22-A, para. 14.

¹⁷ *Ibid.* Annex 22-A, paras. 10, 11.

incorporate negotiation results on domestic regulation disciplines and services trade subsidies disciplines of the General Agreement on Trade in Services (GATS).¹⁸ If services negotiations go smoothly, separate chapters may address services trade provided in different modes and may be different from the GATS. Among the four modes of services trade, cross-border supply of services could attract more attention as electronic commerce rapidly develops.

Third, a variety of investment provisions will be negotiated, with emphasis on issues like indirect appropriation and performance requirements. Subsequent negotiations will cover definition, scope and coverage, national treatment, MFN treatment, minimum standard of treatment, expropriation, transfer, and performance requirements.¹⁹ Indirect expropriation, including its considerations and exceptions, will also be negotiated.²⁰ For performance requirements, they will contain 'high level' commitments covering pre-establishment and post-establishment stages of investment.²¹ Some of these provisions are touched upon by current rules, such as the provisions on senior management and the board of directors,²² and indirect appropriation.²³ Meanwhile, the China-Korea FTA investment rules differ from other investment agreements of China. For instance, an umbrella clause exists in the China-Korea bilateral investment treaties (BIT) and the China-Japan-Korea Investment Agreement,²⁴ but it cannot be found in the China-Korea FTA. It is interesting to see whether such clause will be incorporated in the future given the ensuing expanded scope of investment clauses to non-treaty obligations and the unpredictability arising from possible conflicting interpretations by investment tribunals.²⁵ Compared with Chinese BITs, the China-Korea FTA has a broader coverage and will probably contain investment rules of higher standards as it may build on these BITs. Therefore, investors may prefer to resort to investment rules of the China-Korea FTA rather than those found in the China-Korea BIT and the China-Japan-Korea Investment Agreement.

¹⁸ *Ibid.* Arts. 8.7.4, 8.13.1.

¹⁹ *Ibid.* Annex 22-A, para. 15.

²⁰ *Ibid.* Annex 22-A, para. 17.

²¹ *Ibid.* Annex 22-A, para. 16.

²² For instance, *ibid.* Annex 11-A, s. A, para. 7.

²³ *Ibid.* Art. 12.9.1, Annex 12-B, para. 3.

²⁴ Agreement among the Government of the People's Republic of China, the Government of Japan and the Government of the Republic of Korea for the Promotion, Facilitation and Protection of Investment, Art. 5.2, May 13, 2012, <http://tfs.mofcom.gov.cn/article/h/at/201405/20140500584828.shtml>; Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, China-S. Kor., Art. 10.2, Sep. 7, 2007. <http://tfs.mofcom.gov.cn/aarticle/h/at/201002/20100206778660.html>.

²⁵ UNCTD, *Investment Policy Framework for Sustainable Development*, at 102, <http://investmentpolicyhub.unctad.org/Upload/Documents/Investment%20Policy%20Framework%20for%20Sustainable%20Development%202015.pdf> (last visited Sep. 12, 2015).

Finally, the development of other rules remains to be seen. No detailed guidance is given on how rules in other chapters will be negotiated. Rules here should cover a wide range of provisions on cross-the-border measures (e.g., origin rules, customs-related rules and procedure, sanitary and phytosanitary (SPS) measures, technical barriers to trade (TBT), trade remedies] and behind-the-border measures (e.g., electronic commerce, intellectual property, competition, transparency, government procurement, and environment).²⁶ Sub-committees under the China-Korea FTA will be involved, including the sub-committees on related issues (e.g., customs Procedures and Trade Facilitation (CPTF), and origin rules). Successful operation of local economic cooperation may also contribute to FTA rule development.²⁷

2.2 THE CHALLENGES OF NEGOTIATION

2.2[a] *Market Liberalization*

A pragmatic approach has been taken to swiftly conclude the China-Korea FTA talk, and substantial room exists for further market liberalization. Nearly 10% of goods in Korea's trade with China are not subject to tariff abolition, in contrast to 0.1% with the U.S. and 0.4% with Europe.²⁸ For instance, rice, a major agricultural product for China and Korea, is excluded from the agreement.²⁹ Passenger cars,³⁰ OLED panels, rechargeable batteries, color TVs,³¹ petrochemical products, and steel³² are not subject to tariff cuts. It remains to be seen whether both parties will proceed on the sensitive issues such as agriculture and certain manufactured products. For instance, a possible agricultural tariff cut will probably lead to the provision on special agricultural safeguard measures.

The negative list approach for services trade and investment may not only bring further liberalization but also have broad implications, especially when China is negotiating the BIT with the U.S. Since the U.S. is insisting on this approach, China's theoretically possible participation into the Trans Pacific Partnership (TPP)

²⁶ *Supra* note 4.

²⁷ *Ibid.* Art. 17.25.

²⁸ The Chosun Ilbo, *FTA with China Brings Opportunities and Challenges* (Nov. 11, 2014), http://english.chosun.com/site/data/html_dir/2014/11/11/2014111101917.html.

²⁹ Cho Chung-un, *Korea, China Conclude FTA Deal* (Nov. 11, 2014), [http://www.koreaherald.com/view.php?ud=2014110001175;Mayer Brown Consulting, Asia Trade Update \(February–March 2015\) at 2, https://www.mayerbrown.com/Asia-Trade-Update-03-16-2015/](http://www.koreaherald.com/view.php?ud=2014110001175;Mayer Brown Consulting, Asia Trade Update (February–March 2015) at 2, https://www.mayerbrown.com/Asia-Trade-Update-03-16-2015/).

³⁰ Xinhua, *Hyundai Motor to Boost Localization after China-S. Korea FTA*, (Mar. 12, 2015), http://en.ce.cn/main/latest/201503/12/t20150312_4800660.shtml.

³¹ The Chosun Ilbo, *Korea, China Initial FTA* (Feb. 26, 2015), http://english.chosun.com/site/data/html_dir/2015/02/26/2015022601293.html.

³² The Chosun Ilbo, *Korea, China Forge FTA* (Nov. 11, 2014), http://english.chosun.com/site/data/html_dir/2014/11/11/2014111100972.html.

may be more realistic with this kind of new development in the FTA negotiation. The negative list approach may be used first in the China-U.S. BIT, but the China-Korea FTA may cover more market access in investment and services than that under the China-U.S. BIT. The FTA needs to proceed on the balance among opening in goods, services, and investment.

2.2[b] *Regulatory Cooperation and Coherence*

With further tariff reductions, behind-the-border measures are likely to be a key issue. In this process, regulatory cooperation and coherence could be identified as the one most likely to pose significant negotiation challenges. Regulatory cooperation can be made through mutual recognition agreements for specific products,³³ recognition of equivalent standards, harmonization,³⁴ or regulatory interoperability.³⁵ Regulatory coherence enhances the process of making regulation, and identifies best practices as well as implementation standards.³⁶

The China-Korea FTA calls for regulatory cooperation and, to a certain extent, regulatory coherence. The following examples associated with regulatory cooperation indicate that they are either modeled after the WTO counterpart, or merely calls for regulatory cooperation, but often without detailed provisions. For regulatory cooperation, recognition provision in services trade chapter and recognition of prudential measures in financial services chapter are almost textually identical to GATS counterpart.³⁷ The cooperation in various fields will be strengthened, including consumer protection law,³⁸ intellectual property,³⁹ environment,⁴⁰ and government procurement.⁴¹ For competition, the importance of both cooperation and coordination is recognized.⁴² Regarding TBT, the results

³³ Simon Lester & Inu Barbee, *Will Regulations Sink EU-U.S. Free Trade?* (Oct. 15, 2013), <http://www.cato.org/publications/commentary/will-regulations-sink-eu-us-free-trade>.

³⁴ Eugenio Briales Gómez-Tarragona & Gómez-Altamirano Daniela, *The TPP: How to Facilitate Business Through Legislative and Regulatory Reform?*, 21 ILSA J. Intl. & Comp. L. 371 (2015).

³⁵ The U.S. Chamber of Commerce, *Regulatory Coherence & Cooperation in the Transatlantic Trade and Investment Partnership (TTIP)*, at 2, https://www.uschamber.com/sites/default/files/regulatory_coherence_regulatory_cooperation_chamber_tt看paper-final_2.pdf (last visited Sep. 12, 2015).

³⁶ National Center for APEC, *Strategic Framework for Regulatory Coherence in APEC: An Impact Assessment of the Dairy, Electronics, and Off-Highway Vehicle Industries*, at 1, <http://ncapec.org/docs/Publications/Strategic%20Framework%20for%20Regulatory%20Coherence%20in%20APEC.pdf> (last visited Sep. 12, 2015).

³⁷ China-Korea FTA Arts. 8.9, 9.8; General Agreement on Trade in Services, Annex on Movement of Natural Persons Supplying Services under the Agreement, Art. VII, Apr. 15, 1994, WTO Agreement, Annex 1B, 1869 UNTS 183 (hereinafter GATS); Annex on Financial Services, para. 3.

³⁸ China-Korea FTA Art. 14.6.

³⁹ *Ibid.* Art. 15.17.5.

⁴⁰ *Ibid.* Art. 16.7.1.

⁴¹ *Ibid.* Art. 17.13.

⁴² *Ibid.* Art. 14.6.

of conformity assessment procedures may be accepted,⁴³ and the discussion will be conducted on mutual recognition of the conformity assessment results.⁴⁴ Efforts will be made towards the mutual recognition of digital certificates and electronic signatures,⁴⁵ and of testing results by designating testing laboratories regarding foods and cosmetics.⁴⁶ Regulatory cooperation is closely related to regulatory coherence. Existing clauses calling for cooperation may develop towards regulatory coherence. Examples are cooperation clauses on electronic commerce and consumer product safety that highlights best practices⁴⁷ and good regulatory practice.⁴⁸

However, regulatory coherence has not been addressed that much in the China-Korea FTA. As a key component⁴⁹ and characteristic of regulatory coherence, increased transparency concerns not only the regulation but also the enforcement.⁵⁰ Increased transparency norms are among most obvious developments of the China-Korea FTA, including blanket provisions in the transparency chapter and sectoral provisions in other chapters. Engagement with interested persons is stipulated in some provisions, including comments on investment regulations,⁵¹ consultation with industry in telecommunications,⁵² and consideration of and response to comments on proposed technical regulations.⁵³ Transparency rules consist of publication, information provisions, as well as comments and consultation. However, these requirements under the China-Korea FTA remain limited.

It is possible to promote regulatory cooperation and coherence under the China-Korea FTA. It may bring about more challenges to China than to Korea since FTAs of Korea generally set higher requirements. For China, the expected economic reform is viewed as a response to emerging trading rules focusing on regulatory coherence, which arise in the negotiation of mega FTAs such as the TPP and the Transatlantic Trade and Investment Partnership (TTIP).⁵⁴ Regulatory cooperation and coherence could be supported by the practices of pilot free trade zones (FTZs) in China and the development of a 'service-oriented' government.

⁴³ *Ibid.* Art. 6.6.1.

⁴⁴ *Ibid.* Art. 6.13.2(g).

⁴⁵ *Ibid.* Art. 13.4.3.

⁴⁶ *Ibid.* Art. 2.15.

⁴⁷ *Ibid.* Art. 13.7.1.

⁴⁸ *Ibid.* Art. 6.9.3.

⁴⁹ *Supra* note 35.

⁵⁰ *Supra* note 36.

⁵¹ China-Korea FTA Art. 12.8.4.

⁵² *Ibid.* Art. 10.15.

⁵³ *Ibid.* Art. 6.7.3.

⁵⁴ *China's Trade Development Strategy and Trade Policy Reforms: Overview and Prospect*, at 1, <http://www.iisd.org/sites/default/files/publications/china-trade-strategy-policy-reform.pdf> (last visited Aug. 9, 2015).

The development of the FTA is closely connected with FTZs. Measures taken in FTZs are related with FTA negotiation, and these measures, if done well, lay a foundation for FTAs.⁵⁵ The China (Shanghai) FTZ strives toward, among others, simplified trade regulation procedures, promoted financial system reform to make RMB capital account convertibility, and promoted post-filing regulation 'as a way to transform government functions.'⁵⁶ Regulatory cooperation and coherence may work with such transformation of government functions, which provides incentives to facilitate this process. With the support of the FTZs practices, regulatory cooperation and coherence is likely to happen and bring about domestic law reform.

Meanwhile, it is not an easy job to realize regulatory cooperation and coherence, and its implementation could be challenging. Looking at services trade negotiations as an example, the negative list approach is deemed to relate to improved regulatory patterns of service industry and the development of a service-oriented government,⁵⁷ which are also being discussed in FTZs. Possible development for services trade rules include streamlined regulatory requirements, enhanced transparency and regulatory decision-making processes, and improved mutual recognition of service qualifications. Against the backdrop of further economic integration and the development of a high-level FTA, possible regulatory coherence under the China-Korea FTA may focus on improving transparency and quality of the process of designing and implementing regulation, rather than imposing specific regulation. Potential options of regulatory coherence in mega FTAs, such as regulatory impact assessments or central coordination and review processes, are not referred to in subsequent negotiation guidelines of the China-Korea FTA. Setting much higher requirements than current ones, these options pose serious challenges for governance, affecting various aspects of domestic regulation. It remains open how far China's FTAs may proceed here and the key is to strike a balance between regulatory autonomy and the delivery of high standard rules to drive down trade costs.

2.2[c] *Sectoral Challenges*

A broad range of issues may be discussed in subsequent negotiations and pose sector-specific challenges. Sectoral challenges could arise in different fields, including services and investment (e.g., the consideration for and exceptions to

⁵⁵ MOFCOM, *MOFCOM Held a Press Conference on FTA* (Dec. 10, 2013), <http://english.mofcom.gov.cn/article/newsrelease/press/201312/20131200423462.shtml>.

⁵⁶ China (Shanghai) Pilot Free Trade Zone, *Introduction*, <http://en.shftz.gov.cn/About-FTZ/Introduction/> (last visited Aug. 8, 2015).

⁵⁷ *Supra* note 4.

indirect expropriation, the MFN provision regarding services, sufficient domestic consultation opportunities with a variety of stakeholders in investor-state dispute settlement (ISDS)), intellectual property (e.g., a balance between protection of modern technologies, on the one hand, and genetic resources, traditional knowledge, and folklore, on the other hand), non-tariff measures (NTMs) (e.g., design of more detailed obligations for SPS and TBT measures). They may set stricter good governance requirements, involve non-trade concerns, and expand the coverage.

Dispute settlement and services are taken as examples here. It is not likely that parties will often resort to panels established under the FTA. Instead, disputes will probably be solved through cooperation and consultation,⁵⁸ and if not, possibly through the dispute settlement system of the WTO if they fall within the scope of WTO law. It remains to be seen (i) how to ensure the effective operation of mediation procedure for NTMs as provided in Article 20.5.4, and (ii) whether and how mediation may be further developed as an alternative, including its procedure (e.g., a possible mediator roster). Other challenges include how the scope of the dispute settlement system of the FTA could be extended.

For services, China and Korea completed services negotiation on the positive list approach, and agreed to further negotiate based on the negative list approach. It looks to be a creative shift. However, a key challenge is how to reconcile the negative list approach with the positive list approach, particularly regarding service sectors that are either further liberalized or remain untouched in the agreement. First, both parties may need to agree on the details to smoothly change to the negative list approach. Second, it is not easy to agree on service sectors in which certain restrictions will be allowed. Third, the negative list approach may affect the current across-the-board balance of interests among goods, services, intellectual property, and investment. As the 'trade-investment-services-intellectual property' nexus is getting stronger,⁵⁹ the China-Korea FTA may further strengthen the links and rebalance among these four components.

2.3 CONCLUSION

New rules will be developed towards high-level ones, and the process is more difficult than before as easy issues have been solved in previous negotiations. The FTA could undergo substantial changes, and this helps to understand why subsequent negotiation will be carried out on parties' textual proposals, rather than

⁵⁸ China-Korea FTA Art. 20.1.

⁵⁹ Richard Baldwin, *21st Century Trade and the 21st Century WTO*, http://www.rieti.go.jp/en/special/p_a_w/014.html#note8 (last visited Sep. 10, 2015).

existing FTA provisions.⁶⁰ When the market is to be further liberalized, it will entail regulatory issues. Good governance, such as regulatory efficiency and effectiveness, will be enhanced. It will not only address regulatory divergences but also lead to regulatory reform. The crucial point is how to strike a balance among different areas (e.g., market access, regulatory cooperation and coherence, sectoral concerns), particularly to impose reasonable restriction regarding regulatory space. Moreover, new WTO-plus and WTO-extra provisions may solve the rule uncertainty. They may also create more difficulties than they resolve, and lead to questions that negotiators sometimes did not expect. Therefore, the interpretation and implementation of the FTA is increasingly important.

3 RULE IMPLEMENTATION AND INTERPRETATION

The implementation and interpretation of the agreement is crucial to traders, governments, and other actors. Due to space constraints, this part concentrates on three major challenges: (i) the relationship among FTA chapters; (ii) the relationship among the FTA, domestic rules, and international rules; and (iii) the relationship between the FTA and the WTO, since the China-Korea FTA largely develops from WTO law.

3.1 THE RELATIONSHIP AMONG DIFFERENT CHAPTERS OF THE CHINA-KOREA FTA

3.1[a] *Concurrent Application of Different Chapters to One and the Same Measure*

One chapter may affect or concurrently apply with other chapters under the China-Korea FTA. This part analyzes the relationship among different chapters rather than that among different rules within a chapter. As a typical example, three FTA chapters on services trade, financial services, and telecommunications (services chapters), may apply concurrently with chapters on trade in goods, investment, electronic commerce, exceptions, transparency, competition, and environment, to name a few.

Similar to the WTO system, measures that ‘involve a service relating to a particular good or a service supplied in conjunction with a particular good’⁶¹ may fall within the scope of services chapters as well as chapters dealing with trade in goods. The aspect of measures scrutinized under rules for goods and services will be measures’ effect on goods and services respectively.

⁶⁰ China-Korea FTA Annex 22-A, n. 1.

⁶¹ Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, para. 221, WT/DS27/AB/R (Sep. 9, 1997).

Different from the WTO system, services provisions of the FTA are closely related with the investment chapter. The link between services and investment is strengthened through service-investment linkage clause, and the guideline of further negotiation, among others. It echoes the converging trends of the jurisprudence in investment law and trade law in certain areas like regulatory space.⁶²

Investment rules may apply to services. Measures affecting services and financial services provided through commercial presence will be governed by investment provisions on minimum standard of treatment, expropriation and compensation, transfers, subrogation, ISDS, as well as annexes on customary international law, expropriation, and transfers.⁶³ For measures affecting financial services provided through commercial presence, investment provisions on special formalities and information requirements, and denial of benefits, will also apply.⁶⁴

Investment and services rules may apply together with each other. For transfers in investment, two stand-alone chapters on services trade and financial services are considered with investment rules, and the national treatment clause of services trade chapter applies concurrently with the counterpart of the investment chapter.⁶⁵ For financial services, if the investor makes a claim under the ISDS in the investment chapter and the respondent resorts to the prudential carve out provision in the financial services chapter, a prior consultation will be conducted upon the request of the respondent.⁶⁶ Here, drafters probably have expected the complexity of rule implementation. It is noteworthy that investment rules apply to measures affecting services from a different perspective, which is 'only to the extent that they relate to a covered investment.'⁶⁷

Moreover, chapters on electronic commerce (e.g., privacy protection in electronic commerce), competition (e.g., competition law enforcement, consumer welfare), environment (e.g., environment protection affected by trade or investment), and transparency (e.g., publication, comment opportunities), among others, may govern measures affecting services, goods, or investment from their respective perspectives. The China-Korea FTA has a wider scope, and contains a number of WTO-extra chapters. The concurrent application of different chapters to a certain measure may arise more frequently under the China-Korea FTA than under the WTO system. In the concurrent application of different chapters,

⁶² Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. Penn. J. Intl. L. 86 (2014).

⁶³ China-Korea FTA Art. 12.18.

⁶⁴ *Ibid.* Art. 12.18.2.

⁶⁵ *Ibid.* Annex 12-C, paras. 1, 2(i), 3.

⁶⁶ *Ibid.* Art. 9.13.

⁶⁷ *Ibid.* Art. 12.18.

inconsistency among different rules may arise, which needs to be addressed according to the rules on inter-chapter relationship.

3.1[b] *Rules on Inter-Chapter Relationship*

There are a few rules that elaborate the inter-chapter relationship. First, a hierarchy of FTA chapters exists and rules are stipulated for potential conflict among certain chapters. The telecommunications chapter prevails in the case of discrepancies with other chapters.⁶⁸ In contrast, other chapters have control if there is any inconsistency with the electronic commerce chapter.⁶⁹ Arguably there is a descending hierarchy of the telecommunications chapter, chapters other than telecommunications and electronic commerce, and the electronic commerce chapter.

Second, chapters often appear to be segmented from each other. In certain circumstances, one chapter does not affect another chapter, or does not apply to areas covered in another chapter. Similar to the GATS, the services trade chapter does not proscribe measures on people mobility, provided that services trade benefits are not compromised.⁷⁰ Regardless of provisions in chapters on financial services and investment, parties may take prudential measures concerning financial services.⁷¹ Certain cultural cooperation measures do not weaken the reservations in commitments under other chapters.⁷² Except for a provision on the designation of testing laboratories, disciplines on NTMs do not apply to SPS and TBT measures.⁷³ The chapter on services trade does not apply to financial services, but financial service commitments are included in and cannot be separated from the services schedule annexed to the chapter on services trade.⁷⁴

Sometimes one chapter does not affect another chapter regarding commitments or obligations. The chapter on people mobility shall not be interpreted to impose obligations or commitments regarding other chapters and their annexes.⁷⁵ The telecommunications chapter does not create additional commitments other than those under services schedules of the chapter on services trade.⁷⁶

⁶⁸ *Ibid.* Art. 10.2.

⁶⁹ *Ibid.* Art. 13.2.

⁷⁰ *Ibid.* Art. 8.2.3.

⁷¹ *Ibid.* Art. 9.5.1.

⁷² *Ibid.* Art. 17.23.2.

⁷³ *Ibid.* Ch. 2, s. E, n. 1.

⁷⁴ *Ibid.* Arts. 8.2.2(e), 9.9, nn. 2 & 5.

⁷⁵ *Ibid.* Art. 11.9.2.

⁷⁶ *Ibid.* Art. 10.1.4.

In the same vein, measures taken under one chapter do not automatically lead to inconsistency with other chapters. Measures of spectrum allocation and frequency management do not constitute measures that are per se inconsistent with chapters on services trade and investment.⁷⁷ Similarly, the violation of a FTA article does not amount to breaching the clause on the minimum standard of treatment in investment.⁷⁸

Third, chapters interact with each other in limited circumstances. Certain definitions apply across different chapters, and a provision in one chapter applies with or replaces the provision in another chapter. For the former, in the people mobility chapter, a natural person of a party refers to the definition of the same term as seen in the chapter on services trade.⁷⁹ For the latter, in the telecommunications chapter, its rules on dispute resolution and transparency apply '[f]urther to' the rules of the transparency chapter on administrative proceedings, review, and publication.⁸⁰ A similar situation exists in the transparency rules for people mobility.⁸¹ Setting stricter requirements than relevant provisions in the transparency chapter, these rules seem to apply on the basis of, and together with, relevant rules in the transparency chapter. Moreover, the transparency rule of the financial services chapter replaces the publication provision of the transparency chapter.⁸²

3.1[c] *Challenges*

For the relationship among different chapters, the interaction between service and investment is most obvious with the majority of inter-chapter rules related to services. With broad coverage, a number of chapters of the China-Korea FTA address both trade and investment. Environment chapter sets its scope to measures for addressing environmental issues.⁸³ Although its title of environment and trade indicates that it governs environment-related aspects of trade, the environment chapter affects trade and investment, particularly in the enforcement of environmental measures.⁸⁴ The chapter on competition applies to all undertakings, and affects trade or investment.⁸⁵ The chapter on electronic commerce focuses on services, which is supported by the fact that general exceptions in the GATS,

⁷⁷ *Ibid.* Art. 10.10.3.

⁷⁸ *Ibid.* Art. 12.5.3.

⁷⁹ *Ibid.* Art. 11.1.

⁸⁰ *Ibid.* Arts. 10.12, 10.13.

⁸¹ *Ibid.* Arts. 11.6.1, 11.6.2.

⁸² *Ibid.* Art. 9.6.3.

⁸³ *Ibid.* Art. 16.2.

⁸⁴ *Ibid.* Art. 16.5.2.

⁸⁵ *Ibid.* Arts. 14.8.1, 14.9.3, 14.13.

rather than the General Agreement on Tariffs and Trade 1994 (GATT), are incorporated and apply here.⁸⁶ It also affects trade in goods.⁸⁷ Mainly affecting services and investment, the chapter on people mobility contains provisions targeting service suppliers or investors,⁸⁸ with one annex dealing with investment facilitation.⁸⁹ Meanwhile, its general obligations forbid the delay of trade in goods, services, or investment activities,⁹⁰ which may be read to cope with services, investment, and even goods.

At least two challenges could be identified. One challenge is that it is not absolutely clear how a chapter affects or applies with other chapters in the absence of inter-chapter rules. Except for chapters on telecommunications and electronic commerce, uncertainty exists as to which chapter prevails in the case of discrepancy among different chapters. For instance, unlike China's FTAs with Costa Rica and Chile,⁹¹ the China-Korea FTA does not provide for the relationship between the transparency chapter and other chapters. Sectoral provisions on transparency may only require the publication of measures regarding competition and government procurement,⁹² but blanket provisions in the transparency chapter call for the publication of measures to be made promptly.⁹³ It remains to be seen which provision shall control.

The second challenge is which chapter shall apply in new circumstances including deliveries by electronic means and digital products. It is due to the unclear characterization of services. Since GATS Article XIV is incorporated into the China-Korea FTA and applies to the electronic commerce chapter, digital products may be treated as services under electronic commerce rules. However, they could also be treated as goods since the China-Korea FTA expressly states that it is 'without prejudice to whether digital products should be classified as goods or services'.⁹⁴ Similarly, electronic commerce provisions under the China-Korea FTA are made 'without prejudice to the Parties' position on whether deliveries by electronic means should be categorized as trade in services or goods'.⁹⁵ Both involve the issue of whether chapters for trade in goods and/or services shall apply. It may be increasingly challenging when the development of electronic commerce gains speed. This issue needs to be addressed not only by the FTA, but also by domestic and international rules. The following part will discuss

⁸⁶ *Ibid.* Art. 21.1.2.

⁸⁷ *Ibid.* Arts. 13.6, 13.8.

⁸⁸ *Ibid.* Annexes 11-A, 11-B.

⁸⁹ *Ibid.* Annex 11-C.

⁹⁰ *Ibid.* Art. 11.3.1.

⁹¹ China-Costa Rica FTA Art. 133; China-Chile FTA Art. 77.

⁹² For instance, China-Korea FTA Arts. 14.4.1, 17.14.

⁹³ *Ibid.* Art. 18.1.1.

⁹⁴ *Ibid.* Art. 21.1.2, n. 1.

⁹⁵ *Ibid.* Art. 13.3, n. 1.

international law in general. The relationship between WTO law and the China-Korea FTA is to be analyzed in detail in another segment.

3.2 THE RELATIONSHIP AMONG THE CHINA-KOREA FTA, DOMESTIC RULES, AND INTERNATIONAL RULES

3.2[a] *The China-Korea FTA and Domestic Rules*

The implementation and application of the China-Korea FTA involves the relationship between the FTA, international rules, and domestic rules. Generally domestic law is subject to obligations in the China-Korea FTA,⁹⁶ but the FTA does not affect domestic measures or is subject to domestic law in exceptional circumstances due to domestic regulatory concerns. The China-Korea FTA does not impose obligations on the parties on domestic immigration measures unless otherwise provided in listed rules.⁹⁷ Moreover, obligations under the China-Korea FTA may be subject to domestic law regarding the special requirement related to border measures in intellectual property right protection,⁹⁸ and favorable treatment in financial services.⁹⁹ Cultural cooperation measures are also conducted in accordance with domestic law.¹⁰⁰

3.2[b] *The China-Korea FTA and International Rules*

A close relationship exists between the China-Korea FTA and international rules. In principle, both parties affirm their rights and obligations under existing agreements to which they signed.¹⁰¹ These agreements shall include the China-Korea BIT and the China-Japan-Korea Investment Agreement. First, the China-Korea FTA needs to be interpreted as per customary international law regarding the FTA clauses on expropriation, compensation, and minimum standard of treatment.¹⁰²

Second, the China-Korea FTA provisions are subject to parties' obligations under international agreements, or do not prejudice the obligations under international law. The former situation exists mostly in intellectual property, investment, environment as well as CPTF. Parties affirm their commitments under relevant international agreements to which both parties signed, including twelve

⁹⁶ *Ibid.* Art. 1.4.

⁹⁷ *Ibid.* Art. 11.9.1.

⁹⁸ *Ibid.* Arts. 15.26.1, 15.26.2.

⁹⁹ *Ibid.* Annex 9-A, para. 4(a).

¹⁰⁰ *Ibid.* Art. 17.23.2.

¹⁰¹ *Ibid.* Art. 1.3.

¹⁰² *Ibid.* Art. 12.5, n. 5, Art. 12.9, n. 7, Annex 12-A.

listed international agreements.¹⁰³ The principles of the Convention on Biological Diversity are reaffirmed, with the requirements in Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity respected.¹⁰⁴ The compliance with Article 4(2) of the World Intellectual Property Organization Performances and Phonograms Treaty is required.¹⁰⁵ The right of performers and producers to remuneration for commercial use of phonograms under the FTA is subject to parties' obligations to grant such right under international agreements.¹⁰⁶ For investment, measures to safeguard the balance of payments need to conform to the Articles of Agreement of the International Monetary Fund (IMF),¹⁰⁷ but a violation of international agreement does not necessarily lead to a breach of the article on minimum standard of treatment.¹⁰⁸ For environment, the effective implementation of MEAs is ensured.¹⁰⁹ On a related note, International Convention on the Harmonized Commodity Description and Coding System applies to bilateral trade.¹¹⁰

The latter situation exists in the annex on co-production on film in relation to international law,¹¹¹ and in the annex on transfer in relation to the Articles of Agreement of the IMF.¹¹² The China-Korea FTA does not affect the rights and obligations under tax conventions, which control in the case of inconsistency with the FTA.¹¹³

Third, the China-Korea FTA deals with the making of international rules. It coordinates bilateral actions with multilateral ones to ensure that both parties play a more important role. The committee on the SPS Measures under the China-Korea FTA may coordinate issues and positions in the WTO SPS Committee, certain international and regional organizations and fora.¹¹⁴ These fora target at food safety, human, animal, or plant life. Here the organizations include the Codex Alimentarius Commission (CAC), the World Organization for Animal Health (OIE), and those working under the International Plant Protection Convention (IPPC). It echoes the WTO's link with CODEX, IPPC and OIE,¹¹⁵

¹⁰³ For instance, *ibid.* Art. 15.3.

¹⁰⁴ *Ibid.* Art. 15.17.2.

¹⁰⁵ *Ibid.* Art. 15.2.2.

¹⁰⁶ *Ibid.* Art. 15.7.1, n. 5.

¹⁰⁷ *Ibid.* Art. 21.5.

¹⁰⁸ *Ibid.* Art. 12.5.3.

¹⁰⁹ *Ibid.* Art. 16.4.3.

¹¹⁰ *Ibid.* Art. 4.7.

¹¹¹ *Ibid.* Annex 8-B, Art. 12.

¹¹² *Ibid.* Annex 12-C, para. 3.

¹¹³ *Ibid.* Art. 21.3.3(a).

¹¹⁴ *Ibid.* Art. 5.5.3(f).

¹¹⁵ For instance, Codex and IPPC are referred to in the WTO law. See Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Preamble, Arts. 3.4, 12.3 & Annex A,

which have provided information to the panels concerning procedural matters in disputes such as *EC—Hormones* and *EC-Biotech*.¹¹⁶ As the SPS Agreement is incorporated into the China-Korea FTA, other international rules may play their roles in a similar manner.

3.2[c] *The China-Korea FTA, Domestic Rules, and International Rules*

Obligations under the China-Korea FTA could be subject to domestic and international rules at the same time regarding customs procedures and intellectual property. They need to conform to domestic customs law and trade-related rules of the World Customs Organization (WCO) that both parties signed, including the Revised Kyoto Convention.¹¹⁷ The development of paperless trading in the WCO will also be considered.¹¹⁸ Regarding intellectual property, certain measures or cooperation regarding biological diversity, genetic resources, and traditional knowledge are subject to domestic law and international law.¹¹⁹ As one of the countries with the richest genetic resources on earth,¹²⁰ China attaches great importance to genetic resource protection. In the third revision of China's Patent Law in 2008, the grant of a patent is not allowed for invention-creation, which is accomplished by relying on genetic resources obtained or exploited in violation of laws and administrative regulations of China.¹²¹ Regarding an invention-creation accomplished by relying on genetic resources, the applicant shall indicate the direct and original source of the genetic resources in patent documents; if the applicant is unable to indicate the original source, an explanation shall be provided.¹²² Such domestic law requirements will remain under the China-Korea FTA.

International agreements, the China-Korea FTA, and domestic law may need to be balanced concerning the obligation to protect copyright and related rights under the China-Korea FTA. This obligation does not prejudice parties' obligations under international agreements, and the parties shall follow domestic

para. 3, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments – Results of the Uruguay Round (1994) (hereinafter SPS Agreement).

¹¹⁶ Committee on Sanitary and Phytosanitary Measures, Relationship with CODEX, IPPC and OIE, at 4, G/SPS/GEN/775 (May 15, 2007).

¹¹⁷ China-Korea FTA Art. 4.3.2.

¹¹⁸ *Ibid.* Art. 4.12.

¹¹⁹ *Ibid.* Arts. 15.17.3, 15.17.4, 15.17.5.

¹²⁰ *Third Revision of China's Patent Law: Legal texts and documents on the drafting process 2006-2008*, at 55, https://www.lexisnexis.com/documents/pdf/20100211022732_large.pdf (last visited Aug. 8, 2015).

¹²¹ Zhuanli Fa (专利法) [Patent Law] (promulgated by the Standing Comm. of the Nat'l People's Cong., Dec. 27, 2008, effective Oct. 1, 2009), Art. 5(2), http://www.gov.cn/flfg/2008-12/28/content_1189755.htm (China).

¹²² *Ibid.* Art. 26(5).

laws and FTA provisions on copyright and related rights.¹²³ It lends support to a holistic and mutually supportive approach.

3.2[d] *Challenges*

At least two challenges may arise. One challenge is how to identify and apply international rules referred to in the FTA. A large number of international rules and documents need to be taken into consideration. Regarding international rules, different terms are used including 'international law',¹²⁴ 'international agreement',¹²⁵ 'commitments established in existing international agreements',¹²⁶ 'multilateral agreements',¹²⁷ 'international rights and obligations',¹²⁸ 'international obligations' or similar expressions.¹²⁹ International law is not limited to international agreements in which China and Korea are parties.¹³⁰ These terms could lead to different interpretations as to which rules need to be considered.

Beyond international law, international standards, decisions, and other documents also play a role. In determination of the existence of international standards under Article 2.4 of the TBT Agreement, the Decision of WTO TBT Committee are considered, and these standards include those made by other international organizations, such as the International Organization for Standardization (ISO), the International Electrotechnical Commission, the International Telecommunication Union (ITU) and CAC.¹³¹ By the same token, the importance of international standards made by international organizations, such as the ITU and ISO, are recognized in the telecommunications area.¹³² In the case of discrepancy, the product description in the Harmonized System (HS) of the WCO prevails over the product description in the China-Korea FTA that is structured on HS 2012.¹³³ As an example, it is not clear at least from the FTA text whether the former means the latest version of HS at the time of implementation or interpretation.

¹²³ China-Korea FTA Art. 15.6.1.

¹²⁴ *Ibid.* Art. 15.17.5.

¹²⁵ *Ibid.* Art. 15.2.1.

¹²⁶ *Ibid.* Art. 15.3.

¹²⁷ *Ibid.* Art. 15.17.4.

¹²⁸ *Ibid.* Art. 15.17.3.

¹²⁹ *Ibid.* Arts. 15.2.3 ('international obligations'), 15.6.1 ('obligations set out in the international agreements'), 15.7, n. 5 ('the obligation ... under international agreements').

¹³⁰ *Ibid.* Annex 8-B, Art. 12 ('...international law, including international agreements to which they are party').

¹³¹ *Ibid.* Art. 6.4.4.

¹³² *Ibid.* Art. 10.17.

¹³³ *Ibid.* Annex 3-A, Part I, para. 1.

The other challenge is that the relationship between domestic law and the China-Korea FTA is not always clear as to which one should prevail in the event of inconsistencies. Take transparency in financial services as one example; measures affecting financial services shall be administered in a 'reasonable, objective, and impartial' way,¹³⁴ while domestic legal requirements are respected.¹³⁵ If domestic legal requirements fail to meet these requirements, it remains open as to which one prevails. Similar problems arise as to how to coordinate a wide range of international rules, the China-Korea FTA, and domestic law in the case of divergence. Among them, the relationship between the FTA and WTO law deserves special attention, since the WTO law has substantial influence on the FTA.

3.3 THE RELATIONSHIP BETWEEN THE CHINA-KOREA FTA AND THE WTO LAW

3.3[a] *Five Categories of Circumstances*

Although WTO rules concerning FTA formation are arguably of a higher ranking than FTAs, WTO law and FTAs are generally of similar standings in international law and their relationship mainly rests on the language of the treaties.¹³⁶ Five categories of situation can be distinguished here regarding their relationship. For the purpose of this article, WTO rules are read in a broad sense including documents of the WTO.

First, WTO documents used to interpret the FTA: in interpreting rights and obligations under intellectual property rules of the China-Korea FTA, parties are 'entitled to rely upon' the Declaration on the TRIPS Agreement and Public Health, whose principles are recognized by the parties and which are not weakened by intellectual property rules of the FTA.¹³⁷

Second, incorporated WTO rules: the entirety (except otherwise provided in the FTA), or certain provisions, of a WTO-covered agreement are incorporated into and become an integral part of the relevant chapter of the China-Korea FTA. Incorporated WTO agreements are the SPS Agreement, the TBT Agreement, and the TRIMs Agreement as a whole.¹³⁸ Besides the TBT Agreement being incorporated, parties' rights and obligations to each other under the TBT

¹³⁴ *Ibid.* Art. 9.6.2.

¹³⁵ *Ibid.* Art. 9.6, n. 3.

¹³⁶ Thomas Cottier & Foltea Marina, *Constitutional Functions of the WTO and Regional Trade Agreements, in Regional Trade Agreements and the WTO Legal System* 51, 56 (Lorand Bartels & Ortino Federico eds, 2006).

¹³⁷ China-Korea FTA Art. 15.5.1.

¹³⁸ *Ibid.* Arts. 5.3, 6.3, 12.7.1.

Agreement are affirmed.¹³⁹ The China-Korea FTA not only incorporates the SPS Agreement but also aims to improve the implementation of the SPS Agreement.¹⁴⁰ In addition, it emphasizes that some of these rules apply, such as the definitions in the SPS Agreement Annex A,¹⁴¹ the definitions of Annex 1 to the TBT Agreement,¹⁴² and Article 2.2 of the TBT Agreement.¹⁴³ Similarly, the FTA obliges a standardizing body to observe Annex 3 to the TBT Agreement.¹⁴⁴ The China-Korea FTA also elaborates certain requirements regarding the determination of the existence of an international standard under Article 2.4 of the TBT Agreement.¹⁴⁵ These FTA provisions serve to enhance the clarity and predictability.

Incorporated WTO rules include Articles III,¹⁴⁶ VIII:1,¹⁴⁷ XI,¹⁴⁸ XVII,¹⁴⁹ XX,¹⁵⁰ XXI¹⁵¹ of GATT 1994, Articles 3, 4.2(a), 4.2(b), and 4.2(c) of the Safeguards Agreement,¹⁵² and Articles XIV,¹⁵³ and XIVbis¹⁵⁴ of the GATS. Although GATT Article XXI and GATS Article XIVbis are incorporated, their titles are changed from security exceptions to essential security but the essence remains the same.¹⁵⁵ If a WTO provision incorporated into the FTA is amended, the FTA may be amended accordingly when the parties agree.¹⁵⁶

Third, general provisions on the respect for the WTO law: as one of general provisions on the respect for the WTO law ('General Provisions'), both countries 'affirm' their existing rights and obligations with respect to each other under the WTO Agreement and other existing agreements signed by both parties.¹⁵⁷ This General Provision embraces nearly all aspects of WTO, including the authorization of the WTO Dispute Settlement Body (DSB), WTO provisions not expressly referred to in the China-Korea FTA, and China's accession commitments.¹⁵⁸

¹³⁹ *Ibid.* Art. 6.3.

¹⁴⁰ *Ibid.* Art. 5.1(d).

¹⁴¹ *Ibid.* Art. 5.2.2.

¹⁴² *Ibid.* Arts. 6.2.4, 6.11.1 (para. 1 of Annex 1 to the TBT Agreement).

¹⁴³ *Ibid.* Art. 6.11.2.

¹⁴⁴ *Ibid.* Art. 6.4.1.

¹⁴⁵ *Ibid.* Art. 6.4.4.

¹⁴⁶ *Ibid.* Art. 2.3.

¹⁴⁷ *Ibid.* Art. 2.10.1.

¹⁴⁸ *Ibid.* Art. 2.8.1.

¹⁴⁹ *Ibid.* Art. 2.11.1.

¹⁵⁰ *Ibid.* Art. 21.1.1.

¹⁵¹ *Ibid.* Art. 21.2.

¹⁵² *Ibid.* Arts. 7.2.2, 7.2.3.

¹⁵³ *Ibid.* Art. 21.1.2.

¹⁵⁴ *Ibid.* Art. 21.2.

¹⁵⁵ *Ibid.* Art. 21.2.

¹⁵⁶ *Ibid.* Art. 22.3.

¹⁵⁷ *Ibid.* Art. 1.3.

¹⁵⁸ China's Accession Protocol is 'an integral part' of the WTO Agreement. Protocol on the Accession of the People's Republic of China, para. 1.2, WTO Doc. WT/L/432 (2001).

China's accession commitments on transparency are recognized.¹⁵⁹ Both parties are not inhibited from adjusting a customs duty as authorized by the DSB.¹⁶⁰ This helps to solve possible inconsistency between the implementation of WTO adjudication and FTA provisions. The China-Korea FTA would only permit WTO-consistent measures, and gives stronger support to WTO law than certain FTAs (e.g., Peru-Guatemala FTA) whose provisions prevail over WTO agreements to the extent of inconsistency.¹⁶¹

Fourth, specific provisions on the respect for WTO law: specific provisions on the respect for WTO law ('Specific Provisions') are specific in the sense of involving WTO agreements, provisions, documents, practices or negotiations, or targeting at a specific area. These stipulations usually require the consistency with WTO provisions, and occasionally refer to WTO provisions, documents, practices, or negotiations. They exist in the trade in goods, particularly in trade remedies, intellectual property, electronic commerce, and exceptions. Moreover, at the outset, the consistency with WTO disciplines on FTA is highlighted in the first article of the China-Korea FTA;¹⁶² it echoes General Provisions.

For trade in goods, anti-dumping and countervailing duties should be adopted 'in full compliance with' relevant WTO law.¹⁶³ Regarding the application of anti-dumping and countervailing measures, parties retain their rights and obligations under the WTO Agreement unless otherwise provided in the FTA.¹⁶⁴ For global safeguard measures, parties' rights and obligations under GATT Article XIX and the Safeguards Agreements are kept in the China-Korea FTA.¹⁶⁵ Measures under the China-Korea FTA shall not contravene the Import Licensing Agreement,¹⁶⁶ and its definition of 'import licensing' applies to the FTA.¹⁶⁷ Tariff rate quotas are implemented as per GATT Article XIII, the Import Licensing Agreement, and other WTO agreements.¹⁶⁸ The valuation is made in conformity with the Customs Valuation Agreement and GATT Article VII.¹⁶⁹

For intellectual property, the commitments under the TRIPS Agreement are affirmed.¹⁷⁰ Articles 3, 5, and 39 of the TRIPS Agreement need to be complied

¹⁵⁹ China-Korea FTA Art. 9.6, n. 3.

¹⁶⁰ *Ibid.* Art. 2.5(b).

¹⁶¹ Appellate Body Report, *Peru - Additional Duty on Imports of Certain Agricultural Products*, para. 5.109 & n. 297, WT/DS457/AB/R (Jul. 20, 2015).

¹⁶² China-Korea FTA Art. 1.1.

¹⁶³ *Ibid.* Art. 7.7.2.

¹⁶⁴ *Ibid.* Art. 7.7.1.

¹⁶⁵ *Ibid.* Arts. 7.5.1, 7.7.1.

¹⁶⁶ *Ibid.* Art. 2.9.1.

¹⁶⁷ *Ibid.* Art. 2.9.1, n. 2.

¹⁶⁸ *Ibid.* Art. 2.14.1.

¹⁶⁹ *Ibid.* Arts. 3.1, 4.6.

¹⁷⁰ *Ibid.* Art. 15.3 (a).

with.¹⁷¹ The procedures for grant or registration are required to reach the same level as that specified under the TRIPS Agreement, particularly in Article 62.¹⁷² Both parties commit to join international efforts in implementing the Decision of the WTO General Council on the Implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, as well as the Protocol Amending the TRIPS Agreement.¹⁷³

Regarding electronic commerce, WTO law is applicable to measures affecting electronic commerce.¹⁷⁴ Following existing WTO practice, electronic transmissions are not subject to customs duties.¹⁷⁵ Both parties may adjust the practice of customs duties in electronic commerce, but shall still conform to changes to the WTO Ministerial Decision.¹⁷⁶ WTO document is used to explain current WTO practice on electronic commerce in the FTA.¹⁷⁷

For exceptions, measures to safeguard the balance of payments must be taken in conformity with the WTO Agreement.¹⁷⁸ Rights and obligations regarding taxation measures will be granted or imposed only when the same situation exists under GATT Article III.¹⁷⁹

As a special situation, several provisions on trade remedies, export restriction, and TBT are crafted to avoid affecting WTO negotiations or exceeding WTO rules, to elaborate WTO requirements, or to set stricter requirements regarding WTO rules. The continuing proscription of zeroing in dumping margin determination does not affect the parties' WTO negotiation position.¹⁸⁰ The parties reserve their rights and obligations under GATT Article XIX and the Safeguards Agreement as a number of China's FTAs do.¹⁸¹ The China-Korea FTA goes further to indicate that it does not confer additional rights or obligations on parties regarding actions taken under GATT Article XIX and the Safeguards Agreement.¹⁸² It elaborates the relationship with WTO law, and parties' relevant rights and obligations under the WTO law are kept 'intact'. The FTA also clarifies international standards under Article 2.4 of the TBT Agreement.¹⁸³ Setting higher requirements on a proposed export prohibition or restrictions on energy and mineral resources under GATT Article XI:2(a), it needs to be notified in writing

¹⁷¹ *Ibid.* Arts. 15.2.2, 15.19.

¹⁷² *Ibid.* Art. 15.21.

¹⁷³ *Ibid.* Art. 15.5.2.

¹⁷⁴ *Ibid.* Art. 13.1.

¹⁷⁵ *Ibid.* Art. 13.3.

¹⁷⁶ *Ibid.* Art. 13.3, n. 3.

¹⁷⁷ *Ibid.* Art. 13.3, n. 2.

¹⁷⁸ *Ibid.* Art. 21.5.

¹⁷⁹ *Ibid.* Art. 21.3.4.

¹⁸⁰ *Ibid.* Art. 7.7.5, n. 1.

¹⁸¹ China-ASEAN Agreement on Trade in Goods Art. 9.1; China-Iceland FTA Art. 17.1.

¹⁸² China-Korea FTA Art. 7.5.1.

¹⁸³ *Ibid.* Art. 6.4.4.

'as far in advance as practicable' including its reasons, nature, and proposed duration.¹⁸⁴

Fifth, the use of WTO language: WTO language is widely used in the FTA, and is sometimes modified in WTO-covered areas. It is commonly found in different areas. As an example, nearly all services trade provisions of the China-Korea FTA reiterate GATS counterparts with minor changes. The measures ensuring the orderly movement of natural persons is not inhibited if they do not negatively affect the benefits of the parties under the terms of the commitments,¹⁸⁵ which follows almost verbatim the counterpart of the GATS annex on movement of natural persons supplying services.¹⁸⁶ Stricter than the GATS, the China-Korea FTA also prevents these measures from impairing parties' interests under services trade chapter.

In customs procedures, the design and implementation of risk management shall avoid 'arbitrary or unjustifiable discrimination or disguised restrictions' on trade.¹⁸⁷ Similar language could be found in the chapeau of GATT Article XX. Regarding technical regulations or procedures, Article 6.4.3 of the China-Korea FTA repeats the counterpart of Article 2.4 of the TBT Agreement, and extends to conformity assessment procedures.

Concerning intellectual property, various provisions, such as those on patentable subject matter,¹⁸⁸ exceptions to trademarks rights,¹⁸⁹ exceptions to rights conferred to patents,¹⁹⁰ and exceptions to the protection of industrial designs,¹⁹¹ closely track the TRIPS Agreement.

For dispute settlement, a number of provisions repeat the counterpart of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). This is case with a FTA provision on suspension of concessions, but the China-Korea FTA removes the DSU expression that compensation is voluntary.¹⁹² The use of WTO language is not peculiar to China's FTA. For instance, the

¹⁸⁴ *Ibid.* Art. 2.8.2.

¹⁸⁵ *Ibid.* Art. 8.2.3.

¹⁸⁶ GATS, Annex on Movement of Natural Persons Supplying Services under the Agreement, para. 4.

¹⁸⁷ China-Korea FTA Art. 4.13.2.

¹⁸⁸ *Ibid.* Art. 15.15.2; Agreement on Trade-Related Aspects of Intellectual Property Rights, Art. 27.2, Annex 1C of Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, in World Trade Organization, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* 321 (1999) (hereinafter TRIPS).

¹⁸⁹ China-Korea FTA Art. 15.12; TRIPS Art. 17.

¹⁹⁰ China-Korea FTA Art. 15.15.4; TRIPS Art. 30.

¹⁹¹ China-Korea FTA Art. 15.20.3; TRIPS Art. 26.2.

¹⁹² China-Korea FTA Art. 20.15.2; Understanding on Rules and Procedures Governing the Settlement of Disputes Art. 22.1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 (hereinafter DSU).

language of EU-Korea FTA on exceptions to trademarks rights is similar to the WTO law with some minor changes.¹⁹³

These five categories of circumstances may co-exist in one provision or one chapter, and could lead to different interpretative value of the WTO rules and jurisprudence. The TBT chapter incorporates the TBT Agreement, uses the WTO language,¹⁹⁴ and makes reference to WTO provisions, including the provision on standards that mandates the compliance with Annex 3 of the TBT Agreement.¹⁹⁵ It involves the second, fourth, and fifth categories of circumstances. The fourth and fifth scenario could be found in one provision. Article 8.10 of the China-Korea FTA on payments and transfers not only refers to GATS Article XII, but also reiterates verbatim GATS Article XII. Some provisions closely follow GATS language and refer to GATS provisions.¹⁹⁶

3.3[b] *Challenges*

First, which WTO rules apply to the China-Korea FTA? The FTA is independent from the WTO system, and sets higher requirements in a different context. WTO rules cannot be automatically applied to the FTA, and it is necessary to identify which WTO rules apply to the FTA.

WTO rules incorporated into the FTA apply to the FTA. Specific Provisions requiring compliance with WTO rules should lead to the application of WTO provisions, including the requirements of '[c]onsistent with',¹⁹⁷ 'in full compliance with',¹⁹⁸ 'in accordance with',¹⁹⁹ and not 'inconsistent with',²⁰⁰ WTO stipulations.

General Provisions, the use of WTO language, and some Specific Provisions discussed below do not necessarily entail the direct application of WTO rules to the FTA. The affirmation or retainment of WTO rights and obligations under General or Specific Provisions cannot be equated with the direct application of WTO rules. These requirements may be met without direct application of WTO law. Although the use of WTO language may lend some support to the consideration of WTO rules due to their commonality, one may argue that WTO rules do not apply given the lack of explicit reference to WTO provisions. When

¹⁹³ EU-Korea FTA Art. 10.17; TRIPS Art. 17.

¹⁹⁴ For instance, China-Korea FTA Arts. 6.4.3 (using the language of Art. 5.4 of the TBT Agreement with some changes), 6.11.2 (resembling a part of the language of Art. 2.2 of the TBT Agreement). *Ibid.* Art. 6.4.1.

¹⁹⁵ *Ibid.* Arts. 8.7.4 (reference to GATS Art. VI.4), 8.10 (reference to GATS Art. XII).

¹⁹⁶ *Ibid.* Arts. 1.1, 13.3 & n. 2.

¹⁹⁷ *Ibid.* Art. 7.7.2.

¹⁹⁸ For instance, *Ibid.* Arts. 2.14.1, 3.1, 4.6, 21.5.

¹⁹⁹ *Ibid.* Art. 2.9.1.

²⁰⁰ *Ibid.* Art. 2.9.1.

the WTO language is used in the FTA, it is more important to see how these rules are interpreted, which involves the applicability of WTO jurisprudence.

Certain Specific Provisions encounter more difficulties as to the applicability of WTO rules. For instance, the requirements of reaching 'the same level as that provided in' TRIPs Agreement,²⁰¹ or granting rights or imposing obligations only when corresponding situation exists under GATT Article III,²⁰² pose challenges as to whether these WTO rules are applicable to the FTA. Notably, the China-Korea FTA explicitly stipulates the applicability of the WTO Agreement to measures affecting electronic commerce.²⁰³ This provision looks to stress that WTO rules cover new areas of electronic commerce. It could be read to support the application of WTO law in traditional WTO-cover areas including the TRIPs Agreement and GATT Article III. However, one may argue that these rules are not automatically applicable and only set a benchmark, and that an express wording like the applicability of WTO rules to electronic commerce is needed. Where FTA provisions substantially differ from WTO language, it is not likely for WTO rules to apply.

However, the above analysis is not without doubt. Different viewpoints may exist regarding the applicability of WTO rules in the case of General and Specific Provisions or the use of WTO language. If WTO rules cannot apply to the FTA, WTO law could be considered for the interpretation of the China-Korea FTA. As the customary rules of interpretation of international law codified in the Vienna Convention on the Law of Treaties (VCLT) is used in the China-Korea FTA,²⁰⁴ WTO rules may be considered under Article 31.3(c) of VCLT as 'relevant rules of international law'.

Second, do WTO rules apply to WTO-plus obligations? If WTO rules apply to the FTA, they apply when no similar stipulations exist in the FTA. However, they may not necessarily apply to WTO-plus obligations. A specific FTA provision, such as Article 6.11.2 discussed below, is probably required to enable WTO rules to apply to WTO-plus obligations. Certain WTO-plus obligations are expressly subject to WTO rules. For instance, regarding mandatory marking or labeling of goods, the China-Korea FTA imposes WTO-plus obligations on the mandatory use of identification number, such as non-discriminatory issuance of identification numbers to economic operators without unnecessary delay.²⁰⁵ Using the language of Article 2.2 of the TBT Agreement, China-Korea FTA Article 6.11.2 requires the compliance with Article 2.2 of the TBT Agreement, and specifically indicates

²⁰¹ *Ibid.* Art. 15.21.

²⁰² *Ibid.* Art. 21.3.4.

²⁰³ *Ibid.* Art. 13.1.

²⁰⁴ *Ibid.* Art. 20.11.3.

²⁰⁵ *Ibid.* Art. 6.11.3(c).

that technical regulations include mandatory marking or labeling of goods. At first sight, Article 6.11.2 seems redundant, since technical regulation may include marking or labeling requirements under the TBT Agreement²⁰⁶ and the TBT Agreement is incorporated into the FTA. On the contrary, Article 6.11.2 is necessary to ensure that Article 2.2 of the TBT Agreement applies to WTO-plus FTA obligations. Its thrust is to address the relationship between the incorporation of WTO law and WTO-plus obligations in the China-Korea FTA, and possibly to maintain the coherence with the multilateral trade system. However, it is not clear whether WTO provisions apply to WTO-plus obligations in the China-Korea FTA if no such specific reference to WTO rules exists.

Third, can WTO jurisprudence be applied to the China-Korea FTA? There is more uncertainty as to the application of WTO jurisprudence to the FTA. The China-Korea FTA takes a cautious approach towards WTO jurisprudence. WTO jurisprudence is rarely 'codified' in the China-Korea FTA, even for areas in which WTO law is closely followed (e.g., anti-dumping and countervailing duties). Perhaps it is partially due to the fact that parties do not always agree with all the WTO case law. It remains to be seen how such jurisprudence affects FTA interpretation. For instance, regarding the interpretation of schedules, it is not clear whether the evolutionary or static interpretation approach is taken.

The WTO jurisprudence may be applicable to FTAs.²⁰⁷ The transplant of WTO jurisprudence to the China-Korea FTA is possible in WTO-covered areas. As reflected in past cases, similar wording may lead to the 'sharing' of jurisprudence. Article 11.3 of the Anti-Dumping Agreement almost replicates Article 21.3 of the Agreement on Subsidies and Countervailing Measures with minor changes such as from 'countervailing' to 'anti-dumping'. Parallel wording of these two articles in different WTO agreements enables the interpretation of one article, *mutatis mutandis*, to apply to the other provision.²⁰⁸ Due to functionality and coherence concerns, WTO jurisprudence is a more likely 'applicable precedent' if WTO provisions are used as a basis of drafting FTAs, while it may not be the case if FTA rules substantially differ from WTO counterparts.²⁰⁹ Given the near identity of various FTA articles and WTO provisions, the WTO jurisprudence is arguably applicable in the FTA.

²⁰⁶ Agreement on Technical Barriers to Trade Annex 1, para. 1, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 UNTS 154, Annex 1A, 1868 UNTS 120 (hereinafter TBT Agreement).

²⁰⁷ See generally, e.g., Locknie Hsu, *Applicability of WTO Law in Regional Trade Agreements: Identifying the Links*, in *Regional Trade Agreements and the WTO Legal System* 525–552 (Lorand Bartels & Ortino Federico eds, 2006).

²⁰⁸ Appellate Body Report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, para. 104 & n. 114, WT/DS244/AB/R (Dec. 15, 2003).

²⁰⁹ See, for instance, Gabrielle Marceau, et al., *The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation*, 47 J. World Trade 489, 490, 522 (2013).

Meanwhile, such possibility of transplant cannot be exaggerated based on the practice of other FTAs. Even when Annex 803.3(12) of the North American Free Trade Agreement (NAFTA) is substantially identical to GATT Safeguards Code Article 3.1, a NAFTA panel in *Broom Corn Brooms* refused to expressly apply the latter to ensure its independence in adjudication.²¹⁰ The rejection of application of WTO jurisprudence is possible.

If the WTO jurisprudence is transplanted, difficulties may arise when the FTA is interpreted as per the VCLT. Ordinary meaning under the China-Korea FTA differs from WTO law, since they are written in Chinese, Korean, and English, with the English version prevailing in the case of discrepancy. Most likely, only the English version could demonstrate links to WTO jurisprudence. The context of WTO law also differs substantially from that of the China-Korea FTA despite their commonalities. The China-Korea FTA is developed from WTO agreements, but contains WTO-plus obligations and covers WTO-extra areas. WTO adjudicators cannot 'add to or diminish' the rights and obligations stipulated in WTO agreements,²¹¹ but this requirement may not fit well with the FTA. Regarding the object and purpose, the China-Korea FTA and the WTO Agreement are similar in various aspects such as raising living standards, creating employment opportunities, and promoting sustainable development. There are differences as the WTO Agreement highlights the consideration for developing countries, but the China-Korea FTA emphasizes strengthening bilateral cooperation and extends to investments. In the WTO jurisprudence, the objective of the WTO agreements sometimes may not provide 'specific guidance as to the correct interpretation to be given'.²¹² It is not clear to what extent the object of the WTO agreements and relevant jurisprudence may guide the FTA. The supplementary means of interpretation, including the preparatory work and the conclusion circumstances, are not the same for WTO rules and the China-Korea FTA.

To sum up, the applicability of WTO rules and jurisprudence to the FTA is crucial to the operation of the FTA. A delicate relationship exists between the FTA and WTO rules and jurisprudence. It is not absolutely clear whether different arrangements, such as the difference between 'incorporation' and various forms of 'explicit reference',²¹³ affect the deference to the WTO law. There are nuances in the terms, which can lead to different interpretations of obligations. Anyhow

²¹⁰ *Ibid.* at 523.

²¹¹ DSU Art. 19.2.

²¹² Appellate Body Report, *China - Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, para. 393, WT/DS363/AB/R (Dec. 21, 2009).

²¹³ For the analysis of incorporation and explicit reference, see Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law* 445 (2003).

WTO law is relevant to the FTA to different degrees, and the conflict of interpretation with WTO jurisprudence shall be avoided.

For WTO-extra areas, the application of WTO rules and the transplant of WTO jurisprudence are more difficult. Many rules in WTO-extra areas need to be further elaborated. For instance, the Committee on Investment under the China-Korea FTA may consult issues under the agreement that affect different stages of investment by an investor of a party in the other party, ranging from the establishment to the operation or sales of investments.²¹⁴ It may involve investor-state disputes, although the investor does not participate in the Committee on Investment. Its relationship with the ISDS remains open.

4 CONCLUSION

Rule development of the China-Korea FTA will probably encounter the challenges of further market liberalization, regulatory cooperation and coherence, and sector-specific challenges. These challenges may be taken into account as a whole when parties make concessions. Essentially, the key is to strike a proper balance between economic integration and regulatory autonomy.

The implementation is not easy for either country. Regarding the implementation and interpretation, the fundamental challenge is the lack of a 'systemic' response to the relationship among FTA chapters, and to the relationship among the FTA, domestic law, and international law.²¹⁵ The China-Korea FTA stipulates that the rights and obligations under WTO law and other agreements are affirmed.²¹⁶ However, it does not address the inter-chapter relationship (in spite of several provisions on inter-chapter relationship), the potential conflict or 'tension' among different rules, and the applicability of WTO rules and jurisprudence to FTA obligations including WTO-plus ones. An updated general rule as to how to address these relationships is yet to emerge to provide more predictability. Currently these relationships have to be addressed on a case-by-case basis, and a mutually supportive approach is likely to be adopted as provided, regarding the relationship between the TRIPS Agreement and the Convention on Biological Diversity.²¹⁷ It is not an easy task as rules could give different or even conflicting directions, such as trade rules and environmental rules. Moreover, the response to digital trade, the identification and application of international rules, the interpretation of WTO-extra obligations are also among challenges. Other

²¹⁴ China-Korea FTA Art. 12.17.1(c).

²¹⁵ For other challenges in implementing China's FTAs, see, for instance, Guiguo Wang, *China's FTAs: Legal Characteristics and Implications*, 105 Am. J. Intl. L. 514–515 (2011).

²¹⁶ China-Korea FTA Art. 1.3.

²¹⁷ *Ibid.* Art. 15.17.2.

challenges could arise from, for instance, the implementation of provisions on Outward Processing Zone (OPZ) and ISDS,²¹⁸ vague terms (e.g., the term of 'market access in goods' in the mediation concerning NTMs²¹⁹), and the usage rate of FTA. Some challenges are embedded in FTA texts (e.g., vague terms, the lack of a systemic solution to the relationship among FTA chapters, and to the relationship among FTA, domestic law and international law) while others are more related to the implementation of the FTA (e.g., the behind-the-border measures²²⁰).

These challenges present opportunities to upgrade the agreement. They will probably be overcome in the consultation and subsequent negotiations, as disputes are not likely to be solved through FTA panel proceedings for a number of reasons. The primary function of the China-Korea FTA is, arguably, to strengthen cooperation. Besides mediation for NTMs,²²¹ cooperation and consultation²²² is preferred in the interpretation and implementation, which could be conducted under the Joint Commission²²³ or (sub)committees.²²⁴ Both parties are active in dispute settlement under the WTO but not under FTAs. Dispute settlement mechanism of the China-Korea FTA does not apply to matters arising under chapters on SPS, TBT, electronic commerce, competition, environment, and economic cooperation, annex on co-production on film,²²⁵ and contact points for improving investment environment,²²⁶ as well as the refusal to grant temporary entry with certain exceptions.²²⁷ As the fourth reason, panel adjudication under the FTA could carry more uncertainty compared with the WTO given certain factors, including the lack of the Appellate Body. Parties may want to retain more control of the implementation and interpretation of the agreement. Interestingly, customary rules of interpretation of international law, including those codified in the VCLT, are used by the panel to 'consider' rather than 'interpret' the FTA.²²⁸ It could reflect the caution regarding the panel's role, and is less 'judicial' than the

²¹⁸ On a related note, an ISDS case has arisen in Korea's FTA with US, under whose investor-state dispute clause Lone Star Funds initiated a case against the Korean government. Hee-Jin Kim, *Lone Star demanding \$4.6 billion from government* (May 18, 2015), <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3004273>.

²¹⁹ This term is defined in the EU-Korea FTA but not the China-Korea FTA. China-Korea FTA Art. 20.5.4; EU-Korea FTA Annex 14-A, Art. 2 & n. 1.

²²⁰ Lee Jae-min, *Issues in FTA with China* (Nov. 18, 2014), <http://www.koreaherald.com/view.php?ud=20141118000438>.

²²¹ China-Korea FTA Art. 20.5.4.

²²² *Ibid.* Art. 20.1.

²²³ *Ibid.* Art. 19.2.1(e).

²²⁴ *Ibid.* Arts. 15.31.2(e), 4.19.2(b).

²²⁵ *Ibid.* Arts. 5.6, 6.15, 13.9, 14.12.2, 16.9, 17.3, Annex 8-B, Art. 13.

²²⁶ *Ibid.* Art. 12.19.4.

²²⁷ *Ibid.* Art. 11.8.3.

²²⁸ *Ibid.* Art. 20.11.3.

WTO dispute settlement system. If consultation fails and disputes fall within the scope of WTO law, disputes are more likely to be submitted to the WTO.

Some challenges are those for FTAs of today generally, and Korea-China FTA is just one example in this regard with certain peculiarities (e.g., the relationship between the FTA and the WTO), while other challenges are unique to Korea-China FTA based on the unique economic structure and trade relationship of China or Korea (e.g., the implementation of the OPZ clause). Generally, these challenges may exist not only in the China-Korea FTA but also in other China's FTAs. The solutions to these challenges may be found in future FTAs of China and deserve attention.

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The journal deals authoritatively with the most crucial issues affecting world trade today, with focus on multilateral, regional, and bilateral trade negotiations, on various anti-dumping and unfair trade practices issues, and on the endless succession of vital new issues that arise constantly in this turbulent field of activity. The approach is consistently multidisciplinary, aimed at trade practitioners, government officials, negotiators and scholars who seek to expose ground-breaking theses, to make important policy statements or to offer in-depth analysis and discussion of delicate trade issues.

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