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**Doctoral Dissertation**

**A Study on the ROK-US**

**Intellectual Property Rights Agreement (1986)**

한미 지적재산권 협정 (1986)의  
배경, 과정 및 결과에 관한 연구

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# A Study on the US-ROK Intellectual Property Rights Agreement (1986)

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## **Abstract**

This study examined the process by which the protection of intellectual property rights (IPRs) became a central issue in the international trading system, from the initial stages of the Cold War, through détente to the mid-1980s, when the Cold War system began to collapse. This study tried to reinterpret the Cold War from the perspective of the evolving international trading system, paying attention to how technological development, competition and control affected the Cold War system, and what role the IPR system came to play in the process.

The study proposes a mechanism that assumes a dynamic relationship between the discourse and institutionalization. At key historical moments, discourses are institutionalized, through domestic and international political processes, as policies and legal texts to be implemented subsequently. If the practices that result from the implementation accumulate sufficiently, a new perception about the reality emerges, leading to new sets of discourses.

For the purpose of this analysis, historical documents that summarize the perception of the policymakers are thought to embody the major discourse of the time. This study selected discourses that were important in shaping the history of IP during the Cold War including the discourse of containment (mid-1940s ~ mid-1960s), détente (mid-1960s ~ mid-1970s), discourse on economic security (late

1970s ~ early 1980s), international competitiveness discourse (early 1980s ~ ), and the Intellectual Property discourse (mid-1980s ~ ). Each discourse, as embodied in these historical documents, will be analyzed, paying attention to the historical background of their formation, and their impact on subsequent institutions and practices.

During the containment period, the US government sponsored the rapid accumulation of intellectual capital. During détente, intellectual property (IP) became a diplomatic resource that precipitated the economic exchanges between the East and West, and led to the recognition of the economic and security value of knowledge.

As East-West trade during détente intensified, new discourses began to emerge. The denial approach argued that the duality of technology, especially advanced technology, might result in increased security and economic capability of the Soviet Union, posing a long-term threat to Western security. It further argued that the West's superior economic and technological power needed to be used as a leverage to bring about changes in the international behavior of the Soviet Union. On the other hand, the laissez-faire approach argued that the newly emerging techno-economic space in East-West relations need to be expanded, and should be governed by market-based approaches.

Until then, IPRs were more of a bargaining chip that promoted the exchanges and

dissemination of technology in the US due to the enforcement of strong anti-trust laws. Internationally, active international technology transfer occurred within the “Free World,” due to US post-war diplomacy aimed at reconstructing the economies of its allies and establishing technological infrastructure.

As a result, Japan and East Asian NICs experienced a rapid catch-up of technological capacities, which began to be pronounced from the mid-1970s. The international competitiveness of Western industry began to decline relative to Japan, and Western economies began to strengthen the international competitiveness of their industries by changing trade and technology policies, including IPR-related policies.

The year 1979 became the turning point whereby discussion of economic issues became the dominant discourse in America. As Japan arose as a fierce competitor to US industry from the late 1970s in consumer electronics and advanced technology goods, the economic issue dominated the 1980 US presidential election.

President Reagan regarded international competitiveness as a high priority in his administration. Lively discussion about competitiveness ensued, and in 1985, the Young Commission Report was published after an extensive discussion among policy makers and opinion leaders in various fields. As the report’s subtitle “Global Competition: The New Reality” suggests, the report redefined the new reality of the international political economy from the point of view of a market-based approach.

Domestically, the US began to enact various policies to strengthen industrial competitiveness. Internationally, Japan and East Asian NICs began to be pressured to refrain from “dumping” their products in the American market, further open up their markets, and play a more productive role in US-initiated discussions in the international arena.

These discussions were published in various reports and policy announcements from around 1985. In addition to the publication of the Young Commission report and the announcement of the Plaza Accord, the establishment and implementation of American trade strategy was a notable step forward. According to the new strategy, the US government would launch a new negotiation round within the GATT framework with an aim to forge a new multilateral trading system. Protection of American IPRs, which it regarded as the source of American competitiveness, would be included as a high priority agenda item. According to the plan, America would pursue negotiations bilaterally, and multilaterally, to promote IPRs in the global trading system.

The US-ROK IPR Agreement, which began in earnest with the initiation of the Section 301 investigation of Korean IPRs by the USTR, was an important stepping stone in the US effort to strengthen IPRs in the global trading system. The following section will examine the international competitiveness discourse and its institutionalization in the US and in the global trading system.

The process of negotiations that led to the conclusion of the US-ROK IPR Agreement has been analyzed using the framework of the two-level game, characterized by the intergovernmental negotiation (Level I), the government's negotiation with domestic political actors (Level II), and the exchange of influences between international actors and domestic actors (Reverberation). The negotiation process was analyzed using the ESTN two countries model that examines how the competing discourses converge in the final agreement, and how the process interacts with the domestic politics of Korea.

The bilateral IPR negotiations reached a turning point when the USTR's Section 301 case was initiated in November 1985. Therefore, the study understood the negotiation process moves on to Phase 2, after the 301 investigation was launched.

Phase 1 commenced from 1981 to October 1985, when US requests for increased Korean protection of IPRs, including the rights for computer software, copyrights and process patents, began to be made more systematically. During this period, the Korean government was reluctant to respond with concrete action due to huge domestic political costs.

Phase 2 was from November 1985 to July 1986, a period that began with the initiation of USTR's investigation of unfair trade practices under Section 301, until the final conclusion of the US-ROK IPR Agreement.

The domestic political, economic and legal impact of the Agreement and the

international consequences were examined. Shortly after the US-ROK IPR Agreement was reached, GATT's 8<sup>th</sup> Round of multilateral trade negotiation, i.e. the Uruguay Round was initiated in Punta del Este, Uruguay. IPR issue was included as the GATT agenda. In the subsequent seven and a half years of multilateral negotiations, the Korean government's position was significantly affected by its domestic legal infrastructure induced by the US-ROK IPR Agreement.

The conclusion US-ROK IPR Agreement had the following effects on the IPR negotiation during the GATT Uruguay Round.

First, the US-ROK IPR Agreement was the first instance of an international agreement on IPRs concluded in the context of trade dispute involving unfair trade practices. As such, it became a touchstone for establishing the IPRs relationship with trade.

Second, the Agreement showed the US commitment toward the IPR issue by suggesting that it would be willing to initiate the Section 301 process if necessary. An agreement to improve protection of patented and copyrighted works would attempt to lengthen patent terms, increase the patent protection for such goods as chemicals and pharmaceutical compounds, and extend copyright protection to computer software. In addition, it would create a dispute settlement mechanism to litigate contentious bilateral issues. This multilateral approach would supplement bilateral efforts by the US to improve protection in these areas.

For the US, the strategy in successfully concluding the US-ROK IPR Agreement, namely, the bilateral negotiation in the context of Section 301 investigation would become a model for the subsequent negotiations with developing countries, either bilaterally, or in multilateral fora.

Third, by strengthening Korean protection of IPR, the Agreement changed Korea's negotiating strategy in the Uruguay Round TRIPs negotiation. Korea played a more active role in mediating the developed and developing countries in the formation of the IPR regime. Such efforts tried to reconcile the conflicting positions along the North-South divide, making the negotiation process more multipolar and multilateral.

In conclusion, it can be argued that the US-ROK IPR Agreement was a case in which the US utilized Korea's international status as the model for developing countries in its efforts to strengthen IPRs in the multilateral trading system. From the ROK point of view, the US-ROK IPR negotiations were a process by which it sought to minimize the political and economic costs of the Agreement, while fulfilling the role expected of it as a trading nation and adapting to the changing global system for IPR protection.

In the history of global trading system in the latter half of the 20<sup>th</sup> century, the rise and establishment of IPRs was the central feature of the changing technological and trade environment and went hand-in-hand with the evolving economic and security

landscape of the Cold War. The discourse concerning IPRs gradually replaced the Cold War ideological competition as the new ideology and principle of the era of globalization.

Keywords: ROK-US Intellectual Property Rights Agreement, IPRs, GATT UR TRIPs Negotiation, East-West Trade, International Competitiveness, Two-level Game

# 1. Introduction

The year 1984 opened with an avant-garde video show, “Good Morning Mr. Orwell,” by artist Nam June Paik, that featured live and interactive performances from New York, Paris and San Francisco televised through satellite technology. It was a celebration of the freedom, creativity and technological advancement of the “Free World,” which looked quite different from the grim dystopia George Orwell depicted in his 1949 novel, *1984*. Countering the Orwellian picture of ubiquitous surveillance by Big Brother, where technology is used as a tool of totalitarianism, the event, according to Paik, was meant to show how technology can be a means for “interactive global communication...” that crosses “international borders, providing liberating information, [and] maybe eventually punching a hole in the Iron Curtain.”<sup>1</sup>

By the mid-1980s, the West had been propagating democratic institutions, lifestyle and interdependent techno-economic communities outside the Iron Curtain for more than thirty years. Technologies that had been developed for security purposes had begun to change human lives in the areas of arts, education, finances, industry and entertainment. It was only a few years later that the Iron Curtain began

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<sup>1</sup> Glueck, Grace, “Nam June Paik’s TV Answer to George Orwell,” *International Herald Tribune* December 31-January 1 1984.

to collapse amid much acclamation from those not only in the West, but also in the Eastern Bloc, and it was technology that played a key role in bringing about the Iron Curtain's demise. Technology was directly related to numerous economic values, such as national and industrial competitiveness, the liberation of human labor, and higher living standards. Increasing demand for technology contributed to the sustained expansion of trade and exchanges between the East and West from the détente period.

Although technology and trade was an indispensable factor in the formation, development and dissolution of the Cold War, the institutions and policies concerning technology were subjected to the structural restraints conditioned by perceptions and discourses related to security. It was not a coincidence that the policies of intellectual property rights (IPRs) which is the representative policy of technology, became an important issue in the global trading system around the time when structural security variables began to undergo significant changes toward the end of the Cold War.

The negotiations and conflicts surrounding the IPR issue, which arose as countries prepared for new rules and institutions of the post-Cold War period through Uruguay Round (UR) negotiations of the GATT (General Agreement on Tariff and Trade), summarized a key aspect of changing East-West relations and North-South relations toward the end of Cold War.

In the mid-1980s, Korea was among the group of countries that led changes in the international system of trade and technology, although Korea's role in this was not assumed entirely voluntarily. At the time, Korea's place in the world was moving rapidly along both the axes of economic and political development. As a result of compressed industrialization in the 1960s and 1970s, Korea's economic status was changing from that of a Least Developed Country (LDC) to that of an advanced developing country. In the political arena, decades of dynamic state-society relations entered a new stage and moved closer to democratic transition. The speed and momentum of Korea's political and economic changes were important factors in the bilateral IPR negotiations between the US and Korea, as well as in the formation of the global IPR regime.

## **1.1 Research Questions**

This study examined the background, negotiation process and impacts of the ROK-US IPR Agreement. Although the Agreement was a bilateral agreement between Korea and the US, it had global, regional and national dimensions whose mechanisms and impact go beyond the variables relevant to bilateral relation. As a result, it was necessary to raise the following research questions that encompass the various intersections of such dimensions:

First, through what political and economic process did IPRs come to be the rights regarding the protection of private persons in the global trading system? IPRs nowadays are protected by domestic legal systems of many countries, as well as by international law. Historically, however, IPRs were by no means established rights claimed by individuals, and the extent and coverage of IPRs differed greatly depending on domestic legal systems. Furthermore, up until the 1980s, IPRs were basically regarded as domestic policy issues, rather than international issues. How did they become salient issues in the global trading system since the 1980s?

Secondly, the ROK-US IPR Agreement was signed right before the initiation of the GATT Uruguay Round (UR), and many researchers point out that the Agreement became an important model for the IPR negotiation in the GATT UR.<sup>2</sup> What role did the ROK-US IPR Agreement play in the formation of the international IPR regime?

Thirdly, ROK-US Agreement was regarded as a first “victory” of the US in its bilateral IPR initiative involving a developing country, an expression that summarizes the extent to which American demands had been accepted by Korea during the negotiations. What was the domestic response to the results of the

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<sup>2</sup> Deveraux, Charan, Robert Z. Lawrence, & Michael D. Watkins. *Case Studies in US Trade Negotiation, vol. 1: Making the Rules*, Washington DC: Institute for International Economics, 2006. P.52; Ryan, Michael. *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, Washington DC: Brookings Institution Press, 1998. p.75.

negotiations and the subsequent strengthening of the Korean IPRs? What was the short-term and long-term impact on Korean industries?

In order to answer these questions, this study examined the Cold War period, from its initial stages through détente to the 1980s, when the Cold War system began to undergo significant changes. Rather than reviewing all aspects of the Cold War history in a chronological and encyclopedic manner, this study focuses on the discourses and their institutionalization that played pivotal roles in the development of technology policies, especially the policies and regimes to protect IPRs.

The study proposes a mechanism that assumes a dynamic relationship between the discourse and institutionalization. At key historical moments, discourses are institutionalized, through domestic and international political process, as policies and legal texts to be implemented subsequently, and if the practices that result from the implementation accumulate sufficiently, a new perception about the reality emerges, leading to new sets of discourses.

For the purpose of this analysis, representative historical documents that summarize the perception of the policymakers are recognized as embodying the major discourses of the time. This study selected discourses that were important in shaping the history of IPRs during the Cold War. The discourse of containment (mid-1940s ~ mid-1960s), détente (mid-1960s ~ mid-1970s), discourse on economic security (late 1970s ~ early 1980s), international competitiveness discourse (early

1980s ~ ), and the IPR discourse (mid-1980s ~ ) were selected. In the following chapters, each discourses, as embodied in historical documents, will be analyzed, and special attention will be paid to the historical background of their formation, and their impact on subsequent institutions and practices.

## **1.2 Review of Previous Studies**

The history of how the protection of IPRs came to be the central issue in the international trading system have been illuminated by previous researches of various disciplines, including history, political economy, international economics, international law and international relations. Previous researches can be categorized as; i) researches that analyzed the bilateral and multilateral IP negotiation in the international trade system; ii) researches on the political and security history of the Cold War; iii) researches on the economic-technology history of the Cold War; iv) researches that provide insights for the theoretical framework of this study, in the fields of international politics, political economy and game theories.

Deveraux et al. (2006) analyzed the negotiation process of WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (or TRIPS), which is the

global regulation on IP. The authors argued that “The incorporation of IPR issue into the trading rule resulted in the most comprehensive set of global trade rules for intellectual property, which, at the same time, significantly broadened the scope of the multilateral trading regime under the auspices of the GATT/WTO”.<sup>34</sup>

However, due to the distributional implication of the IPR regime, there have been much conflicts between the developed and developing countries from the stage of agenda-setting throughout the negotiation process. Deveraux et al. (2006) analyzed the seven and a half years of IPR negotiation in the GATT UR as a complex negotiation game involving coalition-building, multi-level and multi-round processes, issue-linkages, and frame game. The authors argued that the ROK-US IPR Agreement became a powerful precedent for the IPR negotiation in the GATT Uruguay Round.<sup>5</sup>

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<sup>3</sup> Deveraux, C. et al. op cit. pp. 37, 42

<sup>4</sup>“The General Agreement on Tariffs and Trade (GATT) has provided rules for international trade and promoted liberalization in trade in goods in the post-World War II period for 47 years through successive rounds of trade negotiations. The Uruguay Round (hereafter, UR), the eighth and final round, was launched in September 1986 to reform the rules, procedures and organization of the international trade regime to make it better suited to the changed realities of the 1980s. As the world economy became increasingly globalized, new issues emerged, such as the expansion of services trade, international investment, and agriculture. After seven and a half years of negotiation, the Uruguay Round Agreements, and with it the TRIPS Agreement as an integral part of it, was concluded in Marrakesh on April 14, 1994, establishing the World Trade Organization (WTO) on January 1, 1995.” (*Understanding the WTO: Basics, The GATT years: from Havana to Marrakesh* [https://www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact4_e.htm) (accessed 2015.8.31))

<sup>5</sup> Deveraux. C. et al. op cit. pp. 18-57

Susan K. Sell (2003)<sup>6</sup> analyzed the rise of IPRs as an international trade issue from the perspective of Constructivism, focusing on the interaction between structure and agents. The author examined how “private interests,” especially the twelve US-based multinational corporations played a central role in making IPR a trade agenda. They led the policy discourse on protecting IPRs and formulated the IPR regime within the framework of the World Trade Organization (WTO) through various channels.<sup>7</sup>

Compared to the IPR regimes that existed before, such as the Paris Convention, Berne Convention, and World Intellectual Property Organization (WIPO), the WTO TRIPs significantly reduced the discretionary power of national government with regard to the IPR policy by establishing the multilaterally accepted minimum standard for the protection of IPRs. It also incorporated the IPR issue into the “trade” issues, subjecting it to the WTO’s enforcement mechanism and dispute settlement mechanism.<sup>8</sup>

In explaining the background of the rise of IPR as a global issue, previous researches discussed so far tended to focus on the micro-level, analyzing the motives and behaviors of state and non-state actors. Deveraux et al. analyzed the strategies of

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<sup>6</sup> Sell, Susan K. *Private Power, Public Law: The globalization of intellectual property rights*, Cambridge: Cambridge University Press, 2003.

<sup>7</sup> Ibid. pp.17, 24

<sup>8</sup> Ibid. pp. 12, 13, 24, 102, 105

negotiating parties based on the rationality assumption of the actor. Susan K. Sell did a constructivist analysis of the interactive process leading to the formation of global IPR regime. Overall, they traced the micro-level process that led to the structural changes in the global trading system.

However, examining the private interests and their efforts to accomplish what they envisaged at the national and international levels may not be sufficient to explain why the agenda of IP as the private property came to be accepted on national and global levels in the mid-1980s, and not before, despite the fact that the motives to claim such rights existed centuries before. As Ha-Joon Chang (2001)<sup>9</sup> argued by reviewing the history of IPR in the West, the discourse of protecting the IPR had to compete with other discourses, such as those prioritizing national security, or those emphasizing the public aspects of technology and knowledge.

The argument that knowledge should be protected as proprietary rights of private persons had existed since the Renaissance, when the craftsmen and technicians tried to turn their know-hows into economic return, in the form of employment by the nobilities. Even in the West, it was not until the late 19<sup>th</sup> century that the IPR began to be protected under domestic law, and the extension of such protection to the

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<sup>9</sup> Chang, Ha-Joon. "Intellectual Property Rights and Economic Development: Historical lessons and emerging issues," *Journal of Human Development*. 2(2) (2001).

foreigners was made possible as late as in the mid-20<sup>th</sup> century.<sup>10</sup>

Although the disposition (*habitus*) that prefer the protection of IPRs exist, the discourse supporting such disposition may not always be justified socially, because individual aspirations and practices can be expressed as reasonable and sensible<sup>11</sup> only when it is compatible with the objective conditions (*champs*) in which they are situated.<sup>12</sup>

Michal P. Ryan (1998) attempted a more macro-structural analysis of the background of the rise of IPR in the global trading system. He examined how state and non-state actors brought about institutional changes in global IPR regime in the context of changing international political economy.<sup>13</sup> The author defined the 1980s as the period of “knowledge diplomacy,” or “intellectual property diplomacy,” as opposed to the previous age of “industrial diplomacy” following the World War II.<sup>14</sup>

Deveraux et al. (2006) and Michal P. Ryan (1998) argued that the ROK-US IPR Agreement provided the first step in the process of establishing the IPR regime in

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<sup>10</sup> Ibid. pp. 290-293

<sup>11</sup> Bourdieu P., *Outline of a Theory Of Practice*, tr. by Richard Nice, Cambridge: Cambridge University Press, 1977. p.79

<sup>12</sup> Ibid. p.77

<sup>13</sup> Ryan, Michael, op cit. p.192

<sup>14</sup> Ibid. p.19

the international trading system. Deveraux et al. (2006) commented that the bilateral IPR negotiation between the US and Korea, and the resulting 1986 ROK-US IPR Agreement became the “model” for the TRIPs negotiation in the GATT Uruguay Round as the first case in which American initiative to strengthen the protection of IPR in a developing country achieved tangible result.<sup>15</sup>

Michal P. Ryan (1998) also examined the negotiation process of the ROK-US IPR agreement and its impact on the subsequent international negotiation.<sup>16</sup> US Trade Representative (or USTR) that had been newly mandated by the US Trade and Tariff Act of 1984 “to defend US IPR in the world economy”<sup>17</sup> initiated the first unfair practice case under Section 301 on Korean IPR. In doing so, it sought to change the Korean practice of IPR protection, while creating a powerful precedent for the subsequent international IPR negotiation.<sup>18</sup>

Yim Geun Young (2003) and Chung Jin Young (1997) paid closer attention to the ROK-US IPR Agreement itself. Yim Geun Young<sup>19</sup> illuminated the evolving US-

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<sup>15</sup> Deveraux et al. op cit. p.52

<sup>16</sup> Ryan, Michael op cit.

<sup>17</sup> Ibid. p.73

<sup>18</sup> Ibid. p.75

<sup>19</sup> Yim, Geunyoung “Hanmi jicheok jaisankweon Hyeopsangui yeoksajeok gochal (Historical Analysis on the ROK-US IPR Agreement)”, *Changjakkwa Kweonri (Creative Writing and Right)*, Spring Issue (2003): 126-151

Korea relations in the context of changing institutional history of IPR in the US, within the framework of multilateral trading system of the Free World. Chung Jin Young<sup>20</sup> described the process of ROK-US IPR Agreement from October 1985 to July 1986, including the response of Korean civil society to the initiation of the Section 301 case.

Many previous studies on the history of IPR in the global trading system tend to focus on the dynamics within the Free World. However, in order to understand the reason why the IPR issue began to be raised in the late 1970s and early 1980s and became a global issue in the post-Cold War era, we need to examine the discourse, institutions and practices of the Cold War. More specifically, such discussion should encompass the dynamics of East-West trade in the context of the global Cold War history.

This study tried to situate the formation of discourses and institutions of IPRs in the context of the Cold War history by building on the previous researches on US-PRC Rapprochement, Vietnam War and the US-Korea relations.

As for the political and security history of the Cold War, Henry Kissinger (2014)<sup>21</sup>

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<sup>20</sup> Jeong, Jinyeong “Hanmi jicheok jaisankweon Hyeopsang(ROK-US IPR Agreement), 1985-1986”, Yu, Seokjin ed. *Hanguui Tongsang Hyeopsang (Trade Negotiation of Korea)*, Seongnam:Sejong Institute, 1997.

<sup>21</sup> Kissinger, Henry. *World Order*. New York: Penguin Press, 2014

and David Shambaugh et al. (2014)<sup>22</sup> provided major insights. Park Tae Gyun (2015)<sup>23</sup> illuminated how the Vietnam War and Korean War, and their impact on the social and policy discourses led to transformation in American policies, and observed the effects of Vietnam War on the industrial and technological development of Korea in the 1960s and 1970s. For Cold War economic and technology history, Park Tae Gyun (2012),<sup>24</sup> Lim Hae Ran (1996),<sup>25</sup> Lee Keun (2013),<sup>26</sup> Paul Edwards (1996),<sup>27</sup> and David Mowery (1994)<sup>28</sup> provided important insights.

For the theoretical framework of this study, representative theories and studies in

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<sup>22</sup> Shambaugh, David , Michael Yahuda eds. *International Relations of Asia* (2nd ed.). Washington D.C.: Rowman & Littlefield, 2014.

<sup>23</sup> Park, Tae Gyun *The Vietnamese War: Forgotten war, half of the memory*, Seoul: Hangyeore Press, 2015

<sup>24</sup> Park, Tae Gyun “The roles of the United States and Japan in the development of South Korea's science and technology during the Cold War,” *Korea Journal*, 52(1) (March 2012)

<sup>25</sup> Lim, Haeran, *The Politics of Industrial Transformation in Korea: A coalition approach*, Davis: University of California Press, 1996

<sup>26</sup> Lee, Keun *Schumpeterian Analysis of Economic Catch-up*. Cambridge: Cambridge University Press, Kindle Edition, 2013. Kindle Locations 2380-2381

<sup>27</sup> Edwards, Paul N. *The Closed World: Computers and the politics of discourse in Cold War America*. Cambridge: The MIT Press, 1996

<sup>28</sup> Mowery, David C. *Science and Technology Policy in Interdependent Economies*, Dordrecht: Kluwer Academic Publishers, 1994

the field of International Relations, political economy, game theory has been drawn upon. In particular, R. Putnam (1988),<sup>29</sup> Bourdieu (1977),<sup>30</sup> and Acemoglu (2009)<sup>31</sup> provided important framework of analysis for this study, as will be discussed in the following chapter.

### **1.3 Materials, Theoretical Framework, and Periodization**

This study tried to incorporate a historical approach with a theoretical approach.

#### **1.3.1 Historical Approach**

The Agreement was examined as part of the process through which the protection

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<sup>29</sup> Putnam, Robert D. "Diplomacy and Domestic Politics: The logic of two-Level games," *International Organization*, 42(3)

<sup>30</sup> Bourdieu P. op. cit. Cambridge: Cambridge University Press, 1977

<sup>31</sup> Acemoglu, Daron *Introduction to Modern Economic Growth*, Princeton: Princeton University Press, 2009.

of IPRs became a central agenda in the global trading system, from the initial stages of the Cold War and through détente to the mid-1980s. This study tried to reinterpret the Cold War from the perspective of the evolving international trading system, paying attention to how technological development, competition and control affected the Cold War system, and what role the IPR system came to play in the process. Such historical processes, events and discussions were analyzed using primary materials, collected as hard copy documents, electronic files and oral history.

Documents have been collected in the Maryland National Archives II, Texas Ronald Reagan Presidential Library, Smithsonian Archives, the United Nations Archives in New York, the National Archives of Korea, and the Diplomatic Archives of the Korea Ministry of Foreign Affairs.

Digital resources have been collected from the Bank of Korea's e-Library, Woodrow Wilson Center's digital archive and Content Management System (CMS), WTO online database, various databases that can be accessed through the Library of Congress, including the National Technical Information Service (NTIS) of US Department of Commerce, Department of State Foreign Relations of the United States, Foreign Broadcast Information Services (FBIS) Daily Reports (1941-1996), Declassified Documents Reference System, the National Council on US- China Trade (NCUSCT) database, US Congressional Serial Set collection, the Washington Evening Star (1852-1981) database, Korea Institute for Industrial Economics and

Trade online archives, and Korea Institute for International Economic Policy online archive.

These resources were complemented by interviews with former employees of Samsung Electronics, and former students who attended college in the 1980s.

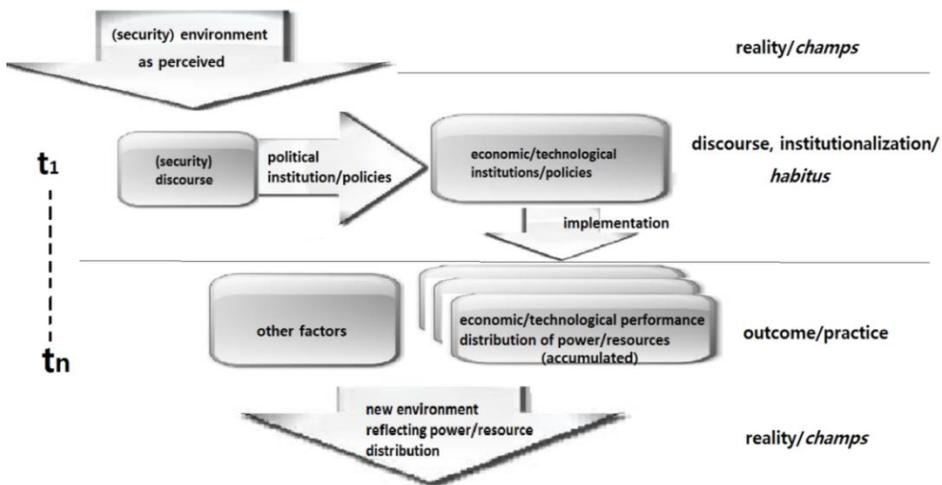
### 1.3.2 Theoretical Approach

Another task undertaken by this study was to theoretically examine the interplay between the security, economic and technological factors in the formation of domestic and international policies during the Cold War. The rise of IPR as an international trade issue took place when industrial competitiveness became an important national agenda, and the market-based approach started to become prominent in American foreign and domestic policies.

Such changes occurred more or less simultaneously around the late 1970s and early 1980s. Rather than regarding the series of changes as exogenous, this study understood them as part of policy responses to the changes in security discourses in the later period of Cold War.

In particular, this study argues that during the Cold War, the change in security discourses became a key factor inducing changes in the policies and institutions in technology and trade arena both domestically and internationally. Based on this assumption, the mechanism of policymaking in the domestic and international arena was specified as the Economy-Security-Technology Nexus (ESTN) model, focusing on the interplay of discourse, institutionalization and implementation. Domestic policymaking of a country can be analyzed as the following ESTN model:

<Figure 1> Economy-Security-Technology Nexus Model for 1 Country



The ESTN model consists of the following processes:

- The process by which discourse reflecting certain perception of reality become institutionalized as policies (at  $t_1$ )
- The process of implementation of the policies that result in changes in the distribution of power and resources ( $t_2 \dots t_n$ )
- The process by which accumulation of practices that gives rise to a new perception of reality and the discourse reflecting such perception (at  $t_n$ )

Domestic policymaking and international negotiation during the Cold War were heavily influenced by security concerns and the discourse that reflects such concerns. The policies and institutions in various fields, including economic and technology policies, were bound by the overarching security discourse and policies. As these policies become implemented, the resulting practices accumulate to yield changes in the distribution of power and resources. When such practices accumulate sufficiently, perceptions about the reality begin to change.

The theoretical component of the ESTN model consists of: i) the Discursive Institutionalism<sup>32</sup> proposed by Schmidt (2008),<sup>33</sup> who emphasized the role of

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<sup>32</sup> Schmidt, V. A. "Discursive Institutionalism: The explanatory power of ideas and discourse", *Annual Review of Political Science*, 11 (2008): 303-326.

discourse as the main independent variable for institutional changes; ii) the Dynamic Political Economic Process model proposed by Acemoglu (2009)<sup>34</sup>, which provides a framework for the changes in resource distribution resulting from the implementation of policies, iii) Theory of Practice by Pierre Bourdieu,<sup>35</sup> who articulated the *modus operandi* of the social reproduction of regularities that results from the implementation of institutions, and iv) the two-level game analysis of Robert Putnam,<sup>36</sup> who modeled the interaction of domestic and international factors of international negotiations.

By focusing on the discourse and its institutionalization, the ESTN model incorporates the discussions of Discursive Institutionalism that emphasizes the role of discourse in bringing about institutional changes. Here, definition of discourse follows Schmidt's view that defines it as "the concept that designates the substantive content of the idea, as well as the interactive processes through which ideas are transmitted, encompassing both the text and context, and the structure and agency."<sup>37</sup>

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<sup>33</sup> I thank my colleague Jaeyoung Lee, who is a doctoral student at the Graduate School of International Studies, Seoul National University, for introducing Schmidt to the audiences during his presentation at the GSIS PhD Seminar.

<sup>34</sup> Acemoglu, Daron op. cit.

<sup>35</sup> Bourdieu P. op. cit.

<sup>36</sup> Putnam, Robert D. op cit. pp. 42,43

<sup>37</sup> Schmidt, V. A. op. cit. p.305

Methodologically, this study included in the definition of discourse a set of documents, and the process through which those documents were produced, which had important influence on government policymaking. The documents may be written either by government agencies or by committees mandated to report to the government after extensive input from industry and academia, or may reflect the discussions in academia or policy circles.

After examining various historical documents, such as memoranda, notes and reports that had been drawn up and circulated within the government during the policymaking process or negotiation with foreign countries, this study found that the process of policy formation and implementation can be assumed to follow the following stages:

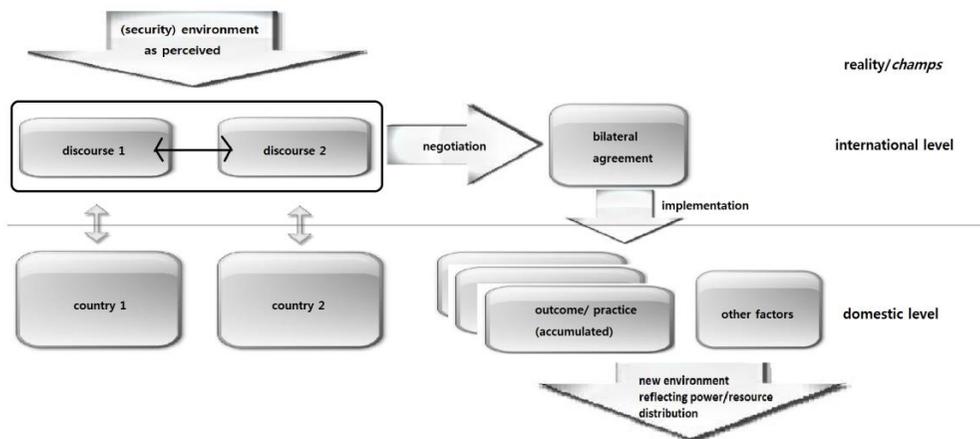
- (1) A certain policy task that calls for a policy response is recognized.
- (2) The policy task is analyzed and a discourse begins.
- (3) A policy response is proposed.

These are the recurring patterns in the discussions of policies related to technology and international trade undertaken by various government agencies, such as the Economic Policy Council or the Trade Policy Review Group. Similar processes can

be found in the bilateral negotiation involving two government parties. When there are certain trade agendas, each country establishes negotiating strategies based on their respective positions and discourses on the agenda. Discursive competition occurs at the negotiating table, and they finally result in a single agreed text to be implemented domestically.

This study adopted Putnam’s two-level game framework in modeling the bilateral negotiation process, as the following figure shows.

<Figure 2> Economy-Security-Technology Nexus Model for 2 Countries



The discourses of each countries that reflects the perception and domestic politics of each parties competes and adjusts to yield a negotiated outcome, namely, the international agreement. The agreement then institutionalizes in the domestic policy

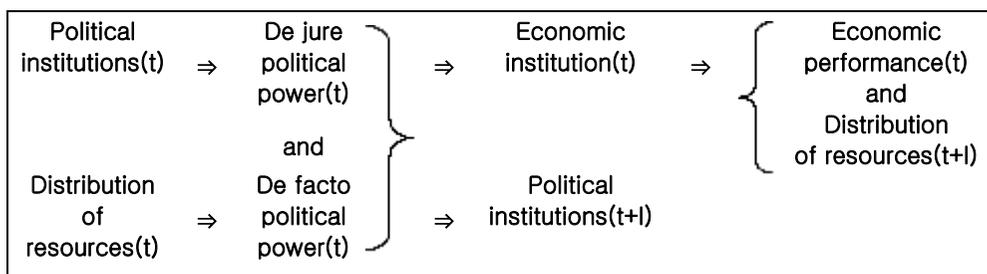
contexts and when they are implemented, results in domestic practices. These practices accumulate to change the distribution of power and resources that eventually leads to a new reality and the perception thereof.

It was assumed that the body of documents that had been utilized to bring about certain policy changes was produced in one time period,  $t_1$ . Policies and institutions established at  $t_1$  translate into changes in resource allocation through implementation.<sup>38</sup> Therefore, a certain span of time is needed from  $t_2$ , when the institution began to be implemented, to  $t_n$ , when the new practice accumulates sufficiently to give rise to the need for major policy changes. During this period of implementation, following dynamic mechanism proposed by Acemoglu will be repeated.

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<sup>38</sup> Acemoglu, Daron, op cit. p. 853

<Figure 3> Components of a dynamic framework<sup>39</sup>



The specific historical context of the Cold War allowed the discourses and institutions on security to have an overarching priority over every other policy areas, limiting the scope of possible policy choices in these areas.

For instance, security policy determined the level of technology embodied in the items that Western countries were allowed to trade with Eastern Bloc countries. When security policies changed, so did policies on trade and technological exchanges, as can be seen from the significant increase in the volume of trade with Eastern Bloc countries during détente. After the 1962 Cuban missile crisis, international agreement on the balance of threat were sought by the two superpowers, the US and the Soviet Union, and the mutual belief in the mechanism of nuclear deterrence laid the foundation for the economic and technological exchanges between the East and West. Changes in the security discourse in key historical

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<sup>39</sup> Ibid. p.853

moments led to successive policy changes in other areas.

Therefore, in the short-run, security discourse acts as an independent variable that directly affects economic and technology policies, but the changes in these other policy areas need not directly result in changes in security policy or discourses. However, when there is sufficient accumulation of practices, leading to changes in the balance of political or economic power, security discourse may change as a result of the accumulated practices in these areas.

At key historical junctures, such an accumulation of practices might reveal the arbitrary nature of the established orders that had been perceived as “natural” and “objective,” giving rise to a new set of perceptions and discourses.<sup>40</sup> The rise and fall of Cold War I, détente, Cold War II, and the end of the Cold War all led to the perception that the security structure had changed, giving rise to new discourses, such as containment, détente, and economic security discourses.

### 1.3.3 Structure of the Study

This study examined how the mechanism of interaction between the discourse,

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<sup>40</sup> Bourdieu P. op cit. p.164

institution and practice provided by the ESTN one country model and ESTN two country model played out in the various phases of the Cold War.

Chapter 2 focuses on the historical background of the rise of IPR using the ESTN one country model. Discourses of containment, détente, economic security, international competitiveness, and intellectual property have been selected as the key discourses that provided important turning points in the rise of IPR discourses. In this chapter, the processes through which each discussion institutionalized and implemented are analyzed. The major discourses and their implication for IP institutionalization can be summarized follows.

<Table 1> Major discourses and their implication for IP institutionalization

Discourse	Representative Document	Period	Economy-Security-Technology Nexus	Intellectual Property
<b>Contain-ment</b>	NSC 68	Mid-1940 ~ late-1960s	Technological competition, denial of technology trade due to security concerns (Denial Approach)	The containment policies affected the accumulation of IP
<b>Détente</b>	Shanghai Communique, etc.	Mid-1960s ~ mid-1970s	Emphasis on diplomatic role of trade, esp. technology trade. A market-based approach to East-West relations emerged (Laissez-faire approach)	Strong antitrust law, weak protection of IPRs
<b>Discourse on economic security</b>	Bucy Report (1976)	Late-1970s ~ early 1980s	Security and economic implication of transfer of technological know-how have been discussed	Security and economic value of IP have been recognized
<b>Discourse on International competitiveness</b>	Young Commission Report (1985)	Since the early 1980s	Security concerns could no longer justify economic control in domestic and international policies	Protection of IP was emphasized as the key to improve international competitiveness of the industry
<b>Discourse on Intellectual Property</b>		Since the mid-1980s	Economic and technological leadership was deemed essential as the basis for long-term security of the nation	Strategies for the international protection of IPR have been established

In Chapter 3, the process of negotiation that led to the conclusion of ROK-US IPR Agreement has been analyzed using the framework of the two-level game, characterized by the intergovernmental negotiation (Level I), government's negotiation with domestic political actors (Level II), and the exchange of influences between international actors and domestic actors (Reverberation).<sup>41</sup> The negotiation process was analyzed using the ESTN two countries model that examines how the competing discourses converge in the final agreement, and how the process interacts with the domestic politics of Korea.

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<sup>41</sup> Putnam argued that “international pressures may ‘reverberate’ within domestic politics.” (Putnam, Robert D. op cit. p. 454)

The IPR negotiation between the ROK and the US was examined in three phases.

<Table 2> Phases of ROK-US IPR negotiations

period	Major Event	Attitude of Korean Government
Late-1960s ~ 1981	The publication industry of the US called for improved protection of copyrights in Korea.	Korean government was reluctant to take action due to domestic pressure from the industry, and invoked the developing country status in the GATT and the need to protect its infant industry.
1981 ~ 1985.10 <b>US-ROK IPR Negotiation phase 1</b>	The US called for improved protection of IPR in the areas including software, copyrights, and process patent	Korean government position remained passive, and invoked domestic political reasons to oppose what its citizens regarded as the US pressure to open up Korean market
1985.11 ~ 1986. 7.21 <b>US-ROK IPR Negotiation phase 2</b>	The USTR initiated an unfair trade practice case under the Section 301 of the US Trade Act, investigating Korean IPR in November.	Korean government actively sought to reach an Agreement with the US so that it can avoid the trade retaliation that would be unilaterally imposed by the US should the negotiation fail to reach a conclusion within a year.

This study defined the ROK-US IPR negotiation period as beginning from 1981. The negotiation process reached a turning point when the USTR's Section 301 case was initiated in November 1985. Therefore, the study understood the negotiation process moves on to phase 2 after the 301 investigation was launched.

Phase 1 was from 1981 to October 1985, when US requests for increased Korean protection of IPRs, including the rights for computer software, copyrights and process patents began to be made more systematically. During this period, Korean

government was reluctant to respond with concrete action because of huge domestic political costs.

Phase 2 occurred from November 1985 to July 1986, a period that began with the initiation of USTR's investigation of unfair trade practices under Section 301, until the final conclusion of the ROK-US IPR Agreement. Most previous studies argue that domestic political factors were excluded from the negotiation process during this period, and Korean government mostly accepted US requests.

Despite the fact that the negotiation during phase 2 was markedly different from that of phase 1 in that domestic dimensions were excluded to a large degree, this study attempted to analyze both phases using the two-level game framework for the following reasons.

First, the negotiations during phase 2 cannot be fully understood without examining the history of the negotiations during phase 1, since the latter was a learning period during which important information for subsequent negotiations were gathered, and the strategies for negotiations were established. Although there was a significant change in the attitude and strategy of the Korean government during phase 2, the negotiation process was basically a continuation from phase 1.

Second, even during phase 2, it can be argued that Korean domestic political factors could not be completely excluded from the negotiation process. This can be seen from the reshuffling of the Korean government's negotiation team during phase

2, and various efforts by the US to persuade the Korean public. Such efforts would not have been made if Korean domestic factors were neglected in the subsequent implementation phase.

Third, the Korean government constantly analyzed the cost and benefit of the IPR Agreement in domestic politics and in international relations throughout the negotiation process, seeking to minimize the costs and maximize the expected short-term and long-term benefits. In phase 2, the initiation of the 301 investigation significantly increased the cost of non-agreement, affecting the negotiation strategy of the Korean government, but the consideration of domestic political and economic costs were made throughout the negotiation process.

In other words, during the entire negotiation period, both the Korean and American governments sought to make domestic and international agreements consistent, which is the only condition required for the two-level game framework to be applied.<sup>42</sup>

In Chapters 5 and 6, the domestic political, economic and legal impact of the Agreement and the international consequences are examined. Shortly after the ROK-US IPR Agreement was reached, GATT's 8th Round of multilateral trade negotiation,

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<sup>42</sup> "The only formal constraint on the ratification process is that since the identical agreement must be ratified by both sides, a preliminary level I agreement cannot be amended at level II without reopening the level I negotiations." Putnam, Robert D. *op cit.* p. 437

i.e. the Uruguay Round, was initiated in Punta del Este, Uruguay. The IPR issue was included in the GATT agenda. In the subsequent seven and a half years of multilateral negotiations, the Korean government's position was significantly affected by its domestic legal infrastructure impacted by the ROK-US IPR Agreement. The chapter will also discuss how such change influenced GATT negotiations concerning IPRs.

## 2. Knowledge as Property and the Rise of Intellectual Property Rights (IPRs) Issue

In this chapter, how the IPRs, or more generally, knowledge, came to be regarded as private properties that can be directly translated to economic right and interest are examined. There was a period during which the government sponsored the rapid accumulation of intellectual capital. This intellectual property (IP) became the diplomatic resource during détente that precipitated the economic exchanges between the East and West, and led to the recognition of the economic and security value of knowledge.

As the practice of East-West trade during détente accumulated, new discourses began to emerge. The denial approach argued that the duality of technology, especially high technology might result in increased security/economic capability of the Soviet Union, posing a long-term threat to Western security. It further argued that the West's superior economic and technological power needs to be used as a leverage to bring about changes in the international behavior of the Soviet Union. On the other hand, the laissez-faire approach<sup>43</sup> argued that the newly emerging techno-economic space in East-West relations need to be expanded, and should be

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<sup>43</sup> Huntington, Samuel P. "Trade, Technology, and Leverage: Economic diplomacy", *Foreign Policy*, No. 32 (1978): 67

governed by market-based approaches.

Until then, IPRs were more of a bargaining chip that promoted the exchanges and dissemination of technology in the US, due to the enforcement of strong anti-trust laws. Internationally, active international technology transfer occurred within the “Free World,” due to US post-war diplomacy aimed at reconstructing the economies of its allies and establishing technological infrastructure.

As a result, Japan and East Asian NICs experienced a rapid catch-up of technological capacities, which began to be pronounced from the mid-1970s. International competitiveness of Western industry began to decline relative to Japan, and Western economies began to strengthen the international competitiveness of their industries by changing trade and technology policies, including IPR-related policies.

## **2.1 Accumulation of Intellectual Property (IP)**

This section examines how the containment discourse that emerged in Kennan’s “Long Telegram” and summarized in the NSC-68 became institutionalized through trade embargoes and the CoCom system that controlled the economic and security

exchanges with the Communist economies in the 1950s and 1960s. Perception about the security environment of the Cold War created the domestic political environment in which major national resources could be directed to improve defense capabilities. As a result, there was a rapid accumulation of the intellectual capital resulting from the large-scale research and development (R&D) investment by governments.

### 2.1.1 Discourse of Containment and the Control of Technology

The discourse of containment, as the overarching national strategy of the early Cold War, was institutionalized in various international economic and technology policies that reorganized the international flow of trade and technology. With the security imperative of surviving and thriving under the constant threat from an expansionist enemy, trade (including technology trade) between the East and West was strictly controlled. Multilateral trading regimes and technology control mechanisms were developed separately on each side of the Iron Curtain, and each aimed at strengthening the politico-military alliance and economic interdependence within the bloc. Security considerations dominated the technological development promoted by the government, leading to rapid technological innovation especially in the West.

A series of “shocks of 1949,” namely, the “loss” of China, the Soviet atomic bomb and outbreak of the Korean War in 1950 changed the perceptions of US policymakers in the Truman administration about the global reality, leading to a polarized world view in which the US stood face to face with increasingly visible security challenges posed by the Communist bloc that entailed expanding responsibilities of the US to defend free institutions with limited resources. Such perceptions gave rise to the overarching discourse of containment, summarized in the National Security Council document 68 (NSC-68), which clearly stated the “interests, threats, and feasible responses,” to be circulated throughout the bureaucracy.<sup>44</sup>

The containment discourse was characterized by the bipolar spatial imagining of the world. A “defensive perimeter” would encircle the Soviet Union by the politico-military alliances led by the US. Within the Free World, reconstruction of industrial capitalism would be implemented through aid programs, most notably the “Marshall Plan.”<sup>45</sup>

Another characteristic of the containment discourse was the moralistic assumption of the “heroic and quasi-Biblical” struggle against an absolute enemy with openly

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<sup>44</sup> Gaddis, John Lewis. *Strategies of Containment: A critical appraisal of American national security policy during the Cold War*. Oxford: Oxford University Press, 2005. p. 88

<sup>45</sup> Edwards, Paul N. *op. cit.* pp. 8, 11

expansionist designs, threatening the Western societies in the military, ideological, religious, cultural, and economic arenas. The Korean War was interpreted as a prime example of this that revealed the nature of the Cold War struggle. President Truman argued that “Communism was acting in Korea just as Hitler, Mussolini and the Japanese had acted...I felt certain that if South Korea was allowed to fall, Communist leaders would be emboldened to override nations close to our own shores.”<sup>46</sup>

Containment policy was systematized through various policies drawn up by the administration and Congress. The pronouncement of the strategy of containment within the Washington policy circle created a condition that favored the economic discourse of Keynesianism providing theoretical rationale for a significant increase in the peacetime defense budget without compromising living standards. In the trade policy arena, the NSC-68’s endorsement of perimeter defense<sup>47</sup> went hand in hand with export control policies (enforced through customs measures along the land and maritime borders) that began to be studied and formulated from early 1951.<sup>48</sup>

Economic policies thus institutionalized would influence US economic activities and resource allocation, turning into the practice of Cold War military buildup and

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<sup>46</sup> Ibid. pp.53-55

<sup>47</sup> Gaddis, op. cit. p. 89

<sup>48</sup> Preface of “Report of the Committee on Interstate and Foreign Commerce: Export Controls and Policies in East-West Trade”, 82<sup>nd</sup> Congress 1st Session Senate Report No. 944

trade patterns characterized by limited East-West trade over the subsequent decades. Trade policy, in particular adequate export control, was thought to be important for the security of the “Free World” by indirectly contributing to these defense efforts.<sup>49</sup>

The most important international organization for export control was the Coordinating Committee for Multilateral Export Controls (or CoCom). Established in 1949 (effective on January 1 1950) in Paris by seven countries of NATO and the US, the CoCom was an informal organization formed to coordinate national controls of exports. It was a voluntary organization, established without any treaty or international agreement that legally binds its members. The principal activities of CoCom are the negotiation of a detailed list of items to be embargoed and the review of proposed specific transactions as exceptions to the embargo.<sup>50</sup> Its members agreed to place an embargo for all items “of primary strategic significance,” and to restrict exports of goods of “secondary strategic significance.”<sup>51</sup>

International cooperation was deemed essential for an effective trade embargo. The US was maintaining its own list of goods, but the differences between the US

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<sup>49</sup> Ibid. p. 9

<sup>50</sup> PRM 31 Draft. November 15, 1977. Sections I, V, VI in National Archives and Records Administration, Record Group 51. Records of the Office of Management and Budget, Office of National Security and International Affairs, Records Relating to President’s Review Memorandum No. 31, 1977-1979. Box No.1. p.4

<sup>51</sup> Committee on Interstate and Foreign Commerce. op. cit. p.8

list and the international list were “very small, and reflect differences of judgment as to the strategic importance of certain goods.”<sup>52</sup> The House Resolution 4550, the so-called Battle bill, passed by both Houses, provided legal bases for such cooperation with other countries in controlling the export of commodities to present or potential aggressor nations, as well as for coordination of activities of the various US departments and agencies concerned.<sup>53</sup>

The US Senate expressed concerns about the “materials of critical or strategic nature” flowing from the west to the Communist bloc. In October and November of 1950, several months after the outbreak of the Korean War, the Interstate and Foreign Commerce Committee Subcommittee on Merchant Marine and Maritime Matters held hearings, in response to the information that “certain American-flag ships were being used to carry materials of strategic significance to the Communist Chinese.” The hearing led to the passage of the Senate Resolution 365 on Dec 21, 1950, and the subsequent Senate Resolution 56 on February 1, 1951 authorizing “a full study of the admin, execution and enforcement of the export policies and control regulations of the US” had been authorized.<sup>54</sup>

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<sup>52</sup> NSC Determination No 18. September 21, 1951.

<sup>53</sup> Committee on Interstate and Foreign Commerce. *op. cit.* pp. 8-10

<sup>54</sup> *Ibid.* p.2

The Report of the Committee on Interstate and Foreign Commerce of the US Senate, which was published in October 12, 1951, summarizes the result of the study. According to the report, Western Germany was a source and channel for the shipment of goods of strategic significance to the Soviet bloc.<sup>55</sup> In the Far East, ships registered as various nationalities have been carrying goods “vital to the Red Chinese and North Korean war machines” to Chinese ports.<sup>56</sup> Hong Kong controls and policies governing exports to Communist China up to June 25 1951 were deemed inadequate, but policies inaugurated on June 25, 1951 were far more effective.<sup>57</sup>

Thus the system of controlling the (now) illegal trade between the East and West had been established over the period of late 1950 and early 1951. The institutionalization of containment policy in the economic arena resulted in the changes in trade patterns, as can be inferred from the committee report: “Trade with the countries behind the iron curtain is presently necessary for the general welfare of certain of the western nations but efforts must be made to provide alternative sources of supply and alternative markets for such nations.”<sup>58</sup> There were strains arising

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<sup>55</sup> Ibid. p.12

<sup>56</sup> Ibid. pp. 3-4

<sup>57</sup> Ibid. pp. 63-64

<sup>58</sup> Ibid. p.13

from the process of such diversion of trade pattern, as numerous measures were devised to evade export controls, despite “highly efficient procedures, extensive investigation, prompt prosecution, and an aroused public opinion condemning such transactions.”<sup>59</sup>

Effective control of trade in technology was deemed especially crucial in ensuring the security of the west. The committee report noted that “technical know-how, engineering skill, and vast development efforts become a part of such shipments when certain equipment is shipped and become prototypes for production.”<sup>60</sup> Although the major items exported to communist areas at the time was categorized as having lesser strategic value, or nonstrategic, due to the fact these economies were much more “simple” than those of most western countries,<sup>61</sup> technology could in the long-run lead to the strengthening of military capacity, and change the distribution of power.

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<sup>59</sup> Ibid. p.6

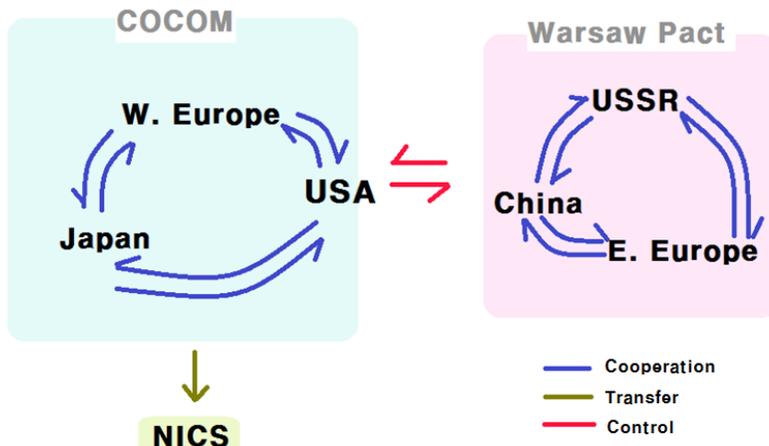
<sup>60</sup> Ibid. p.10

<sup>61</sup> Ibid. p.82

### 2.1.2 Domestic and International Spillover Effect of IP

The pattern of international technology exchanges during Cold War I was determined by security concerns. Technological cooperation was promoted among the industrialized countries of the West, and technology transfer was the prevalent mode of technology exchanges between the developing and developed countries. Technological exchanges between the East and West were strictly controlled. Just as western technological exports to the east were strictly controlled by the multilateral process of CoCom, mechanisms of cooperation, control and transfer of technology were operating in the East as well. The Communist bloc sought to solidify economic and military ties through technical interdependence.

<Figure 4> Pattern of international technology exchanges during Cold War I



Control of economic and technological exchanges between the two blocs resulted in separate paths of economic and technological developments. In the West, an open and liberal economic order was emerging; the Bretton Woods system institutionalized by the IMF, World Bank and the GATT fostered multilateral trade and economic interdependence and sought to overcome the imperial preference, bilateralism, and predatory trade practices of the pre-WWII.<sup>62</sup> Within the Communist bloc, the Council for Mutual Economic Assistance (COMECON) was working as a coordinating body for multilateral trade among the Communist countries.

The policy of controlling exports destined for the Communist bloc countries would establish “discriminatory” trade practices, which the US opposed since WWII. In order to overcome this seeming inconsistency, the “moral imperatives” of the East-West struggle, as well as the need to see it as part of the mutual defense efforts of the west, were emphasized. It was argued that the “distinction between export controls predominately for national interests as opposed to those instituted to promote western defense objectives must be continually stressed.”<sup>63</sup>

In the subsequent decades, there would be a massive increase in the government

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<sup>62</sup> Green, Eric Marshall. *Economic Security and High Technology Competition in an Age of Transition: The case of the semiconductor industry*. Westport: Praeger Publishers, 1996. p. 9

<sup>63</sup> Committee on Interstate and Foreign Commerce. op. cit. pp. 8-10

supports for both basic and applied scientific research on both sides of the Iron Curtain.<sup>64</sup> Already, however, the US lead in technology development was visible by the early 1950s, especially in computers, and by the mid-1960s this lead had become overwhelming. The “international computing community,” in both eastern and western bloc, was dominated by US systems.

By the late 1950s, military potential for digital computers in the area of command, control, and communications system had been demonstrated by the SAGE air defense system, and the US military promoted development of computers in the scientific/engineering arena, most notably, in nuclear weapons design, and data processing applications.<sup>65</sup>

Technology, especially computing technology, began to “control vast systems of military technology central to Cold War foreign policy.”<sup>66</sup> As the symbol of American power and superiority, advanced technology provided strong incentives to follow and adopt American systems for many industrialized and industrializing countries.

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<sup>64</sup> Oreskes, Naomi and John Krige eds. *Science and Technology in the Global Cold War* (Cambridge: The MIT Press), 2014. pp. 4, 12

<sup>65</sup> Goodman, Seymour E. “Soviet Computing and Technology Transfer: An overview”, *World Politics*, 31(4): 539, 545

<sup>66</sup> Edwards, Paul, N. op. cit.

A decade of institutionalization and implementation of containment resulted in bipolarity in international economic relations and technological developments. In the US, the containment discourse justified massive investment in technology by the public sector, including the military. The US defense budget reached over 13 percent of GNP at the height of the Korean War, and the level of defense spending remained at 10 percent of GNP throughout the remainder of the 1950s. Another peak of defense spending, reaching nearly 10 percent of GNP, was achieved in 1968, when the Vietnam War was at its height.<sup>67</sup>

The US federal government made extensive investment in basic sciences and defense-related technologies with a view to win the technological competition with the Soviet Union.<sup>68</sup> The effect of this massive military R&D and military procurement was felt in the civilian sector as well, leading to enhanced technological capacity. Technology, especially advanced technologies, can have dual applications as civilian and military technologies are often in a mutually supportive relationship. Technical innovations can be transferred from the military to the civilian sphere and vice versa.<sup>69</sup> According to Lichtenberg (1988), military R&D

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<sup>67</sup> Graham, D.R., A.J. Tai, and B. Bicksler, "Defense and the Economy. Annex C to Adjusting to the Drawdown," *Report of the Defense Conversion Commission*. Washington DC, 1993. p.4

<sup>68</sup> Mowery, David C. op. cit. p.109

<sup>69</sup> Vayrynen, Raimo. *Military Industrialization and Economic Development: Theory and Historical Case Studies*. Dartmouth Publishing Company, 1992. p. 8

and military procurement enabled the growth of advanced technology start-up firms in post-war America and brought about technology spill-over to the civilian sector.<sup>70</sup>

The history of the formation of the American integrated circuit (IC) industry is a case in point. Military procurement demand played a significant part in the initial development of the IC industry.<sup>71</sup> Invented in 1959, IC is the central technology of the semiconductor industry. The invention of IC was propelled by military and space programs that sought the microminiaturization of devices,<sup>72</sup> and soon the potential for IC to be used in computer guidance systems was discovered. The Pentagon's huge military demand for IC became the major pull factor for the entry of new firms in the IC industry until the civilian market of IC developed sufficiently. Training of the scientists and engineers based on the US government's G.I. Bill and National Defense Education Act significantly enlarged the pool for engineers.<sup>73</sup>

Demand for semiconductors in the space and military program allowed American semiconductor firms to sustain investment in R&D with reasonable profitability, leading to the rapid growth of the semiconductor industry in the 1960s. Rapid

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<sup>70</sup> Mowery, David C. op. cit. p.43

<sup>71</sup> Ibid. p. 209

<sup>72</sup> Irwin, Douglas A. "Trade Politics and the Semiconductor Industry", No. 4745 of Working Paper Series by National Bureau of Economic Research, 1994, pp. 3-4

<sup>73</sup> Mowery, David C. op. cit. p.219

growth and technological development of the semiconductors continued in the 1970s and 1980s, when the commercial application of semiconductors increased with the expansion of markets for personal computers, telecommunication, and consumer electronics.<sup>74</sup>

The military procurement demand for semiconductors culminated during the 1960-62 Minuteman missile program and the Vietnam War of the mid-1960s, and allowed the growth of companies like Fairchild, and Texas Instruments.<sup>75</sup> The prominence of the role of military procurement in the initial development of the advanced technology industries was one of the main reasons that IPRs could not be protected strongly.<sup>76</sup>

The spillover effect of national R&D investment was not confined to domestic industries. As American firms and those of other Western industrialized countries expanded to other parts of the world, such as Japan and other East Asian countries, their technology was transferred to bring rapid technological “catch-up” to these countries. Such catch-up occurred in the 1950s and 1960s in Japan, and in the 1970s in Korea and Taiwan. In the case of American IC industry, Foreign Direct Investment (FDI) to Europe and East Asia occurred actively from the late 1960s

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<sup>74</sup> Irwin, Douglas A. *op. cit.* p.4

<sup>75</sup> Mowery, David C. *op. cit.* p.211

<sup>76</sup> *Ibid.* pp. 209, 216

throughout the 1970s, resulting in the effective transfer of production technology for semiconductors and systems.<sup>77</sup>

The technology spillover was even more extensive in part due to the policies of the recipient countries that restricted FDI. These countries basically restricted the FDI, allowing it only when there was active technology transfer to domestic firms. Technological and economic spillover to domestic firms could be maximized as a result of the restrictive technology transfer policies that set investment or performance requirements, coupled with the investment in domestic human resources that raised technological capacities.<sup>78</sup>

Establishing the economic and technological infrastructure of the allies in the “Free World” was one of the major goals of post-war US foreign policy. Under the Cold War system, the US pursued the technology policy that actively transferred advanced US technology to the countries in the Free World. Open research environment in the US research institutions also contributed to the diffusion of technology. The openness of American R&D system, high mobility for research personnel, and the high dependence on universities for education and training of basic science<sup>79</sup> created an environment in which the international spillover of

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<sup>77</sup> Ibid. pp. 37, 38

<sup>78</sup> Ibid. p.220

<sup>79</sup> Ibid. p.111

American intellectual capital could be maximized.

### 2.1.3. IPRs during Cold War I

Technology or technological know-how can be i) kept secret by the government, to be used only for defense purposes, or ii) formally or informally transferred, either in return for royalty income, or for other forms of benefits. Weighing these factors, technology policies of one country toward other countries can vary in accordance with its overall foreign policy and industrial policy objectives.

During the early Cold War period, security considerations dominated the process of establishing international economic and technology institutions and mechanisms. The US government maintained a practice, formulated during World War II, that kept private inventions secret. Such practices, considered to be functioning “without peacetime philosophy of scrutiny,” and at odds with the principles of the patent system, were examined by US Congress in 1950, before the outbreak of Korean War. However, after President Truman’s proclamation of emergency in December 1950, Congress enacted the Invention Secrecy Act of 1951, to which it included a provision that allowed secrecy orders to become semi-permanent. Thereafter, until

1979, US government agencies, especially the Armed Services Patent Advisory Board, could request a secrecy order to the Patent and Trademark Office for any patent application whose disclosure “would be detrimental to the national security.” Under the system, if private inventors wanted ownership protection of their discoveries, by applying for a patent, they faced the risk of government “confiscation” of their ideas.<sup>80</sup>

On the other hand, if priority is put on protecting the interest of the private inventors to develop technology, IPRs should be guaranteed by law. An intellectual property system can be seen as a set of incentives and rewards designed to affect the behavior of individuals or organized groups engaged in creative or inventive activities. A property right might include the right to use its benefits, the right to decide how it is to be used, the right to receive income from it, and the right to exclude others from using it. In the US, the government is authorized to grant intellectual property rights, including patents, copyrights, and trademarks as inducements to authors and investors to create and disseminate intellectual works.<sup>81</sup>

Implementation of strong antitrust law was one of the reasons that the IPR was

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<sup>80</sup> Committee on Government Operations , “The Government’s Classification of Private Ideas,” *96<sup>th</sup> Congress 2<sup>nd</sup> Session House Report No. 96-1540, Union Calendar No. 908*, December 22, 1980. Washington D.C.: US Government Printing Office. pp. 1-2

<sup>81</sup> Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information*, 1986. pp. 3, 21, 22

not protected strongly in the US. During the 19th century, the US was a net importer of technology and maintained at a low level of protection of foreign IPRs. Since the latter part of the 19<sup>th</sup> century, however, American firms began to step up innovations, and American companies like the Edison Company argued for the strong protection of IPRs during the negotiation for the 1883 Paris Convention. However, the enactment of the Sherman Antitrust Act in 1890 opened up the era of anti-trust dominance, and for the following 75 years, the patent right has been suppressed as a form of monopoly right, rather than the incentive for innovation.<sup>82</sup>

The AT&T (American Telephone and Telegraph Company) antitrust suit had a huge impact in the early days of the IC industry. In 1949, only two years after the transistor was invented in 1947, the US Department of Justice initiated an antitrust law suit against AT&T, which had invented the transistor and tried to commercialize the technology. Due to the ongoing lawsuit, AT&T did not want to emphasize its dominant market position, and as a result, avoided setting high prices for the transistor parts, or for license fee for its patented technologies. Furthermore, in 1952, it opened up its transistor technology. The lawsuit was closed in 1956 with the publication of the Consent Decree, which was the final decision of the Justice Department. The event had a huge impact on the development of IPR regime in the microelectronics industry, and led to active diffusion of IC technology both

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<sup>82</sup> Sell, Susan K. *Private Power, Public Law*. 2003. pp. 64-65

domestically and internationally.<sup>83</sup>

Under the patent clause of the Consent Decree, AT&T had to open up its 8,600 patents for free, effectively licensing them to all applicants without royalties. The company also had to license its other patents, “present and future,” at “reasonable and nondiscriminatory” rates, among other things.<sup>84</sup> AT&T chose to cross-license its patents, and as a result, all the major patents in the IC industry became connected with AT&T through cross-license. Subsequently, cross-licensing became a standard practice in the IC industry, leading to the rapid dissemination of production know-how within the industry. Therefore, IPRs became a medium of exchange in IC related industries.<sup>85</sup>

The AT&T antitrust law suit was a landmark incident involving American IPRs in the 1950s, during which a private person’s IPR was restrained in the interest of national security. One lawyer on the government’s side commented that the decrease in the royalty rate of AT&T and the increase of competition in transistor industry would save the costs paid by the Department of Defense to buy weapons.<sup>86</sup>

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<sup>83</sup> Mowery, David C. op. cit. pp. 216, 217

<sup>84</sup> Lewis, Anthony. “AT&T Settles Antitrust Case; Shares Patents” *New York Times*, January 24, 1956.16.

<sup>85</sup> Mowery, David C. op. cit. pp. 217, 218

<sup>86</sup> Lewis, Anthony, Ibid.

## 2.2 Changing Attitude toward IP during Détente

The culmination of Cold War security tension during the 1962 Cuban Missile Crisis and 1969 Sino-Soviet split was resolved through superpower negotiations, resulting in relaxation of security tension that marked the era of détente and Sino-American rapprochement. The US, Soviet Union and China sought to reduce the risk of military conflicts through negotiation and institutional arrangements. This section discusses how changed security perceptions affected the institutions and practice of economic and technological exchanges during détente.

Reduced security risk enabled the expansion of East-West trade. For the Communist bloc, advanced technology and capital goods of the West facilitated modernization and improvement of living standard for its citizens. For the West, reopening the trade with the East brought new demands for its goods, and showed the possibility that technology can be used as diplomatic leverage in East-West relations.

There were two perspectives on the emerging channels and practice of East-West trade during détente. First, the security-oriented discourse, based on “denial approach” to East-West trade,<sup>87</sup> argued that technologies critical for Western

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<sup>87</sup> Huntington, Samuel P. *op. cit.* p.69

technological lead should be strictly controlled, a view that was in line with the containment logic that had existed since the onset of the Cold War. It argued that since Western technology should not contribute to the military capability of the Soviet Bloc, leakage of technology should be strictly controlled. Although trade embargo and technology control through the CoCom mechanism from the early 1950s had witnessed a marked decrease during this period, it nevertheless provided the overarching framework for East-West trade.

Denial approach is closely related to the argument for economic diplomacy, which seek to use access to Western capital goods, technology and know-how and market, attained through Most Favored Nation (MFN) status, to bring about changes in the behavior and policies of the Soviet Union. Presidential Directive Number 18 of 1977 pronounced the principle that American economic and technological superiority should be used to attain the diplomatic goal of promoting East-West cooperation and limiting Soviet expansionism.

The Jackson-Vanik Amendment to the 1974 Trade Bill passed by the US Congress was a representative case of economic diplomacy. The Amendment stipulated that the MFN treatment cannot be extended to a country that does not allow its citizen freedom of migration, a clause motivated by expressing disapproval for the Soviet government's measure to limit the migration of its Jewish residents. The passage of the bill resulted in some strain in the relations with the Soviet Union, especially in

discussions regarding ongoing bilateral trade negotiations, but eventually brought about Soviet concessions regarding its migration policy. In 1973, the Soviet Union allowed its 35,000 Jewish residents to leave the country in exchange for a US government loan of USD 469 million and in anticipation of the MFN status.<sup>88</sup>

Second, the *laissez-faire* approach argued that East-West economic relations should be marked by practices and institutions based purely on economic logic. Such voices in support of increased autonomy in the economic field as separate from politics grew and institutionalized after *détente*. Such arguments were in line with the liberal idea that increased economic interdependence would lead to reduced military tension. An increase in human and cultural contacts between the East and West were expected to provide greater opportunities for the East to be exposed to Western values, institutions and ideas.

Since the mid-1970s, the discourse of economic security, which argued that duality of technology would add to the economic and security capability of the Soviet bloc received renewed attention. Such view was first expressed in the Bucy Report of 1976 and had a major impact in the Washington policy circle. This discourse led to a total reorganization of American policy concerning technology transfer.

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<sup>88</sup> Ibid. p.72

These two views, namely, the security-oriented approach and the laissez-faire approach to East-West trade, competed with each other, with their influence being dependent on bureaucratic inertia, lobbying by interest groups, and conflicting alliance interests according to time and occasion. One consequence of these discussions was that the economic-security values of American technological superiority received renewed attention, and the case for sustaining such superiority grew in influence.<sup>89</sup> At the same time, dominance of security concerns gave way to the increased autonomy of the economic arena in pursuing national policy toward the latter part of the Cold War.<sup>90</sup>

### 2.2.1 Changing Security Perception and the Rise of Market-based Approach

By the early 1960s, a liberal discourse of *détente* emerged to challenge the policies and practices of containment. A number of developments in international politics gave rise to the discourse of *détente*. The first was the dilemma of a nuclear arms race. Despite (and because of) its huge destructive capability and tremendous costs

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<sup>89</sup> Ibid. p.74

<sup>90</sup> Ibid. p.71

for its development and maintenance, nuclear weapons “could not be used and [its use] could not even plausibly be threatened.”<sup>91</sup> The Cuban Missile Crisis of 1962 became a turning point when the two superpowers began to actively seek to reach a shared understanding that both had attained effective second-strike capabilities which made the risk associated with a nuclear warfare unbearably high, and that a balance of mutual threat might be achieved through mutual restraint.

The second was the intensifying Sino-Soviet conflict, which culminated in the military clashes on Zhenbao Island in early 1969, and Soviet threats to attack Chinese nuclear facilities a few months later.<sup>92</sup> Bipolar order shifted to a US-Soviet-China tri-polarity in the late 1960s<sup>94</sup> with the US-China Rapprochement. The Sino-Soviet split, and the US position in the split, weakened the image of strong and united Communist bloc, and implied that the Cold War adversary was “less formidable than had hitherto been believed.”<sup>95</sup>

The third was the situation in Vietnam. The Vietnam War was a war of advanced

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<sup>91</sup> Kissinger, Henry. op. cit. p.334

<sup>92</sup> Friedberg, Aaron L. “The Collapsing Triangle: US and Soviet policies toward China 1969–1980,” *Comparative Strategy* (1983), 4(2) ; Kuisong, Y. “The Sino-Soviet Border Clash of 1969: From Zhenbao Island to Sino-American Rapprochement”, *Cold War History*(2000). 1(1); Kim, Samuel, “The Evolving Asian System: Three transformations” in Shambaugh. op. cit.

<sup>93</sup> “Moscow Reported Eying Raids on China,” *Washington Evening Star*. Sites\_19690828,

<sup>94</sup> Kim, Samuel. op. cit. pp. 48-49

<sup>95</sup> Williams, Phil. “Detente and US Domestic Politics,” *International Affairs* 61(3):431

technology because it was largely conducted “behind monitors” through remote-controlled operations and simulation-based strategies.<sup>96</sup> However, years of intensive utilization of state-of-the-art technologies and enormous expenditures could not deal a decisive blow to an enemy without all of this technology.<sup>97</sup>

These events changed the perception of policymakers on both sides of the Iron Curtain, and these changed perceptions led to a changed discourse about the Cold War world order. After the Cuban missile crisis, President Kennedy sought to promote arms control alongside his more traditional Cold War policies, mixing the elements of competition and cooperation toward the Soviet Union.<sup>98</sup> Global détente was accelerated in the aftermath of the Vietnam War, and in the context of the intensifying Sino-Soviet conflict when the crusading spirit of anti-communism in US domestic politics had been weakened.<sup>99</sup> Growing voices within Washington policy circles demanded the demilitarization of US foreign policy and the diversion of resources from the military sector to the civilian economy.<sup>100</sup>

In this atmosphere, President Nixon and Henry Kissinger led the effort to establish a new domestic consensus around the idea of superpower détente, reversing the

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<sup>96</sup> Edwards , Paul N. op. cit. pp. 3, 6

<sup>97</sup> For instance, nearly \$1 billion a year had been spent from 1967 to 1972 on one of Vietnam War’s major high-technology operations, the Operation Igloo White. (Ibid. p.3)

<sup>98</sup> Williams, Phil. op. cit. p. 433

<sup>99</sup> Ibid. p.431

<sup>100</sup> Ibid.

dominant security discourse of containment that had been maintained from 1947 to 1968.<sup>101</sup> Détente, as a discourse, as well as the new framework for conducting Cold War foreign policy, was possible as a result of cooperation the US and the Soviet Union. The two superpowers sought to find a mutually beneficial solution to the “Prisoner’s Dilemma” brought by the arms race between the superpowers.

The Prisoner's Dilemma is a situation in which, in the absence of cooperation, a coincidence of the best strategies of the parties involved results in a Nash Equilibrium, but the equilibrium does not bring the optimal outcome that would have been possible if cooperation was achieved. Leading game theorists frequently use the Prisoner’s Dilemma as a model for the US-Soviet nuclear arms race during the Cold War.<sup>102</sup> A typical situation for superpower arms race can be represented as the following matrix.

<Table 3> A Prisoner’s Dilemma of Superpower Arms Race<sup>103</sup>

		USSR	
		Disarm	Arm
US	Disarm	(3, 3)	(1, 4)
	Arm	(4, 1)	(2, 2)

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<sup>101</sup> Ibid, p 431

<sup>102</sup> Plous, S. “The Nuclear Arms Race: Prisoner's Dilemma or Perceptual Dilemma?” *Journal of Peace Research*, 30(2): 163, 164

<sup>103</sup> The table was adopted from p.164 of the above book.

Here, the first number in each cell represents the payoff of that outcome for the US, and the second number represents the payoff for the Soviet Union, with higher numbers representing better outcomes. Both sides prefer the option of “arming,” regardless of the choice of the other party, which results in a Nash Equilibrium. However, at the equilibrium, the payoff for the parties, (2, 2), is smaller than a cooperative solution of mutual disarmament, which would bring (3, 3). A cooperative solution would be unstable, since each party has the incentive to improve their payoffs, at the expense of the other, by choosing to “arm.”

In the 1960s, especially after the Cuban Missile Crisis, the US and the Soviet Union were brought nearer to a cooperative solution of the Prisoner’s Dilemma, due in large part to their shared understanding about the security reality embodied in the Mutual Assured Destruction (MAD) doctrine. The MAD doctrine assumes that as long as each party is fully aware of the unbearable costs associated with initiating an attack, deterrence can be achieved.

Mutual recognition about MAD can be a basis for nuclear peace, since superpower cooperation (such as the commitment to disarm) becomes more plausible and stable. President Nixon’s initiation of the Strategic Arms Limitation Talks (SALT) with the Soviets in 1969, which resulted in the signing of 1972 Antibalistic missile (ABM) Treaty, and SALT I, represented a major effort to codify arms reduction commitments.

The discourse of détente was made possible by the new perception about the global security environment characterized by the balance of threat, which was achieved as a result of a series of negotiations between the two superpowers based on the principle of MAD. The nuclear peace thus achieved would create a perception of the international order<sup>104</sup> in which a greater range of contacts between the East and West, especially in the economic and technological exchanges, could be envisaged with less concern about an escalation of war, and increased economic contacts in turn would lead to a reduced risk of military conflicts.

The discourse of détente was accompanied by a change in perception about the Communist economies. Instead of an image of an absolute enemy threatening Western values and lives, which had been the image prevalent in the containment discourse, the new idea of “untapped markets” with significant demand for Western goods and technologies began to receive significant attention. It was during this period that Communist economies began to be referred to as “non-market economies” in American policy and legal documents. In 1973, there was a joint resolution to affirm Congress’s general support for increased commercial and non-commercial relations with nonmarket economy countries.<sup>105</sup>

Global détente and East-West trade were propelled by US-China rapprochement.

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<sup>104</sup> Kissinger, Henry. *op. cit.* pp. 333-335

<sup>105</sup> Committee on Commerce, US Congress, “East West Trade Policy Resolution,” June 25. 1973.

The US had regarded the People's Republic of China (PRC) as an enemy since the Korean War, but official perceptions toward China changed with the intensification of Sino-Soviet split in the late 1960s. China was viewed less as a threat and more as “a potential weight in the balance of power against the Soviet Union.”<sup>106</sup>

Improved relations with China would complicate the Soviet Union's strategic landscape thereby inducing more cooperative relations between the US and the Soviet Union. American policymakers believed the move would enhance the US position vis-à-vis the Soviet Union and therefore be conducive to the US maintaining its pivotal position in the global system.<sup>107</sup> Anti-Soviet ties between the US and PRC played a key role in creating a “virtual alliance” between these former adversaries.<sup>108</sup> US-PRC rapprochement promoted improved US-Soviet relations, as Chinese entry into the scene shifted the hitherto bipolar game of US-Soviet relations to a tri-polar game.

Subsequently, in February 1972, Washington and Beijing produced the Shanghai Communiqué, in which they agreed to “facilitate the progressive development of

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<sup>106</sup> OTA, *Technology and East-West Trade*, p. 78

<sup>107</sup> Foot, Rosemary “Prizes Won, Opportunities Lost: The US normalization of relations with China, 1972-1979,” in Kirby, William C. et al. eds. *Normalization of US-China Relations: An international history*. Cambridge and London: Harvard University Press, 2005. P. 93

<sup>108</sup> *Ibid.* p 93

trade between the two countries.”<sup>109</sup> This was in accordance with the two country’s agreement over “equality and mutual benefit,” which served as the formal US-PRC agreement in the economic sphere.<sup>110</sup> Under Presidential directive, ways to facilitate US-PRC exchanges in the field of science, technology, culture, sports, and journalism, all agreed on in the Joint US-PRC Shanghai Communique, were studied.<sup>111</sup>

The US took a number of measures to lift barriers to US-PRC trade. Chinese ships and planes could now access US ports, and the PRC was removed from the most restrictive category of the US strategic export control. Formal organizations to promote bilateral trade were established in both countries, namely, the National Council for US-China Trade (NCUSCT) of the US and its Chinese counterpart, the China Council for the Promotion of International Trade (CCPIT).<sup>112</sup> US exports to the PRC grew rapidly, and the US export of goods to China in 1973 was estimated to be over USD 800 million, which was thirteen to fourteen times the USD 60 million export figure of 1972. Chinese exports to the US was USD 32 million in 1972 but

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<sup>109</sup> Mitcham, Chad J. *China's Economic Relations with the West and Japan, 1949-79: Grain, trade and diplomacy*. London: Routledge, 2005. pp.199-210.

<sup>110</sup> Department of State Briefing Paper, “Economic and Trade Relations,” October 10,1973. p. 2

<sup>111</sup> National Security Council. “US-PRC Exchanges,” *National Security Study Memorandum No. 148*, 1972. p.1.

<sup>112</sup> Department of State. op. cit. p 2

was estimated to have doubled in 1973 to USD 60 million.<sup>113</sup>

The 1979 normalization of US-PRC relations gave rise to the perception that Sino-US relations had been improved irreversibly. Cyrus Vance, for example, observed that “the US derives important benefits from its evolving ties with China. Strategically, Sino-American friendship improves our position in the Pacific, reinforces stability in potential trouble spots such as Korea, and constitutes an important factor in the global equilibrium.”<sup>114</sup>

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<sup>113</sup> Ibid, p 1

<sup>114</sup> Vance, Cyrus. “American Foreign Policy for the Pacific Nations”, *International Security*. 5(3): 6

### 2.2.2 Technology as Diplomatic Resource

Détente was institutionalized incrementally through various trade and investment relations between the East and West. Economic exchanges, and especially trade in technology, played a crucial role in détente diplomacy. Technological exchanges during this period was in essence export of Western technology to the East, since the demand for Western technology, either directly transferred, or embedded in capital equipment, was very high. It was during this period that the Eastern economies adopted the development strategy that required the use of advanced Western capital and techniques to increase productivity. Also, Western goods, especially agricultural products and consumer goods, were imported to compensate for shortfalls in the annual economic plans of the Eastern countries.<sup>115</sup>

The West was willing to relax some of the control of technology in expectation of foreign policy gains, namely, of serving the goal of the détente by integrating the Communist countries into the existing world order and to build a “structure of peace.”<sup>116</sup> There were attempts to use technology transfers as explicit leverage to extract political concessions from Communist countries.<sup>117</sup> As a result, barriers to

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<sup>115</sup> OTA op.cit. p.42

<sup>116</sup> Gaddis op. cit. pp. 282-287

<sup>117</sup> Outline for PRM-31, Part II B, Economic and Political Implications of Technology Transfer, Preliminary draft, September 1, 1977, pp. 1-2

increased trade in both the East and the West steadily decreased from the onset of the détente period,<sup>118</sup> and trade grew steadily over the years.

Economic motives, in addition to the foreign policy goals of détente, were also present. For the Western private sector, the Eastern bloc provided a newly emerging and expanding market for their products and technologies, while at the same time posing little threat as potential competitors. Eastern demand for Western goods was continually greater than the Western demand for Eastern goods, resulting in a sustained balance of payments in favor of the West.

Until the mid-1970s, the legal and institutional basis of East-West trade was fragile, and the volume of trade was subject to year-to-year fluctuation. The growth of East-West trade in general necessitated the introduction of more formal institutionalization in the form of domestic legislations and bilateral trade agreements.

On March 27, 1975, President Ford established the East-West Foreign Trade Board through Executive Order 11846, to report on recent developments and issues to Congress in accordance with the Section 411 of Title IV of the Trade Act of 1974.<sup>119120</sup>

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<sup>118</sup> OTA op. cit. p.41

<sup>119</sup> Section 411 of Title IV of the Trade Act of 1974 reads:

The most salient issue was the ongoing bilateral trade agreements between the US and the countries of the communist bloc, regarding the granting of Most Favored Nation (MFN) status. The US and USSR concluded a bilateral Trade Agreement of 1972, although it took several years for the Soviet Government decided not to put it into force.

The most salient issue was the ongoing bilateral trade agreements between the US and the countries of the Communist bloc, regarding the granting of Most Favored Nation (MFN) status. The US and Soviet Union concluded a bilateral Trade Agreement of 1972, although it took several years for the Soviet government to decide not to put it into force.

During the Moscow Summit in June 1974, President Nixon and Brezhnev signed the US-Soviet Long-Term Agreement to Facilitate Economic, Industrial, and Technical Cooperation. The Agreement became the legal basis for the joint US-Soviet program for information exchange that will “assist organizations in both

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Title IV – Trade relations with countries not currently receiving nondiscriminatory treatment

Sec 411. East-West Foreign Trade Board – (a) The President Shall establish an East-West Foreign Trade Board to monitor trade between persons and agencies of the US Government and nonmarket economy countries or instrumentalities of such countries to insure that such trade will be in the national interest of the US. (First Quarterly Report, p 1)

<sup>120</sup> 94<sup>th</sup> Congress, 1<sup>st</sup> Session, House Document No. 94-210, “East-West Foreign Trade Board First Quarterly Report on Trade Between the United States and Nonmarket Economy Countries,” July 8, 1975

countries in determining worthwhile fields of economic and commercial cooperation.” Contracts for large orders of US equipment were negotiated and concluded between Soviet foreign trade organizations and US firms based on the Agreement.<sup>121</sup>

The Trade Act of 1974 allowed the conclusion of trade agreements between the US and non-market economies. The first agreement to be negotiated under its provisions was the US-Romanian Trade Agreement, which included provisions for the extension of MFN tariff treatment, for business facilitation, for procedures for dispute settlement, for the protection of industrial property rights, and for safeguards against disruption of US markets.<sup>122</sup>

There were other institutional developments, such as the establishment in 1972 of the Joint US-Soviet Commercial Commission, which was a mechanism for monitoring the spectrum of economic relations between the US and the Soviet Union, and the Advisory Committee on East-West Trade in early in 1974 by the Department of Commerce “to advise the Bureau of East-West Trade in its work on the development of more normalized commercial relations with the nonmarket economy countries.” The Commerce Department also had a program of trade

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<sup>121</sup> Ibid. pp. 4-5

<sup>122</sup> Ibid. p.5

promotion events in the Soviet Union and in Eastern Europe. The objectives of this program were to help companies already active in East-West trade to increase their commercial presence, and to assist new-to-market firms to take advantage of specifically identified market opportunities in “non-market economies.”<sup>123</sup>

East-West trade grew rapidly since the early 1970s as the following table suggests.<sup>124</sup>

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<sup>123</sup> Ibid. pp.5, 11, 14

<sup>124</sup> OTA. op. cit. p.43

<Table 4> Average Annual Rates of Change of East-West Trade and World Trade by Commodity Category, 1955-76 (% computed on the basis of current prices)

Period	Food and beverages	Raw materials	Fuels	Raw material-and labor-intensive manufacturers	Capital- and skill-intensive manufacturers	Total exports
<b>Western exports to the East</b>						
1955-60	3.9	8.7	18.3	27.3	20.0	17.0
1960-65	27.2	5.4	30.3	2.4	14.1	11.0
1965-70	2.9	1.7	42.5	18.1	13.4	10.9
1970-76	31.0	20.3	16.8	25.7	20.0	26.1
1955-76	14.6	9.3	15.4	18.3	18.6	16.5
<b>Eastern exports to the West</b>						
1955-60	10.9	9.3	9.7	15.9	11.0	10.5
1960-65	6.9	8.6	8.7	18.0	10.7	9.1
1965-70	6.5	6.3	10.5	12.3	11.3	12.2
1970-76	15.7	27.7	53.8	24.0	25.7	30.2
1955-76	10.2	13.3	20.8	17.8	15.0	15.9
<b>World exports</b>						
1955-60	4.1	4.2	4.3	7.7	10.0	6.6
1960-65	6.8	3.1	7.2	8.5	10.5	7.9
1965-70	5.9	5.9	9.6	11.8	14.0	10.9
1970-76	20.4	15.1	41.9	18.7	22.3	22.8
1955-76	9.1	7.0	15.0	11.6	14.1	11.9

Excluding Inter-German trade

NOTE Figures are rounded

SOURCES United Nations, Monthly Bulletin of Statistics, 1955-76, Organization of Economic Cooperation and Development, *Trade Commodities Country Summaries*, series B (Paris OECD, 1955-76)

Détente dramatically increased the commercial and technological “cooperation” between the US and the nonmarket economies. Western models and computing systems began to be “borrowed” by the COMECON countries in huge quantities.<sup>125</sup> Despite CoCom (Coordinating Committee for Multilateral Export Controls) mechanisms for export control to check the transfer of Western technology to the Communist bloc, the technical difficulty in denying access to widely

<sup>125</sup> Goodman, Seymour E. op. cit. pp. 555-556

commercialized technology, and the political need to promote détente, resulted in greater interface between Eastern and Western technologies.

<Table 5> Comparison of High-Technology Exports With Manufactured Goods and Total Exports- 15 Industrialized World (1. W.) Countries to the Communist Countries and to the World (in millions of U.S. dollars)

Destination	1977		1976		1974		1972	
	High-tech. exports as % of		High-tech. exports as % of		High-tech. exports as % of		High-tech. export as % of	
<b>U.S.S.R.</b>								
High-technology I.W. exports. . . . .	\$ 2,003	—	\$ 1,627	—	\$ 1,036	—	\$ 582	—
Manufactured goods I.W. exports . . .	9,537	21.0	9,169	17.7	5,546	18.7	2,430	24.0
Total I.W. exports. . . . .	11,412	17.6	11,653	14.0	6,250	16.6	3,317	17.5
<b>Eastern Europe</b>								
High-technology I.W. exports. . . . .	1,741	—	1,525	—	1,223	—	619	—
Manufactured goods I.W. exports . . .	11,769	14.8	11,438	13.3	10,432	11.7	4,738	13.1
Total I.W. exports. . . . .	12,866	13.5	12,757	12.0	11,322	10.8	5,098	12.1
<b>PRC</b>								
High-technology I.W. exports. . . . .	248	—	342	—	410	—	64	—
Manufactured goods I.W. exports . . .	2,986	8.3	3,094	11.1	3,166	13.1	1,090	5.9
Total I.W. exports. . . . .	3,585	6.9	3,423	10.0	4,369	9.5	1,445	4.4
<b>Total all Communist countries</b>								
High-technology I.W. exports. . . . .	4,886	—	4,140	—	3,197	—	1,562	—
Manufactured goods I.W. exports . . .	29,991	16.3	27,955	14.8	23,714	13.5	10,266	15.2
Total I.W. exports. . . . .	34,263	14.3	32,808	12.6	27,261	11.7	12,234	12.8
<b>World</b>								
High-technology I.W. exports. . . . .	71,576	—	64,366	—	49,314	—	29,092	—
Manufactured goods I.W. exports . . .	523,890	13.7	459,351	14.0	381,983	12.9	214,182	13.6
Total I.W. exports. . . . .	669,393	10.7	590,833	10.9	498,470	9.9	273,045	10.7

SOURCE: Quantification of Western Exports of High Technology Products to Communist Countries, prepared by John Young, Industry and Trade Administration, Office of East-West Policy and Planning, U S Department of Commerce, Project No D-41.

In 1972-1973, American-Soviet scientific exchanges were initiated, and trade and technology exchanges between the American private sector and the Soviet Union were encouraged. By the end of 1974, approximately forty protocol agreements were signed by different American industries and the Soviet Union, providing a framework for subsequent commercial sales. From 1972-1977, federal policies and regulations directly affecting the strategic control of technologies were relaxed. Significant reductions were made in the number of items on the “Control List.”<sup>126</sup>

### 2.2.3 Rise of Economic Security Discourse

In the late 1970s, security concerns about the East-West trade reemerged in Washington policy circles. It was argued that expanding East-West trade, especially trade in technology-related goods entailed a security risk. Namely, after more than a decade of official and unofficial technological transfers, which was in large part due to the active demand of the Eastern economies, there was concern that this was resulting in a reduced “technological lead” of the US vis-à-vis the Soviets, and that this was leading to greater Soviet military capabilities that could shift the global distribution of power in the long run.

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<sup>126</sup> Bucy, J. Fred. “On Strategic Technology Transfer to the Soviet Union,” *International Security*, 1(4) pp. 27-28

The US controlled technology exports with the objective of maintaining lead time in strategic capabilities. The control mechanisms can be summarized as the following. Technology controlled with greater effectiveness is listed first.<sup>127</sup>

- A. US Classified Weapons Systems: Under the authority of the Munitions Act, US Department of State licenses control technology transfer effected as part of weapons sales to allies or other non-Communist nations.
- B. US Export Control Regulations: Export of strategically sensitive products and technology requires a validated license from the Department of Commerce. The US Commodity Control List identifies these items. The Office of Export Control receives more than two hundred requests for validated licenses each day, of which about 10% (as of 1976) cover exports to Communist countries. The Office of Export Control reviews them case-by-case, and the US Government's processing of licenses is stricter than the US's allies.
- C. CoCom Agreement: The NATO alliance members (excluding Iceland) and Japan have joined with the US since the early 1950s in the CoCom, which maintains a list of strategic products similar to the US Commodity Control list.

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<sup>127</sup> Office of the Director of Defense Research and Engineering, "An Analysis of Export Control of US Technology – A DOD Perspective," *A Report of the Defense Science Board Task Force on Export of US Technology*, 1976. pp. 14-22

Under the informal CoCom agreement, member nations follow similar control regulations governing the export of strategic items to Communist countries (Warsaw Pact, PRC, Albania, North Korea, and North Vietnam).

<Table 6> Western Controls of Flow of Strategic Products and Know-How in 1976

Current Controls on Flow of Strategic Products and Know-How		
	Weapons & Technology	Strategic Products & Know-How
<u>From U.S. to:</u>		
1. CoCom partners	} State Dept. Licenses Munitions Act	Commerce Department Licenses Export Administration Act
2. Neutral, Open Market Countries		
3. Neutral, State-controlled market countries		
4. Warsaw Pact Nations		
5. PRC		
6. Other Communist Nations		
<u>From CoCom Countries to:</u>		
1. Neutral, Open Market Countries	} National Licenses	National Licenses
2. Neutral, State-controlled market countries		
3. Warsaw Pact Countries	} CoCom Agreement and National Licenses	CoCom Agreement and National Licenses
4. PRC		
5. Communist nations (Not in Warsaw Pact or PRC)		
<u>From Neutral, Open-Market Countries to:</u>		
Neutral, state-controlled Warsaw Pact, PRC, Other Communist	Unknown	Unknown
<u>From Neutral, state-controlled Countries to:</u>		
Warsaw Pact, PRC, Other Communist	National Licenses	National Licenses

D. Re-Exports: US export control law applies to re-exportation of strategic goods and technical data of US origin to a third country by the receiving firm. This is considered to be an ineffective deterrent except in large or highly visible cases. Further, the US can prosecute only US firms for violations, but not foreign firms.

E. Protection of Proprietary Know-How by US Companies: Companies' general reluctance of sharing proprietary know-how is sometimes cited as an effective deterrent for technology transfer. However, in the mid-1970s some companies began to sell these know-hows, swayed by the allure of exclusive access to state-controlled market and/or large cash payments important in meeting the capital needs of the particular companies.

J. Fred Bucy,<sup>128</sup> the president of Texas Instrument Inc., and chairman of a task Force of the Defense Science Board, expounded on this point in his testimony before the Senate's Permanent Subcommittee on Investigations.<sup>129</sup> In February 1976, the task force on the exports of US technology of the Defense Science Board issued "An Analysis of Export Control of US Technology – a Defense Department Perspective"

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<sup>128</sup> President of Texas Instruments, Inc. Also a member of the Defense Science Board, chairman of the task force on the exports of US technology, and chairman of the subcommittee on Methodology, Office of Technology Assessment, United States Congress. Bucy, J. Fred op. cit. pp. 25-43

<sup>129</sup> Bucy mentioned that: "Over the past 5 years the outflow of technology to the Communist nations has dramatically increased. The amount of significant technology that has been transferred and its impact on the military capability of the Communist countries, especially the Soviet Union, is not known...My concern is that the transfer of militarily significant technology has been of major proportions, and that the Soviet Union narrowed the gap in its relative weapons capability with the US to our detriment." (PRM 31 Draft, November 15, 1977. Sections I, V, VI in National Archives and Records Administration, Record Group 51, Records of the Office of Management and Budget, Office of National Security and International Affairs, Records Relating to President's Review Memorandum No. 31, 1977-1979 Box No 1. p. 2)

(which became widely known as the Bucy Report).<sup>130</sup> The Task Force report was developed from the key findings and recommendations drawn from its subcommittee reports on technology transfer in four industrial sectors representative of advanced technology industries, which had been submitted to the DSB in August 1975, and comments from public and members of the State and Commerce Departments.<sup>131</sup>

The report observed that industrially advanced Communist nations, as well as non-Communist nations “which exercise little or no control over the export of their technologies,” currently gives the highest priority to acquiring “design and manufacturing know-how” from the West. The report emphasized that the transfer of design and manufacturing know-how was of overwhelming importance to US national security, and that controlling them was the principal element of successful strategic technology control.<sup>132133</sup>

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<sup>130</sup> Office of the Director of Defense Research and Engineering, “An Analysis of Export Control of US Technology – A DOD Perspective,” A Report of the Defense Science Board Task Force on Export of US Technology, 4 February 1976, Washington DC.

<sup>131</sup> Office of the Director of Defense Research and Engineering, op. cit.

<sup>132</sup> Ibid. pp. 1,2

<sup>133</sup> The report recommended that the following three categories of export should receive primary emphasis in control efforts:

1. Arrays of design and manufacturing information that include detailed "how to" instructions on design and manufacturing processes.
2. "Keystone" manufacturing, inspection, or automatic test equipment.
3. Products accompanied by sophisticated operation, application, or maintenance, information. (Office

According to the report, transfer of this know-how is the highest and most effective level of technology transfer, allowing the recipient nation to acquire current US practices in a relatively short time period. Such know-how increased the nation's technical capability to design, optimize, and produce a broad spectrum of products in a technical field, and provide a basis for further advances in technology.<sup>134135</sup>

The report noted that in the 1970s “some CoCom members have perceived less need to maintain strict controls while the opportunity for individual gain through the sale of technology to Communist countries has increased. As a result, strategic technology has been transferred to Communist nations through CoCom-sanctioned exceptions, ambiguous interpretations of lists, and, perhaps, conscious violation of CoCom agreements. CoCom effectiveness is also diluted by differences in the national laws of its members, regarding controls of technical data.”<sup>136</sup>

In a similar vein, Senator Jackson wrote to the President in July 25, 1977 that US

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of the Director of Defense Research and Engineering. op. cit. p.3)

<sup>134</sup> Ibid. p.1.

<sup>135</sup> Contracts on the technology transfer from abroad can be categorized into know-how-only acquisition, know-how-and-patent-rights acquisition, and patent-rights-only acquisition. Know-how-only acquisition typically consists of technical services and training that are bundled with relevant documents. Know-how-and-patent-rights transfer consists of technical services, training, and documentations that are protected by the patent system. Patent-rights-only consists of patent right licensing. See Chung, Moon Young and Lee, Keun, “How Absorptive Capacity is Formed in a Latecomer Economy: Different Roles of Foreign Patent and Know-how Licensing in Korea,” *World Development*, Volume 66. P.680.

<sup>136</sup> Office of the Director of Defense Research and Engineering. op. cit. p.19

past and current policies have enabled the Communist bloc countries to “acquire technology that bears importantly on the military balance between East and West.” Since then, the transfers of American technology to other countries have been made the focus of increasing interest by the US Government and industry.<sup>137</sup>

Presidential Directive No. 18 (1977) summarized the view that American economic-technological superiority should be used to attain diplomatic objectives. According to this view, access to American market and technology should be utilized to attain America’s foreign policy objective of promoting exchanges and cooperation between the East and West, and to limit Soviet expansionism.<sup>138</sup>

According to the 1979 Export Administration Act, the president can limit and control the exports of goods and technology to protect US national security, and to further US foreign policy.<sup>139</sup> Based on this authority, the president responded to the Soviet invasion of Afghanistan and the Soviet sponsoring of establishment of a military government in Poland by imposing restrictions on American export of oil and gas transmission, refining, and related equipment and technology to the Soviet Union from December 30, 1981, to June 22, 1982, and to freeze applications for

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<sup>137</sup> Bucy, J. Fred. op. cit. p.25

<sup>138</sup> Huntington, Samuel P. op. cit. p.64

<sup>139</sup> House of Representatives. Report No. 97-762. Export Administration Act Amendment, 97<sup>th</sup> Congress 2<sup>nd</sup> Session, August 18, 1982. p.2

export licenses bound for the Soviet Union.<sup>140</sup>

According to the Department of Commerce, the import restriction measures were expected to result in nullification of American export contracts worth some USD 850 million, and would lead to the disappearance of some 25,000 American jobs. The cancellation of contracts was estimated to result in USD 1.2 billion of losses to the European subsidiaries of American firms. A 1982 report in US Congress argued that use of the Trade Act as a diplomatic weapon and as justification for nullification of contracts might lead to the decrease in foreign confidence to enter contractual relations with the US firms.<sup>141</sup> Such views suggest that the practice based on the absolute dominance of security discourse that limited the economic policies was beginning to be criticized both domestically and internationally by the 1980s.

The economic security discourse raised in the Bucy report was basically similar to the containment discourse in stressing security concerns of the technology transfer. However, it differed from the containment discourse in that it argued for the overall review of institutions regarding technology transfer, covering all the trading partners of the US, including both Communist and non-Communist countries. This suggests a change in the definition of national security concerns in a new era marked by

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<sup>140</sup> Ibid. pp.1-2

<sup>141</sup> Ibid. p.5

expanding East-West trade and the rapid catch-up of Japan and other East Asian NICs. Eventually, such views led to the discussion of the strategic use of technology transfer in the global trade system.

### **2.3 International Competitiveness and IP**

The competing discourses of US technology policy, namely, the denial approach and the laissez-faire approach continued to appear in the 1980s. The competition between the anti-Soviet containment logic and the laissez-faire approach can be seen to be in line with the discussion of parochialism vs. internationalism by Cumings (1983).<sup>142</sup>

Cumings argued that in the 1970s, the discourse of national parochialism that places emphasis on the protection of domestic industries and anti-Soviet containment competed with internationalism that sought the second best world. This was characterized by market capitalism centering on triad of the US-Europe-Japan that included the PRC, but not the entire Eastern bloc, with each proposing the blue

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<sup>142</sup> Cumings, Bruce. "High Technology and Ideology: America's Japan Mythology," *The Insurgent Sociologist*. 11(4)

print for a revived American economy comparable to the “Belle Epoque” of the 1940s and 1950s.<sup>143</sup>

1979 became the turning point whereby discussion of economic issues became the dominant discourse in America. The opening of Cold War II following the 1979 Soviet invasion of Afghanistan did bring a renewed concern for security, but it fell short of raising alarms over the global security order. The US strengthened export controls on the Soviet Union and increased budgets for defense and military R&D, but there was no comprehensive policy response comparable to those based on the NSC-68 right after the outbreak of the Korean War. This was due to the perception that the American-directed quasi-united front had been established with the normalization of US relations with the PRC that took effect on January 1, 1979.

A more pressing domestic issue was the rise of Japan as the formidable challenger to the international leadership of the US economy. As Japan arose as a fierce competitor to US industry from the late 1970s in consumer electronics and advanced technology goods, the economic issue dominated the agenda during the 1980 presidential election. Discussions that were labeled “Japan-bashing,” or “Japan Inc.” arose, and the following passage shows one such discussion.<sup>144</sup>

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<sup>143</sup> Ibid. p.19

<sup>144</sup> Ibid. p.5

“Today the disturber of the natural order of things is Japan. Japan Inc. does not play by the rules: it competes unfairly; it dumps goods in our markets; it has closed its own market; it is a country organized as a multinational corporation; it gets a free ride and screws us to boot.”<sup>145</sup>

Behind the perception of Japan as threat to the US economy was the phenomenon that the American economy was being incorporated into the global economy at a much greater degree than before. In 1950, the proportion of exports and imports to the American GNP was a mere nine % but in 1970, the number grew to 13%, and then in 1985, it became 21%<sup>146</sup> As the effect of foreign factors on the domestic economy increased irreversibly, foreign competition became a big challenge to the US domestic market. A major priority for the US government became a strong and internationally competitive economy and a more open global system for international trade.<sup>147</sup>

President Ronald Reagan, who promised to restore the greatness of America,<sup>148</sup>

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<sup>145</sup> Ibid. p.6

<sup>146</sup> White House, Cabinet Affairs Staffing Memorandum, Administration Statement on International Trade Policy. September 19, 1985. p.2

<sup>147</sup> Ibid, p 3

<sup>148</sup> Reagan, in his inaugural address on July 17, 1980, promised to revive American value and

regarded international competitiveness as a high priority in his administration. Lively discussion about competitiveness ensued, and in 1985, the Young Commission Report was published after extensive discussion among policy makers and opinion leaders in various fields. As the report's subtitle, "Global Competition: The New Reality"<sup>149</sup> suggests, it redefined the new reality of the international political economy from the point of view of a market-based approach.

The report emphasized that the rise of Japan posed a threat to America that was comparable to the Soviet Union's launch of Sputnik. Japan's formidable economic prowess, coupled with the twin deficit and large-scale layout of US industry, led to the prevalence of a market-based view in US domestic discourse. Such discussions

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economy, denouncing such self-depreciating opinion as "The Sun is setting in the USA." Ronald Reagan: "Address Accepting the Presidential Nomination at the Republican National Convention in Detroit," July 17, 1980. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=25970> ; "Many of us are unhappy about our worsening economic problems, about the constant crisis atmosphere in our foreign policy, about our diminishing prestige around the globe, about the weakness in our economy and national security that jeopardizes world peace, about our lack of strong, straight-forward leadership." "I am confident we can effect the reforms I have mentioned—reforms that will get government off our backs, out of our pockets and up to the standards of decency and excellence envisioned by the founding fathers." Ronald Reagan: "Election Eve Address "A Vision for America", " November 3, 1980. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=85199>; "All must share in the productive work of this "new beginning," and all must share in the bounty of a revived economy. With the idealism and fair play which are the core of our system and our strength, we can have a strong and prosperous America, at peace with itself and the world." Ronald Reagan: "Inaugural Address," January 20, 1981. Online by Gerhard Peters and John T. Woolley, The American Presidency Project. <http://www.presidency.ucsb.edu/ws/?pid=43130>

<sup>149</sup> President's Commission on Industrial Competitiveness. Report "Global Competition: The New Reality," January 1985.

soon led to similar precautions against East Asian NICs, including the Republic of Korea (ROK). There were discussions on whether the ROK would be the next Japan. At the same time, Japan was urged to display more self-restraint in the international arena, rather than free-riding on American efforts. Japan and East Asian NICs began to be pressured to refrain from “dumping” their products in the American market, further open up their markets, and play a more productive role in US-initiated discussions in the international arena.

These discussions were published in various reports and policy announcements from around 1985. In addition to the publication of the Young Commission report and the announcement of the Plaza Accord, the establishment and implementation of American trade strategy was a notable step forward. According to the new strategy, the US government would launch a new negotiation round within the GATT framework with an aim to forge a new multilateral trading system. Protection of American IPRs, which it regarded as the source of American competitiveness, would be included as a high priority agenda. According to the plan, America would pursue negotiations bilaterally, and multilaterally, to promote IPRs in the global trading system.

The ROK-US IPR Agreement, which began in earnest with the initiation of the Section 301 investigation on Korean IPRs by the USTR, was an important stepping stone in the US effort to strengthen IPRs in the global trading system. In the

following section will examine the international competitiveness discourse and its institutionalization in the US and in the global trading system.

### 2.3.1 New Reality: Technological Catch-up and Patent Disputes

In the late 1970s, the US began to review its technology policies. As the international flow of goods, capital and technology increased, market competition also assumed global features.<sup>150</sup> The US unparalleled technological lead that had been maintained since World War II in the military and space competition with the Soviet Union began to be eroded with the rapid catch-up of Germany, Japan and other East Asian NICs. From the mid- to late-1970s, Japanese firms competed successfully with American firms in advanced technology goods and, from the 1980s, East Asian NICs began to represent competition for US companies.<sup>151</sup>

The accumulation of the American trade deficit was in part a consequence of the

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<sup>150</sup> Mowery, David C. op. cit. p.110

<sup>151</sup> Song, Jongguk and Myeongjin Lee. “Urugwai Hyeopcheong Tagyeolgwa gisulhyeogsin jiweon jedoui gaeseon Banghyang (Uruguay Round Settlement and the Suggestion for Improving the Support of Technological Innovation)” Research Paper 94-04, Science and Technology Policy Management Institute. p. 4

erosion of competitiveness in the commercial technology of American firms,<sup>152</sup> but it was also a result of the growth and globalization of the American economy. In 1985, the administration statement on international trade policy analyzed that from 1980 to 1985 eight million jobs had been created, and the resulting increase in domestic demand for goods produced by American and foreign firms led to an increase in the trade deficit. In other words, the American trade deficit was a byproduct of the growth of American economy, and was contributing to keeping the economies of friendly nations in the “Free World” healthy and stable.<sup>153</sup>

From 1979, capital inflow from overseas increased and this resulted in the substantial strengthening of the dollar relative to the major currencies and to the trade deficit.<sup>154</sup> In response, the US began to seek international cooperation through multilateral and bilateral channels to urge countries like Japan and West Germany to take action to correct the global imbalances by adjusting exchange rates and relaxing austerity measures from the mid-1980s.<sup>155</sup>

The Plaza Accord announced on September 22, 1985, by the finance ministers and

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<sup>152</sup> Ibid. p 5

<sup>153</sup> White House. op. cit. p.3

<sup>154</sup> Ibid. p.4

<sup>155</sup> Kim, Namdu, Gihong Kim, and Byeonggi Ha. “Asian NICsui Daeoi Tongsang Machalgwa Daeung (Foreign Trade Conflicts of Asian NICs and Their Countermeasures).” Korea Institute for Economics and Technology, November, 1988. p. 6

central bankers of the G5 (the US, UK, France, Germany and Japan) stated that “there is a major imbalance in the external position of industrialized countries ... which can lead to mutually destructive retaliation that can cause significant harm to the global economy,” calling for international policy coordination to “bring about orderly increase in the exchange rate of major currencies against the dollar.”<sup>156157</sup>

America’s absolute technological superiority was also being eroded by the rapid catch-up by Japan and other East Asian NICs within the “Free World.” This was especially pronounced in the IC industry. The IC industry requires R&D in various fields of science including physics, chemistry, and materials technology, which were deemed crucial in securing America’s national defense interests. Furthermore, the commercial value of the goods that use IC, such as computers, telecommunications, and consumer electronics, amounted to \$500 billion in 1988.<sup>158</sup>

The American IC industry grew rapidly in the 1960s with strong demand from federally sponsored military and space programs. After the 1970s, demand from the consumer electronics market exceeded its military applications in importance for the

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<sup>156</sup> Wang, Yunjong and Suyeop Na. “Hanmi Tongsang Macharui Chuiwa Daeung Bangan,” Policy Research. Korea Institute for International Economic Policy, 1997. pp. 17, 18

<sup>157</sup> The value of Yen, which had been 238.5 per USD on September 20, just before the announcement of the Plaza Accord, went down to 211.90 on October 4, and to 200.40 on December 25, showing 30% decrease in 2 months. By the end of 1986, it was 150 and 130-140 by the beginning of 1992. See the above book. p.18

<sup>158</sup> Correa, Carlos M. “Integrated Circuits: Trends in Intellectual Property Protection,” United Nations Industrial Development Organization - IPCT 92, 1989. p. 1

growth of the industry. In the 1980s, the importance of the civilian market in the production of high technology systems and components grew even more, and the successful commercialization of the outcome of the technologies became an important priority.<sup>159</sup> The proportion of military demand, which was about 50% in the early 1960s fell to 10% in 1981. Overseas production of ICs and the new entrance of IC producers steadily eroded the competitiveness of American IC firms from the 1970s.<sup>160</sup>

In 1975, the international market share of American IC firms was 100%, but by 1984, the figure dropped to 60%, with Japanese IC firms taking up 30%. In 1985, the US and Japan produced almost all products in the IC industry, with 45% of the industry's market share each. In 1988, the American market share dropped to 42%, as it was overtaken by the Japanese.<sup>161</sup> Especially in the DRAM market, the American market share was 70% in 1978, but it dropped to 20% in 1986. During the same period, Japanese share jumped from 30% to 75%.<sup>162</sup> In 1988, the American market share in the one megabit DRAM market was only 5%.<sup>163</sup> In 1984, the US trade deficit of ICs against Japan amounted to USD 1.6 billion. From 1975 to 1982,

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<sup>159</sup> Mowery, David C. *op. cit.* p.110

<sup>160</sup> Irwin, Douglas A. *op. cit.* p.4

<sup>161</sup> Correa, Carlos M. *op. cit.* pp. 2, 5

<sup>162</sup> Irwin, Douglas A. *op. cit.* p.18

<sup>163</sup> Correa, Carlos M. *op. cit.* p. 2, 5

the global share of American patent in the IC field fell from 43% to 27%.<sup>164</sup>

American IC firms began organizing in response to the entrance of Japanese IC firms in the late 1970s. In 1977, American merchant producers of ICs organized the Semiconductor Industry Association (SIA)<sup>165</sup> and began to lobby for trade actions. The number of employee of SIA member firms amounted to a third of IC-related workers in California,<sup>166</sup> but workers in the industry rarely participated in the political actions due to high inter-industry mobility. The main actors to promote institutional changes were the principal capital owners of the American advanced technology firms.<sup>167</sup>

Semiconductor technology became the center of patent friction in the 1980s.<sup>168</sup> Since the late 1970s the US began to make efforts to protect IPRs, such as layout design of ICs, this led to patent disputes with Japan and, later, other East Asian NICs. Warshofsky (1989) commented that the “chip war” would determine the geopolitical

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<sup>164</sup> Economic Policy Council, *Memorandum of EPC*. 1985.

<sup>165</sup> Correa, Carlos M. op. cit. p.6

<sup>166</sup> Irwin, Douglas A. op. cit. pp. 6, 13

<sup>167</sup> Ibid. pp. 6-7

<sup>168</sup> Tokyo NIKKET Business. “Strategy for International ‘Patent’ War Discussed: Offensive and defensive Strategies,” Foreign Broadcast Information Service (FBIS) Japan Report, 1981. pp. 44-58; the same report of 1981. p.10

and economic leadership of the 21<sup>st</sup> century.<sup>169</sup>

In 1981, Japan's Nikkei newspaper reported that firms around the world were using patents strategically and many firms were trying to cope with patent disputes by strengthening patent departments within their companies. The article argued that in the 1950s and 1960s, Japan could catch up with advanced country firms because of major technologies being transferred from Europe and America. As Japanese firms caught up with advanced countries firms in the automobile, semiconductor and machinery industries, European and American firms counterattacked by using patents as "weapons."<sup>170</sup>

After Motorola requested royalty payments from Japanese IC producers, companies like IBM and Texas Instruments demanded the patent disclosure of technologies developed in one of Japan's national projects, the Super-LSI Technical Research Association. According to the patent division of Texas Instruments in Japan, Japan had to totally disclose its patent as requested since it would be deprived of the right to use the basic patent for semiconductors if it did not.<sup>171</sup>

Until the early 1980s, patent wars were regarded as disputes among a few industrializing nations, but from the mid-1980s these disputes also involved East

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<sup>169</sup> Warshofsky, Fred. *The Chip War: The battle for the world of tomorrow*. New York: Scribners, 1989. P.16

<sup>170</sup> Tokyo NIKKET Business. op. cit.,1981. Pp. 8-9

<sup>171</sup> Ibid. 1980 pp. 44-58; Ibid 1981. P.10

Asian NICs. The infringement of IPRs that had been commonplace in developing countries were beginning to be thought of as unfair practices that threatened the basis of the advanced technology industry<sup>172</sup> that formed the backbone of American economic security.<sup>173</sup> IPRs disputes were on the rise as a response to the overall economic catch-up of Japan and other East Asian NICs.

Japan began to argue for the increased responsibility of NICs in the international arena.<sup>174</sup> The international competitiveness of East Asian NICs was on the rise. This was a result of the technology transfer that occurred by way of Japanese outsourcing component assembly operations in East Asia to reduce costs.<sup>175</sup> As East Asian high technology goods, such as microprocessors and optoelectronics began to enter international market, in direct competition with the Western companies, trade

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<sup>172</sup> “Computer technologies, the leading catalyst of the Information Age, the leading wedge of productivity gains, have become our national growth industry number one. Led by thousands of new software firms, exports of computers are exploding. We’ve had a 200-fold increase in venture capital commitments, record business starts, a 60-percent increase in companies listed over-the-counter in the stock market, and, in these last 33 months, 8 million new jobs created and employment reach its highest level in history,” in his address. President’s Export Council, *Presidential Address*, 1985. p. 3

<sup>173</sup> “Economic Policy Council. op. cit. September 6, 1985

<sup>174</sup> Kim, Namdu et al. op. cit. p. 6

<sup>175</sup> “Japanese technology transfer within the region – a byproduct of Japanese efforts to remain competitive by “outsourcing” component assembly operations—is improving overall EA competitiveness in automobiles and electronics,” Directorate of Intelligence, “Near-term outlook for East Asian Competitiveness: Spotlight on the NICs” 10 August 1987, p. 9

disputes grew even more.<sup>176</sup>

<Table 7> Trends in real GNP growth in major economies

Unit : Annual Rate, %

	1970~79	1980~87	1987
America	3.5	2.5	2.9
Japan	4.9	3.7	4.2
West Germany	2.9	1.5	1.7
ROK	9.8	8.8	12.0
Taiwan	9.9	7.2	11.2
Hong Kong	8.3	6.9	13.6
Singapore	9.0	5.8	8.8

Source: IMF, *International Financial Statistics*, each volume,  
The Bank of Taiwan, *Financial Statistics*, June 1988.

<Table 8> Trends in Balance of Payments (BOP) of major economies

Unit : one hundred million USD

	1970	1980	1986	1987	1987	
					to America	to Japan
America	25.9	-255.0	-1,443.4	-1,592.1	-	-520.9
Japan	40.0	21.3	928.2	963.9	598.3	-
ROK	-9.2	-43.8	42.1	76.6	98.9	-51.5
Taiwan	-0.4	-9.7	168.6	206.6	189.9	-42.1
Hong Kong	-3.9	-25.3	0.7	0.1	65.1	-73.1
Singapore	-8.5	-42.0	-23.3	-48.8	23.4	-39.6

Sources: IMF, *International Financial Statistics*, each volume  
Singapore Ministry of Trade and Industry, *Economic Survey of Singapore*, each volume,  
Japan Tariff Association, *Survey of Trade* (in Japanese), 1988.2  
HK Census and Statistics Department, *Monthly Digest of Statistics*, each volume

<sup>176</sup> Directorate of Intelligence, op. cit. pp. 2-4

The four East Asian NICs, namely, the ROK, Taiwan, Hong Kong and Singapore, continued their rapid economic growth in the 1980s, and their real economic growth rate in 1987 amounted to 3-4 times that of industrialized countries.<sup>177</sup> From the early 1980s, America began to apply the argument for free and fair trade to East Asian NICs. Such trade policy strategy accelerated US efforts to increase access to developing countries' market and change the rules of the international trading system.<sup>178</sup>

Removal of various institutional and regulatory barriers of the developing countries became a major goal of American trade policy. The US argued that the NICs had the obligation to dismantle trade barriers, eliminate subsidies or any other form of unfair trade practice that increased 20 % between 1980 and 1984.<sup>179</sup> America demanded that Asian NICs open domestic market, especially market for agriculture and services, expand market liberalization by lowering tariff rate, reduce non-tariff barriers and subsidies for domestic industry, and protect IPRs.<sup>180</sup>

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<sup>177</sup> Kim, Namdu et al. op. cit. pp. 1-4.

<sup>178</sup> "The Admin remains unequivocally committed to free and fair trade and will continue vigorously to promote an open trading system through negotiations aimed at improving trade rules and increasing market access." Memorandum for the Economic Policy Council "Trade Policy Strategy", September 6 1985, p 5

<sup>179</sup> President's Export Council op. cit. p. 5

<sup>180</sup> Kim, Namdu et al. op. cit. p.6

### 2.3.2 Discourses on International Competitiveness and IPR

The boundary for individual liberty protected within a society is determined by the socioeconomic consensus of that society.<sup>181</sup> The unchallenged superiority of America's science, technological and industrial competitiveness since the World War II had been taken for granted for decades.<sup>182</sup> When nobody even questioned the superiority of American competitiveness, the encouragement of domestic and international spillover of IP to consolidate alliances and enrich economic interdependence within the Free World was deemed more essential than protecting individual rights for IP.

The politico-economic crisis stemming from the oil crisis and rise of Japan changed such assumptions, giving rise to a perception of the new reality, which began to translate into new sets of individual and collective practices.<sup>183</sup> After the world underwent two oil crises, the major source of international competitiveness turned from capital to technology, and securing technological superiority became

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<sup>181</sup> Song, Ha-Seong, "Hanmi Jichukjaesankwon Bunjaenggwa (Disputes over IPR between Korea and US and Korea's policy response)", *Tongsangjeongboyeongu*. 2(1).

<sup>182</sup> Bourdieu P., *Outline of a Theory Of Practice*, tr. by Richard Nice, Cambridge University Press, Cambridge, 1977, p 169

<sup>183</sup> Bourdieu P., *Outline of a Theory Of Practice*, tr. by Richard Nice, Cambridge University Press, Cambridge, 1977, p 26

directly linked to economic growth, balance of trade as well as national security. As developing countries utilized and copied Western technologies for mass production, international competitiveness of industrial nations firms began to decline.<sup>184</sup>

In order to improve an advanced country's balance of payment, intensive investment into technology must be accompanied by strengthening IPRs.<sup>185</sup> The protection of IPRs began to be closely associated with international competitiveness. The following section will examine the process through which the international competitiveness discourse and the IPR discourse were established in America.

In the process of the rise of IPR as a global trade issue, the discourse of international competitiveness played an important role. In June 1983, President Reagan established the President's Commission on Industrial Competitiveness, which consisted of 30 members from the private sector, labor, government and academia, and was tasked with investigating ways to improve competitiveness of the American private sector.<sup>186</sup> The Report of the President's Commission on Industrial Competitiveness (also called the Young Commission Report)<sup>187</sup> was published in

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<sup>184</sup> Song Ha-Seong, op. cit. pp. 133-135

<sup>185</sup> Ibid, pp 133-135

<sup>186</sup> United States Senate, *Hearing before the Committee on Finance, 99<sup>th</sup> Congress First Session*, US Government Printing Office, March 29, 1985. p. 4

<sup>187</sup> Hearing before the Committee on Finance, United States Senate, 99<sup>th</sup> Congress First Session, US

January 1985, and argued that improving international competitiveness<sup>188</sup> would contribute not only to a rising standard of living, but also to the US position as the leader of the free world and US national security. The report found that international competitiveness of American industries was in relative decline in all four indices investigated by the commission, i.e., labor productivity, growth of real wages, real return for capital, and balance of payment.<sup>189</sup>

The report observed that,

“The US share of high technology exports...declined between 1960 and 1980. While declining market shares can be discounted merely as a reflection of the natural and inevitable catch-up of foreign countries in industries once dominated by the US, the gap is being closed in advanced technology industries rather than in just maturing industries. Further, US loss of export shares may suggest loss of capacity to compete in future markets...The shift in the predominant source of US manufactures imports from Europe to Asia...Finally, increasingly rapid changes in

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Government Printing Office, March 29, 1985

<sup>188</sup> Competitiveness for a nation is defined as the degree to which it can, under free and fair market conditions, produce goods and services that meet the test of international markets while simultaneously maintaining and expanding the real income of its citizens (p 5)

<sup>189</sup> United States Senate. op. cit. p.6

technology and its diffusion have permitted newly industrialized countries (NIC's) to enter markets previously dominated by the US"<sup>190</sup>

The report proposed the following points to improve international competitiveness.

First, in order for technology to continue to be America's comparative advantage area, commercially applicable basis for science and technology should be formed, and the protection of IPRs should be strengthened.<sup>191</sup>

Although the US spends a greater share of its GNP on R&D than its international competitors, much of the R&D is for defense and space programs in which commercial application is an incidental objective...Private R&D incentives are needed to fuel advances in commercially useful new technologies...Greater protection must be given intellectual property to enhance incentives for investments in innovation.<sup>192</sup>

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<sup>190</sup> Ibid. pp. 8-9

<sup>191</sup> Ibid., pp 8-10

<sup>192</sup> Ibid., pp 10, 11

The report further argued that creating an open and fair trade environment was important for the growth of the American economy. In order to achieve this, America's domestic law and policies should be changed as follows.

- 1) The US's domestic law should be more responsive to the legitimate complaints of domestic industries, and to the unfair trade practices that distorts international trade.
- 2) American antitrust law should be adjusted to better reflect the new reality of the market.
- 3) America's export control is becoming more of an obstacle to fair trade, and export promotion should receive more support.
- 4) GATT system needs to be modernized.<sup>193</sup>

John A. Young, the Committee chair of the Young Commission, and the president of the Hewlett Packard commented that "perhaps what we need is another Sputnik; except in this case we are suggesting that perhaps the Japanese ought to launch a Toyota into space." He explained that the competitive challenge America faces has

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<sup>193</sup> Ibid, pp 16, 17

“consequences as grave as the threat posed by Sputnik a quarter of a century ago.”<sup>194</sup>

The Young Commission Report influenced the Reagan Administration’s macroeconomic policies<sup>195</sup> and the reorientation of American foreign policy toward increasing international competitiveness of American industries.

There were concerns for the serious long-term consequences of the loss of international competitiveness as well. The National Security Decision Directive (NSDD) 189, “National Policy on the Transfer of Scientific, Technical and Engineering information,” signed by President Reagan signed in September 1985, stated that American leadership in science and technology is an “essential element” in our “economic and physical security.”<sup>196</sup>

It was also argued that technologies that were not state-of-the-art could be used to enhance the military capability of the Soviet Union. Under- Secretary of State William Schneider, for example, pointed out that IBM 360 mainframes, which might be “obsolete or obsolescent by American standards” made a “very big difference to

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<sup>194</sup> Ibid. p 28, “Statement by John A. Young, Chairman of Commission, President and Chief Executive Officer, Hewlett-Packard Co., Palo Alto, CA.

<sup>195</sup> Wang, Yunjong and Na Suyeop. op. cit. p.17

<sup>196</sup> The White House (1985, Sept 21). National Security Decision Directive 189: National Policy on the Transfer of Scientific, Technical and Engineering Information, Washington DC. Typescript, two pages , in Sumner Benson, “How National Security Considerations Affect Technology Transfer,” *The Journal of Technology Transfer*, Fall 1988, Volume 13, Issue 1, p 34

the performance of their military forces.”<sup>197</sup>

### 2.3.2.1 Theories of IPRs

Theoretical discussion of IPRs, in the field of economics and trade law, began to be accelerated since the mid-1980s. The economist Paul Romer theorized the relationship between the economics of idea and economic growth since the mid-1980s.<sup>198</sup>

Romer formulated an aggregate growth model that treated knowledge as the basic form of capital. He assumed that i) new knowledge is “the product of a research technology that exhibits diminishing returns,” in the sense that doubling the inputs do not result in the doubling of output; ii) investment in knowledge exhibits positive external effect of expanding the production possibility of others who did not produce

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<sup>197</sup> US Congress, Senate, Subcommittee on International Finance and Monetary Policy of the Committee on Banking, Housing, and Urban Affairs (1983). Hearings on reauthorization of the Export Administration Act (98th Congress, 1st Session) Washington DC: Gov Printing Office, p 186, Sumner Benson, “How National Security Considerations Affect Technology Transfer,” *The Journal of Technology Transfer*, Fall 1988, Volume 13, Issue 1, p 35

<sup>198</sup> Charles I. Jones, Introduction to Economic Growth, second Edition, W.W. Norton & Company, 2002, p 80

knowledge themselves, since “knowledge cannot be perfectly patented or kept secret.”; and iii) knowledge “may have an increasing marginal product,” i.e., the production of its output exhibits increasing returns,<sup>199</sup> and as a result, market for knowledge is often characterized by imperfect competition.<sup>200</sup>

Abstract knowledge is both non-rivalrous but at least partially excludable.<sup>201202</sup> Private goods are usually rivalrous and excludable, and public goods are non-rivalrous and non-excludable.<sup>203</sup> In the 1980s, there were discussions about the excludability of abstract knowledge, and the ways by which knowledge can be made excludable. Copyright and patent systems establishes certain degree of excludability to knowledge and ideas, by granting the inventors who hold such intellectual property “rights” the right to charge for the use of their ideas.<sup>204</sup>

By the 1980s, it had been widely known that knowledge created by government-

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<sup>199</sup> Romer, Paul M. “Increasing Returns and Long-Run Growth,” *The Journal of Political Economy*, 94(5). pp 1003-1004

<sup>200</sup> Charles I. Jones, *Introduction to Economic Growth*, second Edition, W.W. Norton & Company, 2002, p 80

<sup>201</sup> Paul M. Romer, “Increasing Returns and New Developments in the Theory of Growth,” NBER Working Paper Series, no. 3098, National Bureau of Economic Research, September 1989, p 23

<sup>202</sup> *Ibid.* pp 22-23

<sup>203</sup> Paul M. Romer, “Increasing Returns and New Developments in the Theory of Growth,” NBER Working Paper Series, no. 3098, National Bureau of Economic Research, September 1989, p 22

<sup>204</sup> Charles I. Jones, *Introduction to Economic Growth*, second Edition, W.W. Norton & Company, 2002, p 82

sponsored and private R&D can have huge positive externality, with the benefits from knowledge spilling over to individuals and companies that did not directly participate in its production. For example, the magnetic disc drive developed first by IBM, or the recombinant DNA technology that Genetech researchers first developed to produce human insulin, were subsequently learned and exploited by hundreds of other firms.<sup>205</sup>

Due to its incomplete excludability, knowledge tends to be under-produced if left alone to the private market. Theoretical discussion of knowledge in the 1980s led to the argument that IPRs should be strengthened to overcome the non-excludability and under-production of knowledge,<sup>206</sup> on the one hand, and that government-initiated basic and military R&D should be encouraged to bring about better welfare outcome for the society.<sup>207</sup>

However, even if certain degree of exclusivity is established by the legal system, knowledge would still be non-rivalrous. In other words, knowledge, as a non-rival good, does has no opportunity cost,<sup>208</sup> and once it is created using fixed cost of

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<sup>205</sup> Paul M. Romer, "Increasing Returns and New Developments in the Theory of Growth," NBER Working Paper Series, no. 3098, National Bureau of Economic Research, September 1989, p 23

<sup>206</sup> Ibid, p 23

<sup>207</sup> Charles I. Jones, *op.cit.* p 81

<sup>208</sup> Paul M. Romer, *op.cit.* pp 23-24

production, it can be produced subsequently with zero marginal cost.<sup>209</sup>

Since legal protection of IPRs gives the right-holders a form of monopoly rent, it provides incentive for innovation, but may entail consumer welfare losses in the short run. Also, it may inhibit diffusion of technology since imitation and adaptation activities by other firms are discouraged.<sup>210</sup> In other words, strong protection of IPRs will result in monopoly distortions and weak protection will lead to under-provision of innovation.<sup>211</sup>

These two aspects should be taken into account when deciding the period of patent protection. William Nordhaus (1969)<sup>212</sup> showed that 17 years can be regarded as the optimal life of a patent, attaining about 90 % of the maximum consumer surplus. Although most advanced countries maintain 17 years of patent terms,<sup>213</sup> the level of IPR protection is basically an issue of domestic policy.

Trebilcock (2013) argued that, from the perspective of trade policy, a country's

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<sup>209</sup> Charles I. Jones, op.cit. p 82

<sup>210</sup> Michael Trebilcock, Robert Howse and Antonia Elliason, *The Regulation of International Trade* (4<sup>th</sup> ed), Routledge, 2013. p 514

<sup>211</sup> Paul M. Romer, "When Should We Use Intellectual Property Rights?" 2002, *American Economic Review*, 92(2): 213-216.

<sup>212</sup> William Nordhaus, *Invention, Growth, and Welfare*, Cambridge, Mass: MIT Press, 1969

<sup>213</sup> Hal R. Varian, *Intermediate Microeconomics: A Modern Approach* (5<sup>th</sup> ed.), WWNorton & Company, 1999, pp 424-425

level of intellectual property protection will be related to “whether its comparative advantage resides in innovation, or imitation and adaptation of innovations made elsewhere, and the relative weight it gives to the interests of consumer (including its own producers who are consumers of inputs), imitators and innovators.”<sup>214</sup>

In general, advanced countries have comparative advantage in innovation, and developing countries tend to adopt or imitate foreign innovation. Such differences in the attitudes toward IPRs were resulted visible conflicts of positions between the North and South during the IPR negotiation in the GATT Uruguay Round.

Developed countries emphasized “fairness or compensatory justice concerns,” defining use of inventions or creative works of others without their permission as piracy or theft. On the other hand, developing countries argued that the relationship between protection of IPRs and domestic and global economic welfare should be taken into account when deciding the level of protection of IPRs.<sup>215</sup>

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<sup>214</sup> Michael Trebilcock, Robert Howse and Antonia Elliason, *The Regulation of International Trade* (4<sup>th</sup> ed), Routledge, 2013. P 515

<sup>215</sup> Michael Trebilcock, Robert Howse and Antonia Elliason, *The Regulation of International Trade* (4<sup>th</sup> ed), Routledge, 2013. P 515

### 2.3.3 Strengthening the IPRs

In practice, American response to the new reality of international competition was three-fold.

First, IPRs could be protected on a case by case basis through patent conflicts among firms. Patent disputes increased dramatically during this period and the royalty paid by developing countries began to mount since the late 1970s.

Second, protection of IPRs increased in America's domestic legal system through legislative reforms. IPRs were relatively loosely protected from 19<sup>th</sup> century to about 1982, but domestic institutions regarding IPRs transformed in a short time.<sup>216</sup>

Until the early 1980s, patent rights were subordinated to the dominant anti-trust policy. The economic value of IPRs such as patents received less attention relative to the public policy in the interest of promoting free competition. Since patent infringement could be resolved with minimal payment of penalty, patent was not considered as a serious factor in making R&D decisions.<sup>217</sup>

Due to such weak enforcement of patent rights, American firms had little

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<sup>216</sup> Sell, Susan K. *op.cit.* pp 12-13

<sup>217</sup> *Ibid*, p 66

incentive to commercialize new technologies, and it became a stumbling block for the development of consumer electronics. As a result, although American firms first developed the high technologies, it was Japan that successfully commercialized them, and increased market share since around the 1960s.<sup>218</sup>

The revised Patent and Trademark Law (P.L. 96-517, in short, Bayh-Dole Act) that took effect on 1 July 1981, and the 1984 revision of P.L. 98-620 were the institutional reform taken to better cope with the new competitive environment. They aimed to facilitate the transfer of innovations made in the university laboratories to the civilian sectors.

The effect of patent policies of federal government on the commercialization of federally funded inventions and on the competitiveness of the industry had been examined since October 1963 when President Kennedy stipulated the “Presidential Memorandum and Statement of Government Policy.” However, before the enactment of the Bayh-Dole Act, it was customary for the IPRs arising from federally funded researches to be under strict control of federal agencies. As late as in 1980, the proportion of the patents licensed for commercial application against the 28,000 patents owned by the federal government was only 5%.<sup>219</sup> With the

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<sup>218</sup> Ibid., p 67

<sup>219</sup> Council on Governmental Relations (COGR), “The Bayh-Dole Act: A Guide To The Law And Implementing Regulations,” 1999

passage of the Bayh-Dole Act, commercial application of R&Ds was promoted.

A special act to protect American semiconductor industry was also enacted. The Semiconductor Chips Protection Act (SCPA) enacted in November 1984 was a special act that had been passed after five years of preparation in response to the requests by American semiconductor industries complaining about the increasing chip piracy by the Japanese.<sup>220</sup>

According to the 1984 SCPA, “mask work protection exists for original mask works fixed in a semiconductor chip product by, or under the authority of the owner of the mask work, which have been registered or commercially exploited anywhere in the world. The owner has the exclusive right to do directly and to authorize others to: (1) reproduce the mask work by optical, electronic, or other means; (2) import or distribute a semiconductor chip product in which the mask work is embodied; and (3) induce or knowingly cause another person to take either of these actions.”<sup>221</sup>

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<sup>220</sup> Correa, Carlos M. op. cit. p 2

<sup>221</sup> The following definitions apply:

Semiconductor chip product: The final or intermediate form of any product, having two or more layers of metallic, insulating, or semiconductor material, deposited or otherwise placed on, or etched away or otherwise removed from, a piece of semiconductor material in accordance with a predetermined pattern; and intended to perform electronic circuitry functions.

Mask work: A series of related images, however fixed or encoded, having or representing the predetermined three-dimensional pattern of metallic, insulating, or semiconductor material present or removed from the layers of a semiconductor chip product, and in which series the relation of the images to one another is that each image has the pattern of the surface of one form of the

The attitude of American judiciary changed significantly around 1980. A series of ruling in favor of protecting the IPR right holders ushered in an era of pro-patent legal environment. The 1980 Supreme Court ruling of Dawson Chem. Co v. Rohm & Haas Co. case (448 US 176) was the first for the US judiciary to recognize the value of IPR protection as being as important as the value of free competition, putting an end to the era of anti-patent. Thereafter, IPRs were regarded as important for the economic growth and competitiveness.<sup>222</sup>

In April 1982, the Court of Appeals for the Federal Circuit (CAFC) was established, auguring a profound change in American IPR policies.<sup>223</sup> With the founding of the CAFC, the technological and legal standard for discerning patent infringement was established, and the royalties paid to the patent holders increased significantly, as did the penalty for the infringer of patents.

CAFC's 1986 ruling of the Polaroid Corp v. Eastman Kodak case symbolized the pro-patent rulings that showed how infringement of IPRs could result in penalties of astronomic scale. Polaroid argued that Kodak infringed its patent rights and the

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semiconductor chip product. Violations of rights in mask works are referred to as infringement or piracy. (Foreign Protection of Intellectual Property Rights and the Effect on US Industry and Trade: Report to the United States Trade Representative, Investigation No. 332-245, Under Section 332(g) of the Tariff Act of 1930 USITC PUBLICATION 2065, 1988.2, p I-5)

<sup>222</sup> Sell, Susan K. op.cit. p 67

<sup>223</sup> Ibid. p 67

CAFC ordered Kodak to pay \$1 billion as reparation.<sup>224</sup> The ruling became a turning point when the perception about the IPR changed significantly. It became clear that IPR could be turned directly into a massive economic benefit on the part of the rights holder.

The revision of the US Trade Act that took place in 1984 and 1988 was part of the process of reorganizing the domestic legal infrastructure to promote the international protection of IPRs.<sup>225</sup> Section 301 of the 1974 Trade Law became the legal basis for trade retaliation by the American government against foreign trade practices, and was often used as a means of opening up foreign markets through bilateral negotiations.<sup>226</sup> Until Special 301 was introduced in 1988, IPRs were regulated by Section 301 of the 1974 Trade Act.<sup>227</sup>

Section 301 was revised in the 1979 Trade Agreement Act, which was revised to implement the international agreement reached in the Tokyo Round. The section's major contents include the expansion of the president's authority to pursue American rights in international trade agreements, and the setting of a time limit to Section 301 investigations. According to the revised Section 301, the US president may use

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<sup>224</sup> Ibid. pp. 69, 70

<sup>225</sup> Sell, Susan K. op.cit. pp 12-13

<sup>226</sup> Wang, Yunjong and Suyeop Na. op.cit. \p 36

<sup>227</sup> Ibid. p 47

Section 301 to respond to the unfair and discriminatory practices and policies of foreign governments at odds with the commercial interests of the US.<sup>228</sup>

The 1984 Trade and Tariff Act granted the US president the right to take retaliatory trade action against foreign governments that provide inadequate protection for IPRs, also regarded as “unreasonable” practices. Also, the post of the US Trade Representative (USTR) was newly established to protect US IPRs in the global economy.<sup>229</sup>

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<sup>228</sup> Reciprocal Trade and Investment Act of 1982, June 30 (Legislative day, June 8), 1982, Senate, 97<sup>th</sup> Congress 2<sup>nd</sup> Session, Report No. 97-483, p 4

<sup>229</sup> Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, 1998, Brookings Institution Press, Washington D.C., pp 72, 73

### **3. From ROK-US Textile Agreement to ROK-US IPR Agreement**

This section will examine the changing trade disputes between Korea and the US, Korea's technological development, and the domestic and international structure of ROK-US IPR negotiations.

#### **3.1 Détente and the ROK-US Textile Dispute (1969-1971)**

As Korean exports grew both in volume and diversity, its major export items became the target for various trade disputes, such as anti-dumping, countervailing, and safeguard measures, especially since the 1980s. During this period, Korean government tended to avoid "legal confrontation in the multilateral forum," and preferred to resolve these disputes through bilateral diplomatic settlements."<sup>230</sup>

The history of trade disputes between the US and the ROK during the Cold War

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<sup>230</sup> Ahn, Dukgeun. "Korea in the GATT/WTO Dispute Settlement System: Legal battle for economic development," *Journal of International Economic Law* 6(3), p. 597-633

dates back to the early détente period, when the ROK-US Textile Agreement<sup>231</sup> was concluded in 1971 after two and a half years of a much publicized negotiation process. Right after the inauguration of the Nixon administration, the US initiated four sets of bilateral textile negotiations with East Asian countries, namely, Japan, Hong Kong, Singapore and the ROK. These negotiations were aimed at concluding Voluntary Export Restraints (VER) agreements limiting their textile exports to the US, which had grown drastically as a consequence of the policies of previous US administrations promoting such exports.<sup>232</sup>

The textile industry led the economic growth of Korea in its pursuit of export-oriented industrialization, and the ratio of textile exports to total South Korean exports amounted to almost 50% by the late 1960s.<sup>233</sup> Korea strongly requested special consideration to be exempt from textile restrictions. Korea's government argued that any sort of restriction on textiles, so vital for the growth of its economy, would create a serious economic threat to the country, which already carried a very heavy military burden due to the threat from North Korea.<sup>234</sup>

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<sup>231</sup> ROK-US Agreement on Trade in Man-made Fiber and Woolen Textiles 1971 (Treaty no. 414)

<sup>232</sup> President Kennedy's "Seven-point Program of Assistance to the Textile Industry," announced in May 1961, aimed to expand the textile exports of developing countries to the US (Pak T'aegyun (Park Tae Gyun), "1956-1964 yŏn Han'guk kyŏngje kaebal kyehoek ūi sŏngnip kwajŏng - kyŏngje kaeballon ūi hwaksan kwa Miguk ūi taehan chŏngch'aek pyŏnhwa rŭl chungsim ūro" [Formation of economic development plans in Korea, 1956-1964] (PhD diss., Seoul National University, 2000), 200).

<sup>233</sup> Source: "Contents and Impact of ROK-US Textile Agreement", *Discussion Paper 31/50*, The 1<sup>st</sup> Survey Section, Bank of Korea, October 1971, p 9

<sup>234</sup> "Migukŭn chayu t'ongsangjuŭie ch'ŏlhara" [United States should be consistent in free-trade!],

The US proposal to discuss restrictions on Korean textile exports to the US was made amid various pressing bilateral issues, such as the security crisis on the Korean peninsula in the wake of the Pueblo Incident, the announcement of the Nixon doctrine and subsequent discussion of reduction of US forces stationed in Korea, as well as disengagement from the Vietnam War. During the San Francisco Summit on August 1969, President Park asked President Nixon directly whether South Korea could be made an exception in order for the country to achieve economic independence. In reply, President Nixon referred to the issue as “a difficult problem” and promised to deal with it “discreetly.”<sup>235</sup>

Textile negotiations began in October 1969 and official and unofficial negotiations proceeded for two and a half years. The difference in positions over quota terms itself was quite large, and agreement was reached on October 16, 1971, only after the US notified Korea on September 23, 1971, that it would unilaterally impose restrictions on South Korean textile products if Korea did not accept the US position<sup>236</sup> on October 16, 1971.<sup>237</sup> Textile products exported to the US took up about half of Korea’s total exports, with this amount growing approximately 60%

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*Tonga ilbo*, May 13, 1969.

<sup>235</sup> “San Francisco, California, August 21, 1969, 4:15–6:15 p.m.,” *FRUS, 1969–1976, Volume XIX, Part 1, Korea, 1969–1972* (Washington DC: US Government Printing Office, 2010), No 35

<sup>236</sup> He also decided that if a voluntary textile agreement was not reached by October 15, he would impose a settlement under the Emergency Banking Act Amendment of the Trading with the Enemy Act, F249 (“Editorial Note,” *FRUS, Vol. IV*, No 249)

<sup>237</sup> *Chosŏn ilbo*, July 17, 1971.

annually in the late 1960s.<sup>238</sup> The share of newly restricted items regulated by the Textile Agreement was 89.5%<sup>239240</sup>

The ultimatum was issued in the context of a series of measures taken by President Nixon that would mark significant turning points in the global political economy. In July 1971, Nixon announced his plan to visit China, which marked the beginning of US-China rapprochement. On August 15, 1971, during the New Economic Policy discussions taking place at Camp David, President Nixon suspended dollar to gold convertibility, effectively putting an end to the Bretton Woods system.<sup>241</sup>

The ROK-US Textile Agreement generally conforms to two-level game model. The US negotiation position was consistently backed by the domestic political process, especially those within Congress, which the negotiators could invoke. As the negotiation proceeded, for example, a number of quota legislations restricting textile imports were submitted to Congress. These bills included Mills' Bill, proposed on March 16, 1970, which on top of not providing special consideration for Korea, would have reduce Korea's planned exports to the US by some USD 100

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<sup>238</sup> Yoo, Jung-ho. *The Industrial Policy of 1970s and the Evolution of the Manufacturing Sector in Korea*. Seoul: Korea Development Institute, 1990.

<sup>239</sup> Growth rate of manmade fiber was restricted at 7.5% annually, and that for woolen material was 1.0% annually. ("Contents and Impact of ROK-US Textile Agreement," *Discussion Paper 31/50*, Han'guk ūnhaeng (Bank of Korea), October 1971 pp 3-4)

<sup>240</sup> "Somyu sanōp: chōnhwan'gi e sōn chudo sanōp ūi onūl kwa naeil 1" [Textile industry: today and tomorrow of major industries in transition 1], *Maeil kyōngje sinmun*, December 11, 1971.

<sup>241</sup> "Editorial Note," *FRUS, Vol. IV*, No 249

million.<sup>242</sup> Moreover, when the US government issued the ultimatum, it invoked the growing voices within Congress and the executive branch that expressed the need for emergency measures to protect “national security.”<sup>243</sup>

The Korean government was keen to take domestic repercussions into full account in the negotiation process, and the outcomes and position changes for every steps of negotiation, as well as the responses from industry and civil society, were reported in the country’s major newspapers on a daily basis.

In addition, the Korean media frequently reported on the activities of a “nationwide committee” organized to block the US restriction of Korean textile exports, whose membership consisted of the Korean Chamber of Commerce, the National Economic Association, the Korea International Trade Association and major business associations and exporters. The Committee collectively submitted a petition to US Ambassadors Kennedy and Porter.<sup>244</sup>

Although Korea’s domestic level fell short of drastically changing the negotiated outcome summarized in the Textile Agreement, it can be argued that it did have some effect on Korea’s bargaining position in bringing about a better outcome. The US promised that imports of Korean textiles would be exempted from a ten percent

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<sup>242</sup> “100 million dollar textile export inevitable,” *Maeil kyōngje sinmun*, April 21, 1970.

<sup>243</sup> “Editorial Note,” *FRUS, Vol. IV*, No 249

<sup>244</sup> “Taech’aegwi sōmyuryu suip kyuje chōnmyōn pandae: Mi K’eneji t’ūksa mada kanggyōng pangch’im kosu” [Operation headquarters fully protests the regulations on textile imports: strong policy line will be kept, meeting with the President’s Special Envoy Kennedy], *Tonga ilbo*, June 14, 1971.

surcharge; meanwhile, textiles that had already been shipped during the period from April 1 to September 30 would be removed from quota count; lastly, Korea would be accorded most favored nation status.<sup>245</sup>

Compromises were made in areas other than the textile sector as well. Before the Agreement was reached, the US president had promised to provide supplemental economic assistance that would “fully cushion” the impact of the US textile proposal on Korea’s Third Five-Year Plan.<sup>246</sup> According to Korea's Economic Planning Board, D. Kennedy and Yi Naksun had exchanged memoranda on the expanded economic aid to Korea. Korean officials said that the economic aid for FY 1972 would be slightly (about USD 30 - 40 million) greater than the USD 160 million aid in FY 1971, which consisted of development aid and agricultural aid based on PL 480.<sup>247</sup>

### **3.2 Korea’s Technological Development and IPR**

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<sup>245</sup> “Letter From President Nixon to Korean President Park, Washington, July 16, 1971,” *FRUS, 1969–1976, Vol. XIX, Part I*, No 100

<sup>246</sup> “Letter From President Nixon to Korean President Park, Washington, July 16, 1971,” *FRUS, 1969–1976, Vol. XIX, Part I*, No 100

<sup>247</sup> 1971.10.18 Seoul Daily

The fact that an issue as novel and high-tech as the “intellectual property” became one of the most salient issues of ROK-US relations in the 1980s, while it was the labor-intensive “textile” products that dominated the ROK-US trade agenda only a decade or so ago, attests to the rapid shift in the global economic and technological environment and Korea’s place in it.

The Korean economy expanded rapidly during the 1960s and 1970s. From 1962 to 1979, Korea’s annual growth rate for industrial production was 20%, and real GNP grew 10% annually. During the same period, per capita GNP jumped from less than USD 100 to USD 1,550.<sup>248</sup>

### 3.2.1 Nixon’s Doctrine and Korea’s HCI Industrialization

Korea’s economic standing had undergone considerable transformation through the rapid industrialization period of the 1970s. In the 1970s, Korean government promoted heavy and chemical industries (HCI) and fostered science and technology under strong government initiative to increase the self-reliance of Korean economy

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<sup>248</sup> Directorate of Intelligence, “South Korea: Economic Decision Making in Transition – An intelligence Assessment,” January 1983, p 1

and defense capabilities. Investment in heavy and chemical industries and the government's efforts to establish a significant defense industry also contributed to Korea's technological development.

Changes in America's Asia policy summarized in Nixon Doctrine accelerated Korean HCI industrialization in several respects.

First, the partial withdrawal of US Forces stationed in Korea that was implemented as a result of the Nixon Doctrine was met with strong protest by the Park Chung Hee administration, which strongly argued for the establishment of Korea's domestic defense industry. The Park government had concerns about security in the face of decreasing American military commitment following the Nixon Doctrine.<sup>249</sup>

While strongly protesting the withdrawal of US Forces, South Korea used this occasion to push for the establishment of its own military industry, and transfer of military technology, which the American government allowed in a limited way from 1970. At the same time the Park government built heavy industries, such as steel, to build to serve as a foundation for military industries.<sup>250</sup>

Second, in the face of expected reduction of America's economic and military commitment in East Asia, bilateral cooperation between Korea and Japan increased.

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<sup>249</sup> Christian F. Ostermann, *The Rise and Fall of Détente*, p 9

<sup>250</sup> Tae Gyun Park, "The roles of the United States," pp. 221-225

The textile agreements that the US concluded with both Japan and Korea activated the “quasi-alliance” mechanism between Korea and Japan. According to Victor Cha (1999)’s quasi-alliance model, the change in America’s East Asia policy around 1970 stipulated in the Nixon Doctrine announced the “Asianization of Asian issues,” symmetrically increased the “fear of abandonment” in Korea and Japan, and led to increased bilateral cooperation, especially in the HCI sector.

The manner in which the negotiations and conclusions of the bilateral textile agreements were conducted symbolized the changing relationship between the US and its East Asian allies. More specifically, the bilateral textile agreements signified the reduction in the US commitment to support the Asian NICs, in addition to its weakened security commitment as embodied in the Nixon Doctrine. As the quasi-alliance model predicted, such symmetrical intensification of the fear of abandonment perceived by the policymakers in South Korea and Japan led to increased cooperation between the “quasi-allies.”<sup>251</sup>

In Korea, this shift in the global political, military and economic landscapes aroused considerable concern in the within the ROK leadership regarding its relative position in this new world order.<sup>252</sup> In Japan as well, the 1970 textile agreement

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<sup>251</sup> “Quasi-allies” is defined as the relationship between two states that remain non-allied but share a third party as a common ally. See Victor Cha, *Alignment despite antagonism*, 36.

<sup>252</sup> In April 1971, the US announced the reduction in American armed forces in South Korea without having consulted with the Korean government. As early as November 24, 1969, a document from Nixon to Kissinger stated, “the time has come to reduce the US army in Korea.” *FRUS, Vol. XIX, Part I*, 117.

resulted in a drastic reduction in the export competitiveness of Japanese textiles. Japan also lost the biggest market for its textile products. In the face of a long-term barrier established against its major export market, Japanese textile companies sought ways out by rapidly increasing external foreign direct investment (FDI), first to South Korea and Taiwan, and later to Southeast Asia.<sup>253</sup>

Overall, US-Japan relations were shifting, and thus vulnerable, as the textile issue made clear. In the 1950s and 1960s Japan's national security and economy were critically dependent on the US,<sup>254</sup> but from the mid-1960s, economic rivalries began to materialize, as Japan ascended to the heights as a global economic power, becoming the third largest economy in 1964, behind only the United States and the Soviet Union. Consequently, pressure on Japan to provide economic aid to developing countries grew, as suggested by the Pearson and Patterson Reports of the Nixon administration in the early 1970s.

Since the bilateral textile agreements were concluded in Korea and Japan alike, the degree of disengagement would have been symmetric in both countries, at least conceptually. In line with this shared concern over America's economic disengagement, Korea-Japan relations changed, and bilateral economic cooperation

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<sup>253</sup> Fukuoka Masaaki, "Kiŏp ũi haeoe chinch'ul kwa muyŏk kujo ũi pyŏnhwa."

<sup>254</sup> As manifest in the conclusion of the Treaty of Mutual Cooperation and Security between the United States and Japan of 1951 and its revision in 1960, US support for Japanese reconstruction and economic growth via the imports of Japanese goods, as well as the encouragement of Japan's incorporation into international economic regimes. See I.M. Destler et al., *Nichibeī sen'i funshō*.

was actively promoted. As the textile negotiations proceeded, economic cooperation between South Korea and Japan accelerated, especially in the production and investment of the HCI sector.

### 3.2.2 Accumulation of Korean IP and IPR system

With national security receiving the highest priority, Korea rapidly accumulated IPs rapidly in the 1970s propelled by state-led investment in R&D for defense-related research. Korean firms began to intensify technological development throughout the 1960s and 1970s.

As early as in the 1950s, after the Korean War, technical aid from the US, most notably the Minnesota Plan, cultivated “scholars and technical specialists who would lead the reconstruction of the nation,”<sup>255</sup> providing teaching facilities at engineering and technical schools and training for personnel abroad.<sup>256</sup> From 1954 and 1976, the US provided technological aid to Korea.<sup>257</sup> During this 22 year period, 159 projects and USD 126,239,250 was provided to Korean projects, and 3,956

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<sup>255</sup> Tae Gyun Park, “The roles of the United States,” p. 215

<sup>256</sup> Organization for Economic Co-operation and Development, *Reviews of National Science and Technology Policy: Republic of Korea* (1996), p. 19

<sup>257</sup> Its legal grounds were ROK-US Economy and Technology Aid Pact enacted since February 28, 1961 and ROK-US Science and Technology Cooperation Pact, enacted since November 22, 1976..

Korean personnel received technical training. After 1976, civilian technological cooperation dominated bilateral relations.<sup>258259</sup>

The Korean government actively invited scientists and technicians trained overseas. By 1985, a total of 1796 Korean scientists and technicians working abroad had been repatriated with government support.<sup>260</sup> They then assumed important decision making positions in Korean institutions.

By the mid-1980s, Korea reached a technological turning point characterized by structural changes in technological capacity, such as in-house R&D capacity and an increase in the number of US patent applications.<sup>261</sup> The private sector, especially the *chaebols* (財閥), or large conglomerates, played a major role in Korea's technological innovations and were well connected to the international network of scientific and technological innovation.

It was this technological catching-up that put Korea into a more sustained path of

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<sup>258</sup> Ministry of Science and Technology, "Discussion Material of Economic Division for ROK-US Policy Council April, Feb. and March 1979 and May 1979. General Official Document Files 9243/12852, February, 1979. pp 55-56

<sup>259</sup> Ministry of Energy and Resources, *Ibid.* March 1979. pp 55-56

<sup>260</sup> Asian and Pacific Centre for Transfer of Technology *Technology Policies and Planning Republic of Korea*, p. 69

<sup>261</sup> Lee, Keun, *Schumpeterian Analysis of Economic Catch-up*. (Cambridge: Cambridge University Press, 2013) Kindle Edition. Location 310, 571

economic growth, reducing the ratio of net foreign debt to GNP from 40% in 1981 to 4% in 1991.<sup>262</sup> Throughout the development of Korean science and technology, connection to international scientific and technological centers, both at personnel and institutional levels, were crucial. These connections added to Korea's capability to generate endogenous technological development, as well as to adopt technologies from frontiers of global technology development. For example, the production of internationally competitive consumer electronics and semi-conductor products required "a combination of access to foreign knowledge bases and learning opportunities (e.g. OEMs, FDIIs, licensing, technology imports, and on-site training, among others) with firms' own in-house R&D efforts."<sup>263</sup>

By 1979, American FDI in Korea totaled USD 200 million, which was a third of the FDI the Japanese had provided. The Korean government wanted the US private sector to increase investment in Korea, since its 4<sup>th</sup> Five Year Plan launched in 1977 emphasized the development of technology-intensive industries, such as shipbuilding, machinery, electronics and petrochemicals.<sup>264</sup> The Korean government promoted the introduction of advanced industrial technologies to improve

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<sup>262</sup> Directorate of Intelligence, "Near-term outlook for East Asian Competitiveness: Spotlight on the NICs," (10 August 1987), p 12

<sup>263</sup> Lee, Keun, *Schumpeterian Analysis*, Kindle Locations 2583-2585.

<sup>264</sup> 2nd Department of Trade and Commerce, Ministry of Foreign Affairs, "Delegation for Trade and Commerce visits the US," General Official Document File 1371/14969, 1980, pp 21, 22

international competitiveness of industries and to build a highly industrialized society in the 1980s..<sup>265</sup>

In particular, the Korean government strongly wanted to increase cooperation with the US in the field of science and technology.<sup>266</sup> From the mid-1970s to mid-1980s, Korean firms invested heavily in technology-intensive industries, and focused on learning foreign technology. In order to increase technology import, Korea significantly relaxed the criteria for technology import.<sup>267</sup>

According to a US government analysis in 1984, Korea was placing high priority in attracting FDI in the advanced technology sector. With the revision of Foreign Capital Inducement Law (FCIL) in 1 July 1984, most obstacles to FDI that had existed since 1962 had been removed. The proportion of industry in which FDI was allowed went up from 44 percent to 67 percent, and FDI became possible in magnetic storage media, steam and gas turbines, and industrial robotics, which had been under government control.<sup>268</sup>

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<sup>265</sup> Bureau of International Economy, Ministry of International Economy, "1979 Material for Presidential Meeting of Official Residence in USA," Working Paper 79-48, 15-17 Feb. 1979.

<sup>266</sup> 2nd Department of Trade and Commerce. *op.cit.* pp. 21, 22

<sup>267</sup> Lee, Keun, "Intellectual Property and Economic Development in the Republic of Korea: An Introduction," *The Economics of Intellectual Property in the Republic of Korea*, WIPO, WIPO Publication No. 1031(E), p 13

<sup>268</sup> Directorate of Intelligence, "South Korea: Foreign Investment Liberalization," 5 September 1984,

In theory, FDI was possible in the semiconductor and computer industries, which had been regarded as infant industries in 1984, but the importation of advanced technology capital goods and processes was impossible in reality if domestic substitutes were available.<sup>269</sup>

At the time, Korea was receiving attention as the NIC that was most likely to achieve significant technological leap-frogging from the mid-1980s to mid-1990s in microelectronics, computers, and sophisticated telecommunications equipment. Already, Korean firms were able to produce IC memory chips, and Korea had become the 10th largest producer of electronic goods in 1985. Korea would be a global supplier of industrial electronics product between 1987 and 1990, and would market 256K DRAM in the summer of 1985.<sup>270</sup>

Korea's 1982-1986 Electronics Industrial Development Plan was aimed at quadrupling the number of scientists and engineers to about 80,000 in 1991 "through investment in equipment for primary and secondary schools, an upgrade in teaching skills, and support for academic research. The Korean government also pursued "a policy of inducing Korean scientists in the US to return permanently to Korea, attracting about 200 scientists annually from a pool of about 5,000 Korean scientists

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pp 1-2

<sup>269</sup> Ibid, p 3

<sup>270</sup> Department of State Bureau of Intelligence and Research: Assessments and Research, "South Korea: Economy in Transition," Report 1092-AR, May 29, 1985, p 2

in the US.<sup>271</sup>

Technological capability of Korea's domestic inventors was very low from the 1960s to the mid-1970s. During this period, foreign application for Korean IPRs remained very low, most of Korean patents were filed by Korean inventors, and the bulk of such patents were petit (utility) patents, rather than regular (invention) patents.<sup>272</sup>

From the mid-1970s to the mid-1980s, foreign inventors dominated IPR applications and registration in Korea, due to the growth of technology market in Korea. During this period, 70% of the IPRs in Korea were owned by foreigners.<sup>273</sup>

It was from the mid-1980s to the mid-1990s that Korean inventors, especially big businesses began the rapid catch-up of technological capabilities. Indigenous R & D capabilities of Korean firms grew, following the establishment of in-house R & D centers by the big businesses to overcome the limitation of licensing and embodied technology transfer. Such moves were encouraged by the Korean government, who provided various institutional supports, such as easing the conditions of approval for

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<sup>271</sup> Ibid., p 2

<sup>272</sup> Lee, Keun and Yee Kyoung Kim, Chapter 5. IPR and Technological Catch-Up in Korea, in Hiroyuki Odagiri, Akira Goto, Atsushi Sunami, and Richard R. Nelson, *Intellectual Property Rights, Development, and Catch-Up: An International Comparative Study*, Oxford Scholarship Online: May 2010, p 3

<sup>273</sup> Ibid, p 4, 13

R & D institutes. Also, Korean firms started to file for more US patents in the 1980s, in response to the patent disputes with foreign entities.<sup>274</sup>

From 1979 to 1982, the US was the largest foreign investor in Korea, concentrating on investments in chemicals, electronics, and automobiles. During this period, Korea had very few protections for IPRs, and American investors preferred majority ownership to protect their IPRs.<sup>275</sup> Korea's IP laws sought international harmonization in the 1970s, entering into patent agreements with major countries. The 1974 patent agreement between Korea and Japan was Korea's first patent treaty concluded with a foreign country. In 1978 Korea concluded an IPR agreement with the US. In 1979, Korea became a member of the World Intellectual Property Organization (WIPO) in 1979, and in 1984, Korea acceded to the Paris Convention and the Patent Cooperation Treaty (PCT).<sup>276</sup>

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<sup>274</sup> Ibid, p 4

<sup>275</sup> Directorate of Intelligence, "South Korea: Foreign Investment Liberalization," 5 September 1984, pp 9-10

<sup>276</sup> Lee, Keun, "Intellectual Property and Economic Development in the Republic of Korea: An Introduction," *The Economics of Intellectual Property in the Republic of Korea*, WIPO, WIPO Publication No. 1031(E), pp 15-17; and Lee, Keun and Yee Kyoung Kim, *op. cit.* pp 11-12

### **3.3 Competition of Economy-Security-Technology Discourses between the US and ROK**

This section examines the perception about the geopolitical environment and Korea's changed geo-economic status in both Korea and the US, and how such perceptions affected the economic discussions between the two governments.

#### **3.3.1 Differences in Perception on Security and Economic Situation**

The most notable change in the discussion between the US and Korea during this period was the US-PRC rapprochement and the rise of Korea as one of the Newly Industrializing Countries (NICs).

US-PRC relations was normalized as the US established diplomatic relation with the PRC, and recognized it as the sole legitimate government of China on January 1, 1979. From January 28 to February 5, 1979, Deng Xiaoping visited the US to discuss US-PRC economic cooperation and improvement of trade relations. The Korean government expected that the US-PRC normalization would strengthen the US position in Northeast Asia now that it had both the PRC and Japan on its side to

check the Soviet Union in the region.<sup>277</sup>

At the same time, President Carter's visit to Korea on July 1, 1979 and the American decision to postpone further US ground combat force withdrawals until a reassessment in 1981 assured the Korean government of the US's intention to stay firm on the Northeast Asian security. During his visit to Korea, President Carter announced the decision to stop the withdrawal of American ground combat forces stationed in Korea by 1981, after which bilateral consultations would lead to a resolution to the issue.<sup>278</sup>

Such perceptions about the changing international situation were shared between the two governments from 1979 to 1980. On September 12, 1979, William Gleysteen, the US Ambassador to Korea, gave a speech at a seminar hosted by the Korea International Trade Association, titled "US and Korea, developing an effective relationship for the 1980s." He noted during the speech that "there will continue to be a mutuality in ROK-US relations coupled with a greater demonstration of Korean self-reliance." Moreover, he said expected the international environment around Korea to improve and that he did not "expect developments

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<sup>277</sup> Office in Charge of North America, Ministry of Foreign Affairs. "Diplomatic Policy towards the USA in 1980s", General Official Document 9934/12674, 1979, pp. 19, 20

<sup>278</sup> Ibid, pp 20, 23

within the so-called communist world to intensify the threat from North Korea.” Finally, he said that “changes in Sino-Soviet relations are unlikely to alter the basic geopolitical realities that help to keep the peace in Korea.”<sup>279</sup>

Gleysteen pointed out two factors that had a “tremendous impact” on Korean confidence: “the US role in maintenance of the military balance on the Korean peninsula,” and “the degree of hospitality the world will show Korea’s continued economic development.”<sup>280</sup>

There were differences in perception on the geopolitical stability of East Asia between the policymakers of the US and Korea. The Korean government believed that the Carter administration was “naïve” in assuming that the Soviet Union would not support North Korean provocations. Korea’s Ministry of Foreign Affairs believed that the American view on Korean peninsula mainly considered the changing balance of power between China, Soviet Union, Japan, and the US, all of which was moving favorably toward the US as the Sino-Soviet split and PRC-Japan normalization proceeded.<sup>281</sup>

The Korean government believed that the international status and capability of

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<sup>279</sup> Office in Charge of North America, Ministry of Foreign Affairs. “Korea in Asia of 1980s”, Material for ROK-US Policy Council, General Official Document File 9932/12847, 1979, p 119

<sup>280</sup> Office in Charge of North America, Ministry of Foreign Affairs. “Diplomatic Policy towards the USA in 1980s”, General Official Document 9932/12847, 1979, pp 2-4

<sup>281</sup> Ibid, p 23.

China following its rapprochement with both the US and Japan was resulting from changes in China's domestic politics induced by the rise of Deng Xiaoping to power, and the new national goals of pursuing economic development and opposing the Soviet Union in the military arena.<sup>282</sup>

However, the Korean government expected PRC-DPRK relations to remain friendly in the 1980s, as the PRC sought to bring DPRK closer to its side in the Sino-Soviet split. In the economic arena, Korea expected China to become its competitor in the export market, as it began to pursue economic development and exports.<sup>283</sup>

The Korean government argued that the "situation in Northeast Asia was changing rapidly, which will bring serious consequences for the Korean peninsula." This argument was based on its assessment of the "continued, extreme hostility" of North Korea, Japan's economically motivated equi-distance policy toward the two Koreas, and the limitation of Chinese influence over DPRK. Therefore, it argued, the presence of American troops in Korea was needed to maintain the military balance of power, and the US-PRC rapprochement should not be expected to ease tension on

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<sup>282</sup> Office in Charge of North America, Ministry of Foreign Affairs. "Korea in Asia of 1980s", Material for ROK-US Policy Council, General Official Document File 9932/12847, 1979, p 119

<sup>283</sup> Ibid, pp 119-120

the Korean peninsula.<sup>284</sup>

The most important change in the economic arena was Korea's rise as a NIC. According to Korean government's report, Korea attained per capita GNP of \$1000 in 1978, becoming a Newly Industrialized Country.<sup>285</sup> Korean media quoted the Economist article that named the eleven developed countries including Korea, the NICs.<sup>286</sup>

Korea's Economic Planning Board (EPB) reported that "since Korea started its first Five Year Plan in 1962, it has sustained rapid economic growth for seventeen years at a rate of 10% annually, which is twice as high as the world average growth rate. As a result, Korea is receiving much attention as one of the most successful countries to achieve economic growth." In particular, Korean growth accelerated in 1976-1978 to grow at a 12% annually. The country's per capita GNP was more than USD 1,200 in 1978, and export was above USD 12.7 billion in 1978.<sup>287</sup>

In 1977, Korea attained a balance of payment equilibrium, thanks to the strong

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<sup>284</sup> Ibid, p 123

<sup>285</sup> Ibid, p 125

<sup>286</sup> "Sodeugui Goreun Baebun(Fair Distribution of Income)", in the series of *Keonguk 30 nyeon sae sedaewi munteogeseo*(At the Threshold of the 30<sup>th</sup> Anniversary of Building the Nation), Kyeonghyang Daily. August 4, 1978.

<sup>287</sup> Economic Planning Board, "Korean Economy: Present Conditions and Future Tasks", Meeting material for ROK-US Policy Council, May 4 1979. General Official Document File 9932/12847, pp 128, 129

invisible balance of trade due to Middle Eastern construction boom. The Korean government estimated that, in order for the Korean economy to sustain the rising living standard with its expanding population, Korea need to sustain a 10% growth rate. The government expressed an optimistic view that such growth will be possible as long as “there is no sudden disturbance in global economic order.”<sup>288</sup>

The US had a different analysis about Korea in the 1980s. The American government recognized that Korea had become the 11th trading partner of the US in a remarkably short time, and Korea’s successful industrialization had become the source of confidence for the Koreans and model for many developing countries. The US government also believed that a rise in educational levels and the importation of foreign technology, sound economic policy, and basic political stability would continue.<sup>289</sup>

However, the US did not expect the high growth rate of Korean economy to continue in the 1980s. It argued that the 12-16% growth rate that Korea had attained in the 1970s was excessive for the Korean economy, resulting in imbalances. Also, it thought that Korea’s practice of emphasis on import substitution and aggressive export promotion would not be beneficial of Korean economy in the long run.<sup>290</sup>

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<sup>288</sup> Ibid, pp 129-133

<sup>289</sup> Office in Charge of North America, Ministry of Foreign Affairs. “Addresses by USA Ambassadors in Korea 1979,” General Official Document File 9932/12847, pp 6, 7

<sup>290</sup> Ibid, pp 8-9

<Table 9> Korea's Yearly Exports to the US (1968-1978)

(unit: USD million)

	1968	1970	1972	1973	1974	1975	1976	1977	1978
exports	198.8	370.2	707.7	973.7	1,460.4	1,441.7	2,403.9	2,895.4	3,747
Imports	510.3	642.2	735.3	1,236.7	1,546.4	1,760.6	2,015.0	2,370.9	159
Trade balance	-311.5	-272.0	-27.6	-263.0	-86.0	-318.9	388.9	524.5	587

Korea's real GNP grew at an average annual rate of 8.2 % from 1962 to 1984. Such a rapid growth was possible mainly because of export-oriented industrialization,<sup>292</sup> and America was the major destination for Korean exports. Korea's trade surplus in the ROK-US bilateral trade was growing since the mid-1970s.

Whether the US market can absorb Korean exports "at the same explosive rate as" during the 1970s" would become a big issue, according to Ambassador Gleysteen. Given the recession that the American economy was experiencing at the time, there would be problems, although, overall, the US would remain a big, and growing, market for Korea in the 1980s, the Ambassador added. In order to manage

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<sup>291</sup> Requoted from Office in Charge of North America. "Diplomatic Policy towards the USA in 1980s", General Official Document 9932/12847, 1979. p 26

<sup>292</sup> Asian and Pacific Centre for Transfer of Technology, Country Study Series, *Technology Policies and Planning Republic of Korea* (Bangalore, India, 1986), p 4

problems in the bilateral relationship, Korea was expected to diversify its export markets, try to avoid sudden surges of sales, refrain from dumping, reduce subsidies, liberalize its own economy, expand its domestic market as rapidly as possible, and avoid persistent current account surpluses.<sup>293</sup>

### 3.3.2 Discourses of Fair Trade and Mutual Market Opening

Fair trade and Market opening became important keywords in the trading relations between Korea and America in the 1980s. Whereas the ROK-US Textile Agreement took the form of Voluntary Export Restraint, that directly limited the export quantity, in the 1980s, indirect import restrictions such as anti-dumping, and countervailing duties, and the request for market opening became the major mode of American trade policy.<sup>294</sup>

According to the trade policy position of the US government revealed in July 8,

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<sup>293</sup> “Address by American Ambassador William H. Gleysteen Jr. to Financial Times Conference, September 12, 1979, “The United States and Korea: developing an effective relationship for the 1980s” Office in Charge of North America, Ministry of Foreign Affairs. “Addresses by USA Ambassadors in Korea 1979,” General Official Document File 9932/12847 pp 7, 8

<sup>294</sup> Kim, Namdu et al. op.cit. p 18

1981, “the Administration will continue to pursue more open access to markets abroad for US exports and fairer conditions of trade.” At the same time, the administration would ask major developed and advanced-developing trade partners to achieve substantial trade liberalization and market opening of degrees comparable to the level of opening of the US market.<sup>295</sup>

These new policies were accompanied by the argument for “graduation” of developing country status. Namely, developing countries were expected to accept greater responsibilities under the trading system as their development proceeds.<sup>296</sup>

For instance, the US had been applying lower tariff rates for developing countries than the MFN rate under the Generalized System of Preference (GSP), which was a preferential tariff rate announced in the 1974 Tokyo Round.<sup>297</sup>

Countries that have developing country status are treated favorable in the GATT’s dispute settlement procedure. Since Korea acceded to the GATT in 1967, it was subjected to various preferential treatments due to its developing country status.<sup>298</sup>

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<sup>295</sup> White House, Cabinet Affairs Staffing Memorandum, Administration Statement on International Trade Policy, September 19, 1985, p 8

<sup>296</sup> “Ga otawa oeonjingu jeongsang hoedam tae mi sae jean jeuikiro(USA plans to offer new proposal at the Ottawa Summit in Canada,” *Maeil Economics*. June 1981.

<sup>297</sup> Wang, Yunjong and Suyeop Na. op.cit. p 22

<sup>298</sup> Ibid, p 52)

Korean policymakers wanted to maintain the developing country status until the 1990s. Given the fact that Korea's per capita GNP remained at USD 1,000 as of 1980, while spending 6% of its GNP on defense,<sup>299</sup> they argued, it was too soon to discuss graduation from developing country status.<sup>300301</sup>

Korean government also argued that Korean government was taking “vigorous measures” for import liberalization, “with a view to rendering [ Korea's ] cooperation towards the further expansion of world trade... even though its domestic industries still remain at a developing stage and its competitiveness is yet insufficient in certain respects.”<sup>302</sup>

Korea's import liberalization was met with widespread opposition from domestic businesses, but it became the basic industrial policy of Korea since the EPB announcement of “Industrial Policy Issues in the 1980s and the Direction for Rearranging Industrial Assistance Measures” in 1983.<sup>303</sup>

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<sup>299</sup> The 1<sup>st</sup> Department of Economic Cooperation. op.cit. p 18

<sup>300</sup> The 1<sup>st</sup> Department of Economic Cooperation. op.cit, pp 17-19

<sup>301</sup> Wang, Yunjong and Suyeop Na. op.cit. p 22

<sup>302</sup> The 2<sup>nd</sup> Department of Economic Cooperation. op.cit p 24

<sup>303</sup> Byung-Sun Choi, *Economic Policymaking In Korea: Institutional Analysis of Economic Policy Changes in the 1970s and 1980s*, Chomyung Press, Seoul, Korea, 1991. 6.1, p 288

## 4. ROK-US IPR Negotiation

By the mid-1980s, Korea was widely held as a “major success story within the group of East Asian NICs.” From late 1985 to 1986, Korea made trade surplus “for the first time in its modern history,” which would be “the first example of a developing country that borrows heavily, uses the money to build a modern industrial base, and then uses that base to pay off its obligations.”<sup>304</sup>

Such changes in the geoeconomic status of Korea were reflected in the bilateral trade discussions between Korea and the US. In the US-ROK trade disputes in the 1980s, the rhetoric, rationales, and positions of the two parties were different from those of the textile negotiation 10 years before. The US emphasized that Korea, as one of the East Asian “superstars,”<sup>305</sup> needed to liberalize its market and actively participate in the emerging international regime for trade. Meanwhile, Korea emphasized the aspect as a developing country that was promoting industrialization under the heavy burden of foreign debt and a large defense burden.

Sustained growth of the Korean economy was directly related to political stability. In the early-to mid-1980s, state-society tension was at its height, with a call for

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<sup>304</sup> Directorate of Intelligence, “Near-term outlook for East Asian Competitiveness: Spotlight on the NICs” 10 August 1987, p 12

<sup>305</sup> *Ibid.*, p 8

democratization growing more than ever. The state-society conflict that played an important role not only in Korea's domestic politics but also in US-ROK relations was influenced by the following factors.

First, President Chun Doo Hwan, who was inaugurated in June 1980, did not receive widespread support from Koreans. This was due to the fact that despite increased expectation for democratization following the October 26 incident of 1979, liberal reform of the Korean constitution did not materialize, and a president with a military background had been elected through indirect presidential election.

The political structure of Korea at the time was authoritarian, marked by a concentration of power to the president, and government control of the congress. Political freedom was reduced even more than before.

Second, the Korean government's brutal suppression of the May 1980 Kwangju Democratization movement added to the deepening of distrust of the government. Especially, the role of America behind the suppression had been questioned, giving rise to anti-Americanism among Korean citizens.

Third, as the unpopular Chun regime demonstrated a close relationship with the US, like the invitation of US president to Korea,<sup>306</sup> and expanded economic

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<sup>306</sup> At the invitation of President Chun Doo Hwan, the President of the United States... paid a state visit to the ROK from November 12 to 14, 1983. The two Presidents met at the Blue House on November 12 and again on November 13 for discussions of both bilateral and world affairs.

exchanges with the US, Korean citizens criticized the “pro-American” attitude of the Korean government. Since the early 1980s, criticism regarding the American demands for opening of the Korean market, and the Korean government’s responsiveness to such requests, became a central focal point of democracy activists.

Such tension in Korea’s domestic politics continued until it was resolved by the June 29 announcement of Roh Tae Woo in 1987, in which he promised to hold direct presidential elections. The US-ROK IPR Agreement was concluded one year before the democratic transition

In this section, the process of negotiation that resulted in the US-ROK IPR Agreement was analyzed, using two-level game framework. The negotiations between the ROK and the US (Level I), between Korean government and the civil society (Level II), and between America and Korean civil society (Reverberation) were analyzed.

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President Reagan addressed the National Assembly, visited field installations of both the Korean and the United States Armed Forces, and also met with senior Korean officials, other Korean citizens, and a group of American businessmen. (Joint Statement Between His Excellency Chun Doo Hwan President of the Republic of Korea and The Honorable Ronald Reagan President of the United States of America, 1983. 11.13)

#### **4.1 Two-Level Game Structure of ROK-US IPR Agreement**

Robert Putnam (1988)'s Two-Level Game analyzed the interaction between domestic and international factors in international negotiations. Conceptually, international negotiation can be divided into two levels, one between the governments, the other between each government and their domestic constituents. Since international negotiation should be subsequently ratified through domestic political procedure, a successful negotiation should meet the demands of both levels.

Using the framework of Putnam's Two-level game,<sup>307</sup> the structure of two-levels in the ROK-US IPR Agreement can be conceptualized as the following:

1. Bilateral negotiation between Korea and the US (level I)
2. Negotiations with domestic political factors (level II): the formal and informal negotiation processes that endorse and implement the level 1 agreement. The process includes not only the constitutional ratification process, but also those including the congress, bureaucracy and public

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<sup>307</sup> Robert D. Putnam, "Diplomacy and Domestic Politics: the Logic of Two-Level Games," *International Organization*, 42,3

opinion.<sup>308</sup>

3. Win-set: the set of all level I agreement that can be ratified in level II

The following section will examine the formulation of IPR agenda through the level II process in the US, followed by the analysis of Korea's level II negotiations.

#### 4.1.1 Domestic Level of the US: Three-pronged Strategy

Before the level I negotiation between Korea and the US was initiated, there were coordination procedures that formulated the trade policy strategy between the US government and legislature (Level II). According to a memorandum written by Senator Frank Murkowski in September 1985, "the trade issue has become politicized and is now squarely before the congress." Trade issues were discussed seriously in US Congress along with a detailed strategy for response to Korean

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<sup>308</sup> Ibid., p 436. "Level II may represent bureaucratic agencies, interest groups, social classes, or even public opinion."

demands.<sup>309</sup>

In the level II negotiations, the Economic Policy Council (EPC) functioned as the official mediator between the government and Congress to define the negotiation strategies and scope for authorities during level I negotiations.

In September 1985, when the US-ROK IPR negotiation was still in the initial stages, the EPC analyzed the trade options for the US government that would be considered for the GATT Round agenda, including the IPR issue. The EPC's report included comparison of the proposal by the House of Representatives and the position of the Administration. The House's proposal argued that sanctions should be imposed on foreign practices that manufacture and sell products patented in America, so that the right of US IPR holders would be better protected. The administration proposal suggested that it also supported this principle and any administration package would likely include provisions on IPRs.<sup>310</sup>

The House Proposal also argued that the negotiations on IPRs, including patents, copyrights, and trade secrets, should be launched in the new GATT Round. If developing countries did not participate in the negotiations, the US Trade Representative should be authorized to take reciprocal measures. The administration

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<sup>309</sup> Senator Frank Murkowski's Memorandum to Economic Policy Council, "Resolving the Trade Deficit," 1985. 9. 18

<sup>310</sup> Economic Policy Council, Trade Policy Strategy, 1985. 9.6, p 1

position on this issue was that it supported the idea of providing a new negotiating authority, but it opposed the proposal to take retaliatory measures for countries refusing to participate in the negotiation. There were also discussions about the possible actions that USTR could take under Section 301, the revision of Section 301, and the adjustment of the Department of Defense's list of export controls.<sup>311</sup>

The administrative trade package that would become the basis for the trade negotiation of the US administration was the outcome of coordination of positions between the government and legislature. The trade package proposed by the House and the administrative initiative were harmonized. In addition, comprehensive legislative authority, including the authority to initiate a new GATT Round, and to take retaliatory measures through congressional action or customs reclassification, was granted.<sup>312</sup>

In 1985, the strategy for strengthening IPRs in the global trading regime was established. The US decided to launch a new negotiating round to create a new multilateral trading system attuned to the new global competitive reality, and strengthening the protection of IPRs, which was the source of US competitiveness would be a major agenda. In order to achieve this, the US administration promoted negotiations in bilateral, plurilateral, and multilateral directions.

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<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

On May 16, 1985, President Reagan approved a three-pronged trade negotiation strategy in the EPC meeting. According to the plan, (1) highest priority will be given to launching a new multilateral trade negotiation; (2) if enough participation of the GATT members was not attained, organize plurilateral negotiations; and (3) utilize bilateral or regional negotiating opportunities. The Working Group on General Trade Negotiation Strategy established the operational “road map” that would provide guidance for the international initiatives and domestic preparation to implement the strategy.<sup>313</sup> The bilateral and multilateral negotiation opportunities would serve to improve market access to parties involved and to further the cause of fair trade, and to promote a wider interest in the multilateral negotiation process.<sup>314</sup>

The EPC proposed the timetable for the multilateral negotiation round on its meeting held on September 24, 1985:

- (1) September 1985: special session for parties will be held to discuss the content, structure and timing of negotiation.<sup>315</sup>

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<sup>313</sup> Memorandum for the Economic Policy Council, “Action Plan for Multi-pronged Trade Policy Strategy,” 1985.9.3

<sup>314</sup> Memorandum for the President, “Trade Policy Strategy,” 1985.9.6, p 4

<sup>315</sup> Directorate of Intelligence, “Post-mortem on Special GATT Session: Slow Momentum Sustained,” 1985.11

- (2) November 1985: confirm the commitment of the GATT member countries about the new negotiation round, establish an official preparatory group, and secure the agreement by the “critical mass” about the negotiation agenda.
- (3) Spring 1986: the preparatory works of the GATT preparatory group would be concluded.
- (4) Mid-1986: A new negotiating round would be launched.

According to the timetable, the US proceeded with the domestic and international procedures to prepare for the new round. In Congress, the Republican party proposed a new round of GATT multilateral negotiations, tentatively termed the “New Reagan Round,” which the GATT Council approved on September 10 1985. President Reagan had declared the initiation of the new round in his State of the Union address. The Reagan administration was preparing for an administration bill that would bestow comprehensive legislative authority to the executive branch.<sup>316</sup>

According to the EPC, which was in charge of establishing the trade policy strategy of the American government, such trade initiatives were measures that confirmed the

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<sup>316</sup> Memorandum for the Economic Policy Council, “Action Plan for Multi-pronged Trade Policy Strategy,” 1985.9.3

president's commitment for free and fair trade. Such measures would confirm the commitment to improving the trade rules, expanding market access to forge a more open trading system, vigorously pursued American trade rights and interests under US domestic law and the GATT. It also included plans to reform Section 301 so that the unfair trade practices cases could be self-initiated without the formal petition of the industry.<sup>317</sup>

The protection of IPRs was one of the most important agendas that the American government was pursuing, and was included in the three negotiation agenda that the Trade Policy Review Group (TPRG) unanimously supported.<sup>318</sup> The US argued that the infringement of American IPRs was becoming a serious obstacle to the international competitiveness of American industries, where “a wide spectrum of American industries is affected including chemicals, pharmaceuticals, motion pictures, publications, semiconductors, computer software, apparel and other consumer goods, and new industries such as biotechnology.” The estimated losses due to IPR infringement was an annual USD 8-20 billion.<sup>319</sup>

The US government made it clear that it would use all the leverage within its use to

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<sup>317</sup> Memorandum for the President, “Trade Policy Strategy,” 1985.9.6, p 2

<sup>318</sup> Cabinet Affairs Staffing Memorandum, Memorandum for the Economic Policy Council, “Administration Trade Bill,” 1985.9.19

<sup>319</sup> Memorandum for the Economic Policy Council, “Intellectual Property: Executive Summary,” 1985.12.17

intensify the efforts to strengthen IPRs,<sup>320</sup> including the application of US's trade law.<sup>321</sup> In order to achieve this, it discussed controlling the trade of goods that infringed US process patents, extending the patent period of agricultural chemicals, abolishment of injury clause of Section 337 in initiating the ITC (International Trade Commission) lawsuit,<sup>322</sup> and a more liberal technology licensing regime.<sup>323</sup>

The problem was that the American initiative to include IPRs in the agenda for the new GATT round was met with strong opposition from developing countries. The US put high priority in improving the treatment of IP in major developing country trading partners of the US, such as Taiwan, the ROK and Brazil. The US found that the incomplete IP law, or the inadequate enforcement of IP laws, was “particularly acute in, although not confined to NICs.”<sup>324</sup>

In 1985, Indonesia did not have a patent law, and China did not have a copyright

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<sup>320</sup> Presidential Address: President's Export Council, 1985.9.23, p 6

<sup>321</sup> Cabinet Affairs Staffing Memorandum, Memorandum for the Economic Policy Council, “Action Plan for Multi-pronged Trade Policy Strategy,” 1985.9.24, p 2

<sup>322</sup> “Elimination of the requirement in Section 337 of injury to an efficiently and economically operated US industry as a precondition for relief where the International Trade Commission found a patent, trademark or copyright infringement.” (Cabinet Affairs Staffing Memorandum, Memorandum for the Economic Policy Council, “Administration Trade Bill,” 1985.9.19, p 1)

<sup>323</sup> Cabinet Affairs Staffing Memorandum, Memorandum for the Economic Policy Council, “Administration Trade Bill,” 1985.9.19

<sup>324</sup> Memorandum for the Economic Policy Council, “Intellectual Property: Executive Summary,” 1985.12.17

law. Even if a patent law existed in domestic legal systems, such as in the case of Taiwan, the ROK, Brazil, Mexico and Canada, chemicals and pharmaceutical patents were not adequately protected, by the US standards. Korea and France provided inadequate protection for copyrights for foreigners and for computer software.<sup>325</sup>

The EPC recommended that the US government must pursue aggressive bilateral strategy for these major trading partners, and that consideration should be placed on putting additional pressure on these countries through a self-initiating the Section 301 investigation. In particular, the EPC argued that maximum pressure needed to be put on these major NICs in 1986.<sup>326327</sup>

#### 4.1.2 Domestic Level of the ROK: Strong State Contentious Society

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<sup>325</sup> Memorandum for the Economic Policy Council, "Intellectual Property: Executive Summary," 1985. 12.17

<sup>326</sup> Cabinet Affairs Staffing Memorandum, Memorandum for the Economic Policy Council, "Action Plan for Multi-pronged Trade Policy Strategy," 1985.9.24, p 3

<sup>327</sup> "Mi tongsangbeop boho jangbyeok deouk ganghwa (USA reinforces the trade barrier even more) Maeil Economics. December 15 1984.

In this section, Korea's domestic political situation will be examined with a view to determining whether the two-level game framework is applicable to Korea in the mid-1980s. In order for two-level game to be applicable, domestic political actors should influence the international negotiation. In other words, the scope of action of the government negotiator should be limited within the domestic win-set.

In applying Putnam's model, there is no condition that the country in question needs to be a democracy with a functioning legislature. As Putnam put it, "ratification need not be "democratic" in any normal sense. The actors at level II may represent bureaucratic agencies, interest groups, social classes, or even 'public opinion.'<sup>328</sup> Therefore, we need to examine whether Korea's domestic political forces could exert *de facto* political influence via official and unofficial channels in international negotiation.

The US-ROK IPR negotiation was severely criticized in Korean society as an example of "low profile diplomacy" by the Chun Doo Hwan administration, a diplomacy that gave in to US requests in blatant disregard of public opinion, and at the expense of the welfare of Koreans. Critics assumed that asymmetrical power capabilities affected the negotiated outcome, as the US exercised its preponderant power to force changes using economic coercion.<sup>329</sup> However, domestic industry

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<sup>328</sup> Robert D. Putnam, *op. cit.*, pp 436, 437

<sup>329</sup> Susan K. Sell, *op. cit.*, 2003, p 5.

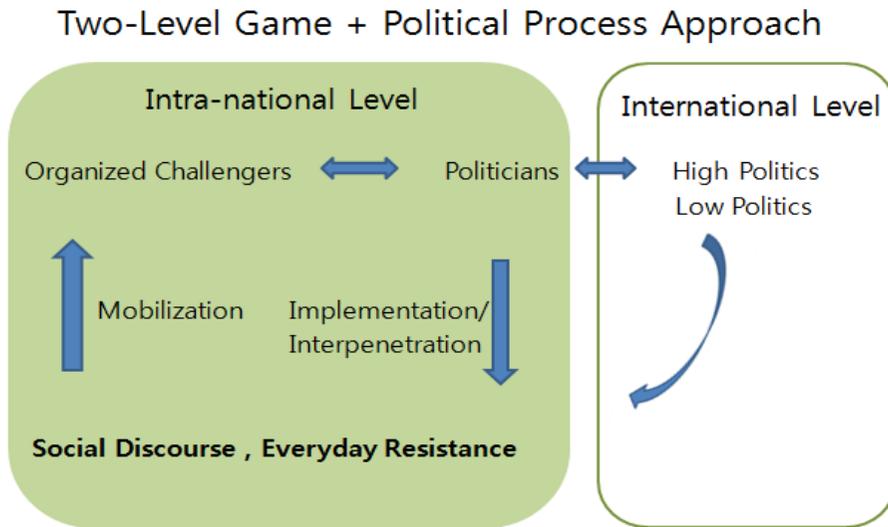
and overall public opinion had significant influence on the government's negotiating behavior.

This study argues that the negotiation between the governments of the US and Korea, a "bureaucratic-authoritarian"<sup>330</sup> state, can be analyzed with the two-level game framework, since the timing coincided with a period of heightened state-society contention on the eve of Korea's 1987 democratic transition. Although the domestic level of Korea was basically excluded from the negotiation process, especially toward the final stage of negotiation, evidence suggest that the domestic political repercussion that was expected most definitely affected the negotiating strategy of the Korean government. The two-level game incorporating the democratization process can be conceptualized in the following figure.

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<sup>330</sup> Directorate of Intelligence, "Trade Policy Formulation in Selected Developing Countries: Underlying Influences" 11 July 1986, P 40

<Figure 5> Augmented two-level game model



In the early 1980s, Korea's political situation can be summarized as a "strong state and contentious society." During the period between the death of President Park Chung Hee and the brutal suppression of the May 1980 Kwangju democracy movement, Koreans increasingly called for more political freedom.<sup>331</sup> General Chun tried to reestablish one-man rule, and, as such, he began his presidency very unpopular. His policies of maintaining oppressive elements of the Yushin Constitution, characterized by a strong one-man rule and government control of the

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<sup>331</sup> Gi-Wook Shin et al., *South Korea's Democracy Movement (1970-1993)*: Stanford Korea Democracy Project Report, 2007.12, p 25

National Assembly, were met with popular criticism.<sup>332</sup>

Political dissent was been repressed strongly and protests were rare and far between in the period between 1980 and 1984.<sup>333</sup> However, the tensions between the state and civil society continued. Korea's rapid industrialization and rising living standards fueled the desire for more political freedom.<sup>334</sup> As the level of education of general public increased, and information on the political values and institutions of advanced countries became more and more available, the demand for political participation increased.<sup>335</sup>

Students were among the most active groups participating in the democracy movement. The number of students that actively engaged in social movements was about 4,300 nationwide, which was less than 1% of the total number of university students.<sup>336</sup> However, university students were respected as having succeeded in the intense competition of university entrance exam and were expected to become the

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<sup>332</sup> Memo from American Embassy Seoul to the US Secretary of State, "Yet Another Assessment of ROK Stability and Political Development," 1980.3.12, p 2

<sup>333</sup> Gi-Wook Shin et al., *op. cit.*, p 25

<sup>334</sup> Directorate of Intelligence, "South Korea: President Chun's Opponents," A Research Paper, April 1983, p iii

<sup>335</sup> *Ibid.*, p 2

<sup>336</sup> *Ibid.*

socioeconomic elite of the future.<sup>337</sup>

The Chun government was always aware of the *de facto* political power that the students had in setting the social agenda and influencing public opinion.<sup>338</sup> As a result, the administration strengthened the legal and administrative sanctions on the student protest activities of students. The educational reform of 1981, which drastically increased the number of university students admitted to universities, while also tightening the graduation criteria, was expected to increase the competition among students once they entered the university, so that they can have less time outside the classroom.<sup>339</sup>

There were other important players in the domestic political process that influenced the US-ROK IPR negotiation: the media, National Assembly and industry.

According to one analysis by American government, Korean media had greater freedom of expression in dealing with trade policy issues than it had with political

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<sup>337</sup> Ibid., p 3

<sup>338</sup> Acemoglu (2009) argued that *de jure* political power and *de facto* political power need to be distinguished to understand equilibrium political change. *De jure* power is a power that stems from formal political institution and *de facto* power comes from majority, when the majority overcomes collective action problem. (Daron Acemoglu, Introduction to Modern Economic Growth, Princeton University Press, 2009, p 851)

<sup>339</sup> Directorate of Intelligence, "South Korea: President Chun's Opponents," A Research Paper, April 1983, p 3

issues. Therefore, media reports reflected the positions of the Korean government and public opinion relatively accurately regarding trade policy issues.<sup>340</sup>

Korean media was critical of the US requests to open up Korean market, requests that had become intense from the beginning of the 1980s. While analyzing the trade policy of America as based on the new policy of drawing a strict dividing line between political and economic interests, the Korean media held the view that Korea was being unfairly singled out by the Reagan administration to open its market.

Within the National Assembly, the critical view on the trade issues between the ROK and the US, including the IPR issue, was shared by the ruling party and the opposition alike. The New Korea Democratic Party (NKDP), which gained substantial victory in the general election held on February 12, 2012, became led the criticism against pressures to open the market and the accommodating approach taken by the Korean government. The Korean public opinion supported such criticism.<sup>341</sup> The ruling party also called for more discrete market liberalization.

The Korean private sector was also against market opening. While market liberalization, which implied reduction of government involvement in the market, was welcomed by the private sector, the Korean government's attempt to pursue

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<sup>340</sup> Directorate of Intelligence, "South Korea Overhauls its Trade Negotiation Machinery," 11 February 1986, p 5

<sup>341</sup> Directorate of Intelligence, "Trade Policy Formulation in Selected Developing Countries: Underlying Influences," Annex 6 South Korea, 1986. 7.11, p 43

market liberalization led to the deterioration of business confidence. This was due to the fact that Korean businesses generally welcomed the reduction of government engagement, while they protested the elimination of subsidized credit and increased foreign competition.<sup>342</sup>

During the HCI industrialization period of the 1970s, Korea's large conglomerates received various benefits from the government, such as subsidized credit, monopoly or oligopoly market position, and extensive protection from foreign competition. *Chaebols*, along with the Minister of Commerce and Industry and the Heavy and Chemical Industrialization Planning Council (HCIPC), argued that HCI industrialization should be promoted in order to realize the strong and wealthy nation envisioned by President Park, and became a major pillar in the dominant coalition<sup>343</sup> supporting the Yushin regime.<sup>344</sup>

Since the beginning of Chun Doo Hwan administration in September 1980, drastic restructuring of HCI system had begun. Big conglomerates were asked to

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<sup>342</sup> Directorate of Intelligence, "South Korea: Economic Decision Making in Transition – An Intelligence Assessment," January 1983, p 4

<sup>343</sup> Under the HCI regime of the Yushin system, the military, defense industry, big conglomerates, construction company, and agricultural sector formed the dominant groups of the society (Byung-Sun Choi, *Economic Policymaking In Korea*, p 143)

<sup>344</sup> Byung-Sun Choi, *Economic Policymaking In Korea*, pp 144, 149

streamline their businesses,<sup>345</sup> and the financial support for small and medium-sized enterprises (SMEs) grew. In 1980, the government established the guideline according to which 55% of new loan of the local banks and 35% of the new loans of nationwide city banks should be made to the SMEs.<sup>346</sup>

Lim Haeran (1996) analyzed that the democratization movement of the 1980s caused the government to pay more attention to SMEs and labor, which had largely been excluded from policy supports during the 1970s. Accordingly, basic approach of industrial policy changed, from industry-specific supports to functional approach. Emphasis of preferential tariff treatment also changed from support for the key industries to the support for technologically leading industries.<sup>347</sup>

Chun government's policy of fostering SMEs was related to its goal of attaining international competitiveness in industries of microelectronics, computers, and sophisticated telecommunications equipment by the 1990s. The government recognized the need to foster a strong subcontracting sector of SMEs to improve

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<sup>345</sup> Ibid, pp 163-164

<sup>346</sup> Lim, Haeran, *The politics of industrial transformation in Korea: a coalition approach*, University of California, Davis, 1996, p 88; Byung-Sun Choi, *op. cit.*, p 164

<sup>347</sup> Lim, Haeran, *op. cit.*, pp 86-87

price and design competitiveness of high-technology industry.<sup>348</sup>

#### 4.1.3 Korean Government's Structure of Decision-making

Since Korean government was one of the main negotiators of the US-ROK IPR Agreement, the structure of decision-making needs to be examined. Professional economic bureaucrats, or technocrats were in charge of establishing and implementing the negotiation strategies. The Economic Planning Board, Ministry of Finance, Ministry of Commerce and Industry and the Blue House all played a key role in finding negotiation strategies.<sup>349</sup>

The economic planning board was established in 1961 to be in charge of long-term planning of the economy. Its organizational structure and objectives had different emphasis depending on the administration in power.<sup>350</sup><sup>351</sup> The Chun

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<sup>348</sup> Department of State Bureau of Intelligence and Research: Assessments and Research, "South Korea: Economy in Transition," Report 1092-AR, May 29, 1985, p 1

<sup>349</sup> Park Tae-Gyun, "Compositional Changes of Economic Policymakers and New Economic Discourses in the 1970s and 80s," Seoul Journal of Korean Studies 22, no. 1 (June 2009), pp 5-6

<sup>350</sup> From 1961 to 1965, the role was to embark upon comprehensive economic development plans and promoting an open economy system. From it was 1966-71, it was expanding base for economic growth

government conducted a Cabinet shuffle that transferred much of EPB's role to the Ministry of Finance and the Ministry of Foreign Affairs, but the Economic Planning Board retained a central position in economic planning and coordination.<sup>352</sup>

The Minister of Economic Planning Board also assumed the position of the Deputy Prime Minister (DPM), playing a central role in the economic decision-making of Korea in the 1980s. The Deputy Prime Minister was the top economic advisor of the president and the spokesperson for the economic policies of the administration. The Deputy Prime Minister was in charge of the formal and informal consultation process within the bureaucracy, before reporting the ministerial policy proposal to the president, a process crucial in making decision-making internally consistent. Choi argued that “the extensive use of the consultation process has much to do with Korean political and bureaucratic culture in which debating in front of the President is regarded as extremely imprudent.”<sup>353</sup>

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and entering the stage of take-off. From 1972-75, responding to the turbulent domestic and external politico-economic conditions. From 1976-78 responding to adverse effects of the economic boom, and from 1979-81 restructuring the economy for a new leap-forward (EPB, *Kaebalnyongdaewi Kyongjejongch'aek: Kyongjegihoekwon Isipnyonsa* (Economic Policy in the Developmental Decades: The Twenty-Year History of the EPB; Seoul, 1982, pp. 14-30, quoted from Byung-Sun Choi, *Economic Policymaking In Korea*, p 43)

<sup>351</sup> Byung-Sun Choi, op. cit., pp 43-44

<sup>352</sup> Directorate of Intelligence, “South Korea: Economic Decision Making in Transition – An Intelligence Assessment,” January 1983, pp 4, 6

<sup>353</sup> Byung-Sun Choi, op. cit, pp 25, 33

During the Chun Doo Hwan administration, the role of International Economic Policy Council (IEPC) is also noteworthy. The IEPC was a separate wing of the Economic Policy Board established as an organization, whose role was comparable to the US Trade Representative at the time.<sup>354</sup>

In the 1960s and 1970s Korea's economic development plan was pursued by professional technocrats, who usually held degree from the US universities, and who followed a highly structured and well-defined decision-making process. They maintained close business-government relationship in which the government provided low-cost financing, tax exemptions, and assistance in marketing abroad.<sup>355</sup>

However, in the 1980s, the role of the government in economic decision-making became a focus of controversy in Korean society. Liberalizers argued for greater autonomy of the economy, while Traditionalists, or Gradualists called for continued government involvement in the economy to sustain rapid growth.<sup>356</sup>

Import liberalization was at the center of controversy surrounding the role of government in the 1980s. It was in part promoted by the foreign pressure to open up

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<sup>354</sup> "Haewoe Hyumnyeok Wiwonhoe(Committee on Cooperation Abroad)," *Maeil Economics*, June 6 1985.

<sup>355</sup> Directorate of Intelligence, "South Korea: Economic Decision Making in Transition – An Intelligence Assessment," January 1983, pp 1-2

<sup>356</sup> *Ibid.*, p 3

Korean market, but the economic stabilization policy since the late 1970s also added to the voice that the role of government in the market should be reduced.<sup>357</sup> The turn away from the growth-oriented policy to the reduction of government's role was implemented at a time when there was a widespread instability in the economy marked by high inflation and economic recession, and the political instability following the assassination of President Park.<sup>358</sup> The main response of the new government was the politically unpopular measure of fiscal austerity,<sup>359</sup> which provoked nationwide controversy.

Within academia, the Sogang School and think tanks like the Korea Development Institute (KDI) led the economic discourse on market-centered thinking. The theoretical base of their arguments was Milton Friedman's Monetarism. On the other hand, Seoul National University's Division of Economics argued that the market liberalization and reduction of government's role should be achieved gradually. Following the Keynesian view, they argued that there were areas where government needs to complement the functioning of the market, such as investment in human

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<sup>357</sup> Park Tae-Gyun, "Compositional Changes of Economic Policymakers and New Economic Discourses in the 1970s and 80s," *Seoul Journal of Korean Studies* 22, no. 1 (June 2009), pp 21-22

<sup>358</sup> *Ibid.*, p 21

<sup>359</sup> Directorate of Intelligence, "South Korea: Economic Decision Making in Transition – An Intelligence Assessment," January 1983, p 3

and technological resources and income distribution.<sup>360</sup>

There were different opinions regarding the market within Korea's bureaucracy as well. The official policy of Chun Doo Hwan government was to reduce the government's role in the market, reflecting the Liberalist view. Such market-oriented policies were met with strong resistance within the bureaucracy.

There were divisions within the bureaucracy as well. For example, the Ministry of Commerce and Industry (MCI) was in general strongly opposed to market liberalization initiative, preferring a gradualist approach, which received broad support from Korea's business circles.<sup>361</sup> Even within the MCI, however, there were differences in attitudes toward market opening, the international commerce division within the MCI, headed by the first undersecretary of MCI, was more sensitive to the foreign pressure to open Korean market, while MCI's division in charge of dealing with domestic industry, headed by the second undersecretary of MCI, preferred a more gradual implementation of import liberalization,<sup>362</sup> based on the

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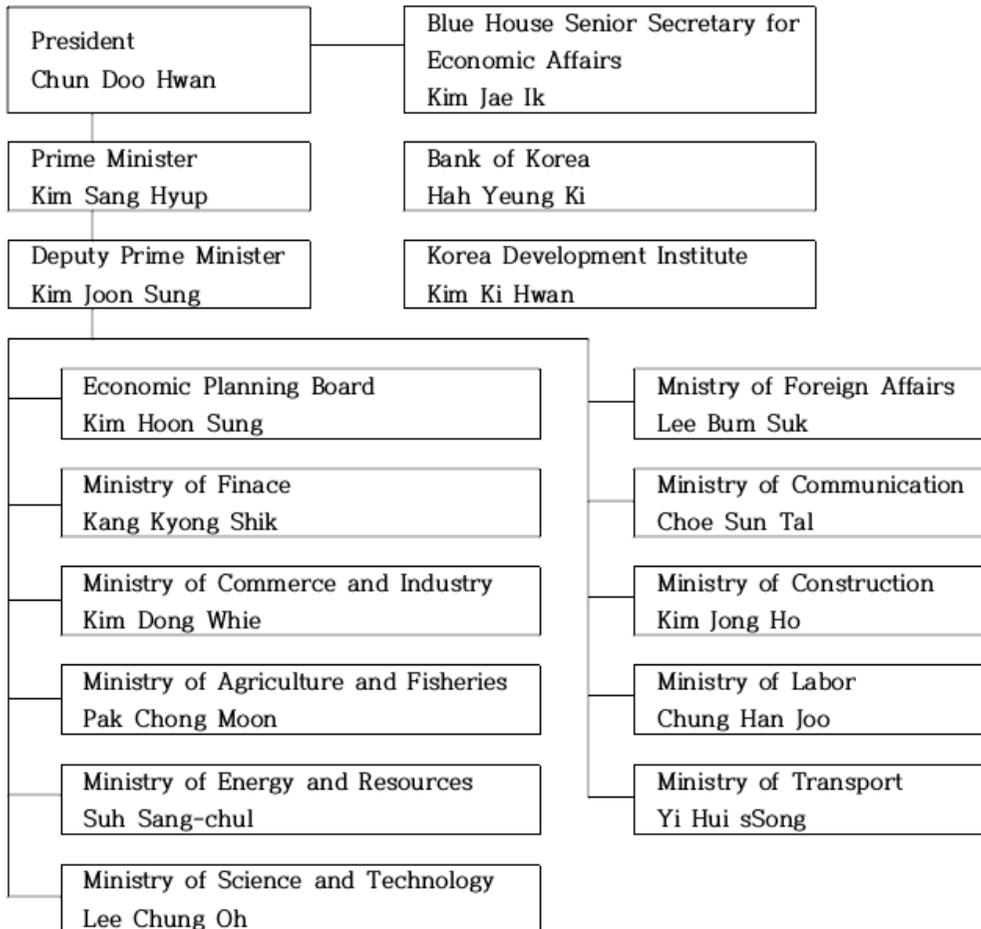
<sup>360</sup> Park Tae-Gyun, "Compositional Changes of Economic Policymakers and New Economic Discourses in the 1970s and 80s," *Seoul Journal of Korean Studies* 22, no. 1 (June 2009), pp 22-26

<sup>361</sup> Byung-Sun Choi, *op. cit.*, pp 285-286

<sup>362</sup> Interview with former Minister of MCI, Chulsu Kim conducted on 21 January 2016. Minister Kim had been the head of the first undersecretary of MCI during the ROK-US IPR negotiations, and served as the director of Korea Intellectual Property Office from 1990, and became the Minister of Commerce and Industry in 1993. He chaired the negotiating group on MTN Agreements during the Uruguay Round from 1987 to 1990, and became the Deputy Director-General of the WTO in 1995.

view that domestic industries should be protected during their infancy.<sup>363</sup>

<Figure 6> Structure of Korean government (1983)<sup>364</sup>



<sup>363</sup> Directorate of Intelligence, "South Korea: Economic Decision Making in Transition – An Intelligence Assessment," January 1983, pp 3-4

<sup>364</sup> Directorate of Intelligence, "South Korea: Economic Decision Making in Transition – An Intelligence Assessment," January 1983, p 2

## **4.2 ROK-US IPR Negotiation: Phase 1 (1981-1985.10)**

### 4.2.1 The Beginning of ROK-US IPR Negotiation

The origin of the US-ROK IPR discussion dates back to the late 1960s, when America's publishing industry criticized Korea's copyright infringement, and urged it to accede to the Universal Copyright Convention (UCC) and to reform domestic copyright laws.<sup>365</sup> The Korean government responded passively, saying that domestic publishing companies were "underdeveloped."<sup>366</sup> Korea had been categorized as a developing country since it acceded to the GATT in 1967, meaning that Korea's weak protection of IPRs was ignored for decades.

However, since the early 1980s, Korean infringement of IPRs became more of an issue, as Korea's status as the advanced developing country led to discussions about "graduating" from developing country status.

From the point of view of the US, the ROK-US IPR negotiation was launched as a

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<sup>365</sup> Wang, Yunjong and Na Suyeop. *op. cit.*, p 35

<sup>366</sup> *Ibid.* p 48

part of its effort to correct Korea's unfair trade practices. The US idea that opening up the Korean market based on the idea of fair trade and reciprocity was only fair for Korea, considering its new status within the global trading system.

The American government was mandated by the Congress to actively respond to the unfair trade practices of foreign governments that distort trade and investment. One of the objectives of US's trade policy since the mid-1980s was vigorously pursuing American trade interest and rights protected under US domestic law and GATT system.<sup>367</sup> Eliminating the trade barriers created by inadequate protection of US-generated intellectual property by the foreign government was an important new priority of the Reagan administration.<sup>368</sup>

On the other hand, for Korea, the US demand for increasing the protection of IPRs was perceived as part of the US pressure to open up its market. This pressure had been building since the early 1980s, when the Korean economy achieved a certain degree of economic development. As Korea's trade balance to the US turned from deficit into surplus, these pressures were expected to grow.<sup>369</sup>

When President Reagan visited Korea in November 1983, he proposed that Korea

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<sup>367</sup> White House, Cabinet Affairs Staffing Memorandum, "Trade Policy Statement," 1985. 9. 19, p 9

<sup>368</sup> Ibid., p 10

<sup>369</sup> Wang, Yunjong and Na Suyeop. op. cit. p 25

open up its market for manufactured goods, agricultural goods, and services. As an example, Reagan requested tariff reductions for the following 19 items, shown in the table below.

<Table 10> US requests for Korean tariff cuts in the 1980s

Time	No. of Items	Occasion	Contents
1983.11	19	President Reagan's visit to Korea	○ Almond , chocolate products, cosmetics, tangerine, raisin, refrigerator, veneer, oils, camera, batteries, etc.
1984.2	8	Official letter	○ Almond, cherry, veneer, tangerine juice, carpet, etc.
1984.3	5	US-ROK Trade Minister's Conference	○ Chocolate products, dried egg of cod and salmon, frozen fish, dried and salted cod, etc.
1984.4		USTR visit to Korea	○ Issues related to Korean tariffs on import liberalization items
1985.3	27	IEPC Chief visit to the US	○ Almond, alfalfa, chocolate products, cosmetics, cherry, timber, processed wood, prunes, veneer, etc.
1986.5-1 1987.3	291	After US-ROK GSP Consultation	○ 57 agricultural products: frozen vegetable, orange, timber, etc. ○ 234 manufactured products: lime, film, cosmetics, etc.
1987.4	3	US-ROK Trade Minister's Conference	○ Tobacco, automobile, communication equipment, etc.
1987.6	447	US-ROK Economic Conference	○ 87 agricultural products, 360 manufactured products
1988.1	-	US-ROK Trade Conference	○ Beef (50% tariff cuts), orange

#### 4.2.2 Korea's Domestic Politics and the ROK-US IPR Negotiation

Other things being equal, a government that enjoys greater autonomy from domestic political pressure has weak negotiating power. Since such a government has a greater win-set, an international agreement is easier to be reached.<sup>370</sup> The decision-making process of the Korean government was “highly centralized and bureaucratic,” allowing “little extra-bureaucratic input.” Trade policy was usually made within the Blue House and a few government ministries, “subject to limited popular influence.”<sup>371</sup>

In theory, the highly centralized, bureaucratic decision making process of Korea's Chun Doo Hwan administration should have been conducive to reaching an international agreement, since it could pursue international agreements with relative autonomy from the Level II negotiations. In particular, trade policy that was an important part of overall economic policies was usually decided by the Blue House and certain government ministries.<sup>372</sup>

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<sup>370</sup> Robert D. Putnam, *op. cit.*, p 449

<sup>371</sup> Directorate of Intelligence, “Trade Policy Formulation in Selected Developing Countries: Underlying Influences” 11 July 1986, P 39

<sup>372</sup> Directorate of Intelligence, “Trade Policy Formulation in Selected Developing Countries:

However, during the first phase of the US-ROK IPR Agreement, Korean government postponed to take action for the US request, invoking domestic political opposition (level II). This was due to public opinion that was highly critical of the government's trade policy toward America. Since there was a high risk of an organized challenge by domestic political dissents, pursuing policies that was against public opinion entailed a great political cost. The perception of Korea's senior economic officials that still had belief in the "special" relations between the ROK and the US, which would prevent the US from imposing serious trade sanctions, also affected their negotiating behavior.<sup>373</sup>

The media report onn the USS's trade pressures, including those related to the IPR issue, also reduced the Korean win-set and increased the bargaining power of the Korean government. The US analyzed that Korean government was instigating a "public outcry" on the IPR issues.<sup>374</sup>

As late as the fall of 1985, it was hard for President Chun to reverse its hardline stance, for fear he would be criticized by domestic public opinion for "giving in to

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Underlying Influences," Annex 6 South Korea, 1986. 7.11, p 39

<sup>373</sup> Directorate of Intelligence, International Economic and Energy Weekly "South Korea Ready to Deal on Trade Issues", 20 December 1985, p 8

<sup>374</sup> Ibid., p 7

US pressure.”<sup>375</sup> At the negotiating table, Korea’s economic technocrats also cited the unsettled political scene as a major constraint to progress.<sup>376</sup>

On top of creating the political liability for permitting a “pro-American” and pro-liberalization policy amid heightened nationalistic public sentiment against the US pressures, trade issues could potentially become the rallying point for Chun’s domestic opposition.<sup>377</sup> The New Korea Democracy Party (NKDP) had recently succeeded in securing its place as a popular political opposition against the unpopular Chun regime and the ruling Democratic Justice Party (DJP), in the election that took place in early 1985. The NKDP heavily criticized market liberalization and US trade policy toward Korea.<sup>378</sup>

Although the NKDP did not have enough seats in the National Assembly to push through legislation, it had shown its capacity to create pressure on the administration regarding trade issues, such as liberalization and intellectual property protection, by questioning ministers on legislation publicly. The popular attention on the trade issue was so great that even the DJP had to reverse its stance, officially taking a

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<sup>375</sup> Ibid., p 8

<sup>376</sup> Directorate of Intelligence, International Economic and Energy Weekly “Seoul-Washington Trade Talks” 13 June 1986, p 2

<sup>377</sup> Directorate of Intelligence, op. cit., p 11

<sup>378</sup> Directorate of Intelligence, “Trade Policy Formulation in Selected Developing Countries: Underlying Influences” 11 July 1986, P 43

position against liberalization.<sup>379</sup>

#### 4.2.3 Rupture of the Negotiation Phase 1

Phase I of the US-ROK IPR negotiation was marked by increased negotiating power of the Korean government due to the *de facto* political power of Korean society. The reason that the Korean government's response to the US request to strengthen protection of IPR could be understood on the ground of negotiating strategy of Korean government and the analysis of cost and benefit of the agreement. The factors that affected the negotiation during this period can be summarized as the following:

(1) Level I (negotiation between Korean and American government): competition of discourses and incomplete issue framing

- Competition of discourses: the competing arguments for the protection of IPRs from the US and Korean side did not result in the dominance of one side. America's argument that Korea needs to assume greater responsibility

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<sup>379</sup> Ibid.

as an NIC competed with Korean argument that graduation from developing country status was premature.

- Inadequate framing of the IPR issue: the logics and institutions for the protection of IPR was still developing within the US, and the protection of IPRs were not yet a universally accepted agenda.

(2) Level II (Korea's domestic politics): intense state-society relations and the small win-set size due to politicization of negotiation

- Political instability: in the early to mid-1980s, the Chum Doo Hwan government received only moderate support from the Korean people. The higher the political support for the government representative for negotiation the greater the win-set,<sup>380</sup> and the distrust for government, especially government's trade policy led to small win-set size.
- Politicization of negotiation: Korean government allowed relatively liberal media reporting on the US's market opening initiative, including the IPR issue, and the public interest in this matter was high. The greater the

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<sup>380</sup> Robert D. Putnam, *op. cit.*, p 445

politicization of the issue, the smaller the win-set.<sup>381</sup>

- Small win-set size: In principle, agreement between Korea and the US could be reached within the overlapping level II win-set. Therefore, the smaller the win-set the greater chance of negotiation failure.<sup>382</sup>

### **4.3 ROK-US IPR Negotiation: Phase 2 (1985.11-1986.7.21)**

During the phase II of the ROK-US IPR negotiation, there were structural changes that significantly altered the costs and negotiating power of Korea and the US. The initiation of Section 301 investigation on Korean IPRs worked to facilitate the negotiation process.

The Section 301 investigation on Korean IPRs by the US Trade Representative was initiated on the ground of US domestic legislation and its trade policy established in the middle of the 1980s. The Section 301 investigation was criticized by the Koreans as a strong “weapon” to unilaterally push through American trade

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<sup>381</sup> Robert D. Putnam, *op. cit.*, p 451

<sup>382</sup> Robert D. Putnam, *op. cit.*, p 438

agenda,<sup>383</sup> and it is commonly believed that Korean government ended up completely giving in to US pressure under the implicit threat of trade sanction.

However, even in the second phase of the US-ROK IPR Agreement, Korea's domestic level (level II) was not excluded from the negotiation game completely. The trade issue still received a lot of attention from the people, and even if agreement was reached, domestic political costs that would be felt subsequently still existed.

The following section will examine the process of phase II negotiations and the changing strategies of actors.

#### 4.3.1 Initiation of Section 301 Investigation on Korean IPR

The USTR's investigation of Korean IPRs under Section 301 was one of the IPR initiatives that had been pursued with a high priority to prepare for the multilateral

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<sup>383</sup> "Beginning in the early 1980s, section 301 trade diplomacy confronted foreign trade barriers with a tough, aggressive strategy of rule- and power-oriented negotiation: the USTR was to demonstrate the legitimacy of the US complaint by proving, when possible, that the barriers violated the international trade rules of the GATT and to demonstrate the US commitment to compel foreign governments to change policy by threatening or actually deploying economic sanctions." (Michael Ryan, 1998. *op.cit.*, p 73)

trade negotiation under the GATT auspices. As the USTR initiated investigation on 4 November 1985, the ROK-US IPR negotiation entered a new stage.

Better protection of intellectual property rights was one of the features of the Trade and Tariff Act of 1984, the new trade act of the US. Inadequate protection of intellectual property now constituted “unreasonable” practice, for which the president was to take action, including removal of tariff preferences or the application of other sanctions under the authority of section 301 of the 1974 Trade Act. As a result of the 1984 amendment to section 301, the United States Trade Representative (USTR) was mandated to defend US intellectual property rights in the world economy. Incidentally, it was the situation of IPR protection in the Republic of Korea that captured the attention of the USTR as it embarked on new bilateral diplomacy on IPRs.<sup>384</sup>

In reviewing the proposal to initiate a Section 301 investigation on Korean protection of IPRs, the Economic Policy Council found out that Korea did not provide adequate protection for foreign copyrights and the revised copyright bill did not include protection of computer software.<sup>385</sup>

Korean patent law did not cover patents for food and beverages and the protection

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<sup>384</sup> Michael P. Ryan, *Knowledge Diplomacy: Global Competition and the Politics of Intellectual Property*, 1998, Brookings Institution Press, Washington, D.C., pp 72-73

<sup>385</sup> Michael Ryan, *op. cit.*, pp 74-75

for chemical and pharmaceutical patents only covered process patents.<sup>386</sup> Ryan (1998) observed that, “Because many pharmaceutical and chemical products can be readily manufactured using slightly different techniques, the protection was worthless. The American manufacturers further complained that the term of protection was only twelve years from the time of a patent’s publication, and because in the pharmaceutical industry the development period from discovery to market approval takes ten to twelve years, the term was tantamount to no protection at all.”<sup>387</sup>

The issue of IPRs was becoming a major bottleneck in the overall trade negotiation between Korea and the US. In the early October 1985, Kim Ki Hwan, who had been the chair of the International Economic Policy Council (IEPC) visited Washington DC to propose the Korean trade package that included promise to enact a special law to protect foreign copyright and the plan to accede to the Universal Copyright Convention in 1988. The proposal was rejected by the US side, which called for a more direct and immediate measures to be taken.<sup>388</sup> The Section 301 investigation was launched shortly after this.

On 3 October 1985, the Economic Policy Council recommended the initiation of

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<sup>386</sup> Memorandum for the Economic Policy Council “Potential Section 301 Investigations”, Oct 1, 1985

<sup>387</sup> Michael Ryan, *op. cit.*, p 74

<sup>388</sup> “Foreign Property Protection”, *The Korea Times in English*, 27 Oct 1985, p 1, quoted in FBIS 11 December 1985, p 76

Section 301 investigation on Korean IPRs,<sup>389</sup> and the investigation began on 16 October. The EPC expected the Section 301 investigation to make the Korean counterpart to deal with the IPR issue more seriously, and to send a strong signal for other NICs in East Asian region about the extent of US commitment on securing the protection of IPRs.<sup>390391</sup> The US had initiated several bilateral IPR negotiations in 1985 with countries in Latin America and Asia, but Korea was the only country where the Section 301 investigation was being conducted.<sup>392</sup>

The ROK-US IPRs Agreement entered a new stage when the US initiated a Section 301 case against it for the lack of effective protection of US IPRs on 16 October 1986.

There were several factors that were taken into account in establishing the negotiating strategy of the US government in the bilateral IPR negotiation.

First, the American government considered the range of industries or products that

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<sup>389</sup> Minutes of the Economic Policy Council, October 3, 1985

<sup>390</sup> Ibid.

<sup>391</sup> “Because developing countries had been united in their opposition to IP negotiations in the GATT forum, the USTR determined that bilateral negotiations under the threat of section 301 sanctions could separate Korea from other developing country opponents in the GATT and lead it to reform its policy. The negotiations with Korea were thus important in themselves for the expected change in Korea policy, but also important to the UR negotiation strategy and as a precedent for bilateral and multilateral negotiations with other developing countries.” Michael Ryan, *op. cit.* p 75

<sup>392</sup> EPC “Executive summary,” p 2

would be directly affected by the agreement. It analyzed that if the agreement would act like a “surgical strike,” selectively affecting certain “high technology, capital intensive and higher value-added” exports, it would be easier for the Korean government to implement it. The Korean government’s policy of restriction the economic and political influence of large conglomerates since 1980<sup>393</sup> was taken into account.<sup>394</sup>

Secondly, the American government carefully considered the cost of non-agreement to the Korean government should the agreement fail to be reached. If America imposed sanctions on exports produced by Korea’s SMEs, there would be widespread anti-Americanism and implementation would be very difficult.<sup>395</sup>

Third, the American government assessed that the Korean government to take into account the prospects for long-term access to American market and technology. Since Korea’s large conglomerates, such as Samsung, Lucky Gold Star, Daewoo and Hyundai were investing heavily in high-technology, such as PC and semiconductor, it was clear that they would want to avoid a prolonged trade disputes with America

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<sup>393</sup> Directorate of Intelligence, International Economic and Energy Weekly “South Korea Ready to Deal on Trade Issues”, 20 December 1985, p 10

<sup>394</sup> Lim, Haeran, *The politics of industrial transformation in Korea: a coalition approach*, University of California, Davis, 1996, pp 86-87

<sup>395</sup> Directorate of Intelligence, op. cit., pp. 8-9

in these products.<sup>396</sup> Besides direct economic cost resulting from sanction, economic recession would result in widespread dissent against Korean government policy, leading to political costs.<sup>397</sup>

#### 4.3.2 Korean Response to the Section 301 Investigation

The initiation of Section 301 investigation on Korean IPRs created a lot of responses from the Korean public.<sup>398</sup> Koreans in general perceived that it was “being unfairly singled out for punishment,<sup>399</sup> and there was a widespread “denunciation of America.”<sup>400</sup> Korean media argued that Korea had become “the victim of American protectionism.”<sup>401</sup>

Korean perception about the Section 301 case was that it was “being unfairly

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<sup>396</sup> Directorate of Intelligence, International Economic and Energy Weekly “South Korea Ready to Deal on Trade Issues”, 20 December 1985, p 10

<sup>397</sup> Ibid., p 11

<sup>398</sup> “Miguk tongsangjeongchaek kwa daeeung(USA Trade Policy and Our Response,” *Maeil Economics*, October 23 1985.

<sup>399</sup> Directorate of Intelligence, op. cit., P 8

<sup>400</sup> “Kim, Kihwan, Chairman of the Committee on the Foreign Cooperation, talks about ROK-US trade conflict and its prescription: Next year will be the critical point” *Kyeonghyang Daily*. October 28 1985.

<sup>401</sup> “ROK-US Trade Conflict I: Dark cloud is already on” *Donga Daily*, March 9 1984

singled out for punishment.”<sup>402</sup> Korean media reported that there was a widespread atmosphere of denouncing America,<sup>403</sup> saying that Korea “fell victim to American protectionism,” and that “Korea is receiving carpet bombing as a model case”.<sup>404</sup>

Kim Kihwan, the IEPC chairman explained in an interview that contrary to common belief, the Section 301 investigation would not bring immediate damage to the export prospects. Rather, it should be understood as “a kind of an invitation to trade negotiation, with a deadline of one year.”<sup>405</sup> He further argued that, once the investigation has been initiated, it is to Korea’s best interest to reach a negotiated solution and to avoid the trade sanction under Section 301.

Such perception was shared within the Korean government. By October 1985, it became clear that the US was seeking to strengthen protection of its IPRs in Korea with more vigor than any other trade issues, and the initiation of the Section 301 investigation was a visible and official expression of such intention. American government rejected the market-opening package that Korea proposed in response to

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<sup>402</sup> Directorate of Intelligence, International Economic and Energy Weekly “South Korea Ready to Deal on Trade Issues”, 20 December 1985, P 8

<sup>403</sup> “Kim, Kihwan, Chairman of the Committee on the Foreign Cooperation, talks about ROK-US trade conflict and its prescription: Next year will be the critical point” Kyeonghyang Daily. October 28 1985.

<sup>404</sup> “ROK-US Trade Conflict I: Dark cloud is already on” Donga Daily, March 9 1984

<sup>405</sup> “Kim, Kihwan, Chairman of the Committee on the Foreign Cooperation, talks about ROK-US trade conflict and its prescription: Next year will be the critical point” Kyeonghyang Daily. October 28 1985.

the US pressure to open Korean market since 1983, and the main reason was the lack of momentum in improving the IPRs by the Korean government. Such strong stance of the US government led Korea's economic ministers to urge the Korean government to step up its efforts to protect foreign IPRs on October 26, 1985.<sup>406</sup>

After the 301 investigation was initiated, the Korean government's attitude significantly changed during December 1985 trade talks between Seoul and Washington. With the initiation of the 301 investigation, potential costs borne by the Korean government not agreeing to US terms increased dramatically, since the USTR would be able to recommend that the US president take retaliatory actions if the two parties failed to reach agreements within a year.

Within a month of the initiation of Section 301 investigation, the insurance market was opened, and trade mark was decided to be liberalized from 1986, although there were some remaining issues in the IPR negotiations.<sup>407</sup> The Korean government seemed to be willing to make concessions, and, according to the reports from the American side, "the order to compromise came from the top."<sup>408</sup>

In the following months, Korean governments tried to pursue quiet, behind-the-

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<sup>406</sup> "Foreign Property Protection", The Korea Times in English, 27 Oct 1985, p 1, FBIS p 76

<sup>407</sup> "ROK-US Trade Agreement decides to open completely the trademark right", Donga Daily, December 13 1985.

<sup>408</sup> Directorate of Intelligence, International Economic and Energy Weekly "South Korea Ready to Deal on Trade Issues", 20 December 1985, P 7

scenes diplomacy. During this period, the highest goal of Korean government was to seek withdrawal of the Section 301 investigation as soon as possible.<sup>409</sup>

#### 4.3.3 Reorganization of Korean Negotiation Team (1986. 1.21)

Although the Korean government had strong incentive to conclude the bilateral IPR agreement as soon as possible, the level II negotiation involving Korea's National Assembly, media, public opinion and industry did not become easier. If anything, there was domestic backlash to the strong action taken by the US. As a result, the ROK-US IPR Agreement that was supposed to be concluded within 1985 dragged on for half a year, and was finally concluded about a month before the initiation of the GATT Uruguay Round in September 1986.

The reshuffle of Korea's negotiating team that was announced at the end of January 1986 made clear the sustained influence of domestic level. On 20 January 1986, Korean government announced that it would "dismantle the IEPC and transfer the negotiating authority to the ministry in charge."<sup>410</sup>

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<sup>409</sup> Directorate of Intelligence, International Economic and Energy Weekly, "Seoul-Washington Trade Talks," 1986. 6.13, p 1

<sup>410</sup> "Dissolution of the Planning Board for Foreign Cooperation Committee considered", Maeil

The main reason for the reorganization of the trade negotiation team was the “widespread dissatisfaction” about the IEPC’s approach to the trade negotiations. Popular pressure had aggravated differences between the EPB/MOF technocrats and those in the MTI. Due to these tensions, the International Economic Policy Council, which handled trade negotiations and favored relatively rapid liberalization, had been dissolved.<sup>412</sup> An American intelligence report observed that the IEPC had been severely criticized by Korean media for being excessively accommodating to American requests.<sup>413</sup>

The IEPC, with Kim Ki Hwan as the chairman, had been the focus of domestic criticism since the IPR negotiations began. The public regarded its approach to the trade issue as too “pro-American,” making the IEPC the “lightning rod for domestic criticism of economic liberalization.” There was ministerial infighting between the Liberalizers and Gradualists, and the business community was also concerned about the issue. Under the circumstances, if the IEPC further pushed for negotiations, the

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Economics, January 20 1986.

<sup>411</sup> Directorate of Intelligence, “South Korea Overhauls its Trade Negotiation Machinery,” 11 February 1986, p 2)

<sup>412</sup> Directorate of Intelligence, “Trade Policy Formulation in Selected Developing Countries: Underlying Influences” 11 July 1986, P 46

<sup>413</sup> Directorate of Intelligence, “South Korea Overhauls its Trade Negotiation Machinery,” 11 February 1986, p 2

domestic political cost would become too great, possibly resulting in widespread opposition to the overall economic liberalization reforms that the administration had been pursuing.<sup>414</sup>

The reorganization of negotiating team resulted from such domestic political consideration. As the Minister of Trade and Industry became the new chief negotiator, the influence by the conservative bureaucrats increased in the trade negotiating structure.<sup>415</sup>

The reorganization of negotiating team confirmed the *de facto* power of Korea's domestic actors. Although Korea's decision-making structure in making trade policy was made basically autonomously from civil society, level II could not be completely excluded from negotiation. Furthermore, if an agreement was reached without sufficient consensus building within the bureaucracy and through domestic public opinion, there would be after-the-fact resistance and implementation problems.

The efforts to change the Korean perception about the IPRs were in part motivated by such concerns. During phase II of the negotiation, there were active attempts by the liberalizers in Korea and abroad to turn the domestic discourse about

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<sup>414</sup> Directorate of Intelligence, "South Korea Overhauls its Trade Negotiation Machinery," 11 February 1986, p 3

<sup>415</sup> *Ibid.*, pp 2, 4

IPRs more favorably. Such efforts can be seen as the process of reverberation as expounded by Putnam.<sup>416</sup> Putnam (1988) argued that international factors can influence domestic public opinion, leading to changes in domestic political balance influencing the negotiated outcome.<sup>417</sup>

For example, in April 1986, several months before the final conclusion of ROK-US IPR Agreement, the Brookings Institute and Korea's Ilhae Institute hosted an international seminar on the "issues and responses to bilateral trade issues between Korea and America."<sup>418</sup>

The seminar was held in ten consecutive days, with twelve American presenters representing the Congress, Administration and industry, and six Korean presenters, and some sixty discussants representing Korea's industry, government and media. The seminar sought to enhance Korean public's understanding of the positions of US Congress, the Whitehouse, Administration, industry and citizens, as well as the process of trade policy decision-making. It conveyed the message that "Korea needs to pursue liberalization and market opening," and "participate actively in making the global trading system more open."<sup>419</sup>

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<sup>416</sup> Robert D. Putnam, *op. cit.*, p 454

<sup>417</sup> *Ibid.*, p 454

<sup>418</sup> "Market opening to protect American Market," *Maeil Economy* 1986.4.4

<sup>419</sup> *Ibid.*

## 5. ROK-US IPR Agreement and the Uruguay Round

### 5.1 Conclusion of the ROK-US IPR Agreement

The ROK-US IPR Agreement was concluded during the Seoul-Washington working level trade talks on 21 July 1986. For domestic political reason, quiet diplomacy continued for six months since the reorganization of Korean negotiation team in January 1986. An American report observed that “Seoul has met nearly all of Washington’s demands under unfair trade practice actions by offering greater access to SK’s insurance market and better protection for IPRs” during the July trade talk.<sup>420</sup>

The Section 301 investigation for the lack of effective protection of US IPRs in Korea was terminated on 14 August 1986, following the conclusion of the ROK-US IPRs Agreement that would dramatically improve protection of IPRs.<sup>421</sup> Korea promised to enact an IPR legislation that reflected the outcome of the Agreement. The Korean government promised to revise the patent law in September 1987, and to retroactively protect pipeline products for ten years until June 1997 through

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<sup>420</sup> Directorate of Intelligence, International Economic and Energy Weekly “Seoul-Washington Trade Talks” 13 June 1986, p 1

<sup>421</sup> Ahn, Dukgeun, Op. cit., p 602

administrative guidance. The patent protection period was extended to fifteen years.

Copyright law would also be revised, which would extend the copyright period to fifty years. Korea would adopt a system similar to the Bern Convention, but it did not join the Convention and instead acceded to the UCC in October 1987. Korea enacted the Computer Program Protection Act on December 31, 1986, which protected the IPRs of computer programs. The contents of the ROK-US IPR Agreement are as follows.<sup>422</sup>

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<sup>422</sup> Minutes of the Committee for Commerce and Industry no. 6, 130<sup>th</sup> session, the Secretariat of the National Assembly of the Republic of Korea, 1986.8.5 Committee for Commerce and Industry, p 9

<Table 11> Summary of the ROK-US IPR Agreement (1986)<sup>423</sup>

	American Request	Agreement
Patent	-86.3 revision of law Implementation in 1986	86.9 proposal of law 87.7 implementation
	Protection of chemical and pharmaceutical materials	
	Extension of patent period from 12 to 17 years	Extension to 15 years
	Patent protection for pipeline products	Protection via administrative guidance for the pipeline products <sup>424</sup>
Software	Protection under copyrights law	Separate enactment
Copyrights	86.3 revision of law 86 implementation	86.9 proposal of law 87.7 implementation
	Extending copyrights protection from 30 years to 50 years	
	Protection of recordings (50 years) and accession to Geneva Convention	Protection of recordings (20 years) and accession to Geneva Convention

<sup>423</sup> South Korea-United States Copyright, Patent, and Trademark Rights Agreement (1986)

<sup>424</sup> The issue of extending material patent protection to “pipeline” pharmaceutical inventions was one of the controversial points during the ROK-US IPRs negotiation. Interview with former Minister of MCI, Chulsu Kim conducted on 21 January 2016

For patent rights and copyrights, Korean government promised to take the following actions through administrative guidance:<sup>425</sup>

## COPYRIGHTS

Through the strict application of administrative guidance, based on the provisions of the Law on Registration of Publishers and Printers, the ROKG will use every available means to prevent the unauthorized reproduction, publication and distribution of US copyrighted printed materials. Administrative guidance will be applied to all US-copyrighted printed materials created or published during the ten year period prior to the year in which the new copyright law becomes effective. Such protection will be provided as of the effective date of the new copyright law.

The ROKG will enforce this administrative guidance by means including denying or revoking registrations for publishers or printers who engage in the unauthorized reproduction, publication or distribution of US copyrighted printed materials. Through the strict application of administrative guidance, based on relevant laws,

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<sup>425</sup> White House Staffing Memorandum, "Letter from Ambassador Kyung-Won Kim to Ambassador Clayton Yeutter," Presidential Determination RE: Korean Intellectual Property and Insurance Unfair Trade cases, 8/12/1986, casefile #401111, BE005, US-Korea Patent Agreement, Ronald Reagan Presidential Library

the ROKG will use every available means to prevent the unauthorized reproduction, publication and distribution of US copyrighted computer programs. Relevant laws would include the Engineering Service Promotion Law, which requires registration by data processing companies. For those companies not yet registered under this law, the ROKG will require them to register.

The ROKG will enforce this administrative guidance by means including denial of registration and of financial benefits provided under relevant laws such as the Engineering Service Promotion Law and the Technology Development Promotion Law. Such protection will apply to all US copyrighted computer programs created or first published during the five-year period prior to the year in which the computer program protection law becomes effective. This protection will be provided as of the effective date of the computer program protection law.

The ROKG will deny permission for the importation, reproduction, publication or distribution of sound recordings, video recordings and motion pictures in the absence of a valid license or contract which establishes that the importation, reproduction, publication or distribution would not infringe a US copyright. The ROKG will deny approval of performance applications in the absence of a valid license or contract which establishes that the performance is authorized by the US copyright holder. The ROKG will impose penalties on those who infringe US copyrights. Such penalties will include imposition of fines, incarceration,

cancellation of licenses and registrations and denial of financial benefits. These actions and penalties will be based on Korean laws, including the Law on Registration of Publishers and Printers, the Phonograms Law, the Motion Picture Law and the Performance Law.

## PATENTS

The ROKG will not permit the manufacture or marketing of products marketed neither in Korea nor in the United States prior to the effective date of the amended Korean patent law and which are patented in the United States after January 1, 1980; this denial of permission to manufacture or market will apply for 10 years.

A list of products meeting the above definition will be provided by the United States. The consultative group will meet to confirm that the products on the list satisfy the foregoing definition; both governments concur that a reasonable burden of proof must be borne by applicants to ensure a manageable process. These discussions will be completed no later than the effective date of the amended Korean patent law. Administrative guidance will be applied as of this date. Administrative guidance will be enforced through the denial of domestic production, marketing and sale approvals in the absence of evidence that the US patent holder has authorized such manufacture and marketing, assuming the validity of the US patent.

## **5.2 Domestic Consequences**

### **5.2.1 Political Impact**

When Korean media reported in July 21, 1986, that ROK-US Intellectual Property Rights Agreement was concluded finally, strong voices of criticism were raised before its ratification in the National Assembly regarding the results of the negotiation by Korean government.

According to National Assembly minutes, “The en bloc settlement of the ROK-US IPRs Agreement yielded results not totally agreeable. Rather it will cause no little damage to us. A significant part of Korean people criticizes it as a hasty conclusion without sufficient consideration to such factors as vulnerability of Korean industrial structure, immaturity of its technology, and decline in the enthusiasm of domestic manufacturers, etc.”

Several congressmen demanded an official apology by the Minister of Commerce and Industry saying that “the government gave enormous shock to Korean citizens by making announcement suddenly on one day, only after concluding secret

negotiation on matters of tremendous importance that can turn the Korean industrial structure upside down.”

As Keum Jinho, Minister of Commerce and Industry, began to explain the principle of negotiation, most of the attending congressmen raised strong voices of objection. The minister said that, in order to keep smooth trading relations with the US, who shares about 40% of the export from Korea, it is vital to solve the trade conflict; that, since the investigation based on the Section 301 was invoked, it is next to the best to conclude the agreement by negotiation; and that the government set to the negotiation with all the capacity mobilized to the best, in order to achieve as best results from the negotiation process and conclusion measures as possible.<sup>426</sup> Minister Keum explained in a National Congress meeting about the points of concern as follows:

First, as a country with high economic dependency on foreign trade, Korea must respect the principles of free trade. For this, the government will carry forward continual opening within realizable range, thereby trying to contribute to the reinforcement of the constitution of Korean economy.

Second, as a country growing into one of the 12 largest trading nations, we are in

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<sup>426</sup> Minutes of the Committee for Commerce and Industry no. 6, 130th session, the Secretariat of the National Assembly of the Republic of Korea, 1986.8.5 Committee for Commerce and Industry, , pp. 4-5

a position to take over the duty and the responsibility equivalent to our status in the international society. It will be helpful to the long-term development of Korea to carry out such duties.

Third, the government made a realistic judgment that it is indispensable for Korea's economic development to keep smooth trading relations with the US in a situation where the export to US has very large portion in the whole export, Korea's trade surplus with the US is growing recently, thereby stimulating movements within the US to reinforce protectionism.

In short, with its economic structure with high foreign dependency, Korea can hardly achieve sustained economic growth, and therefore the government set to the IPR negotiation process as the management of the US market, the number one market for Korean export.<sup>427</sup>

In response to the minister's explanation, criticisms were raised by the attending congressmen including complaints that the minister was "rambling about the US position as impairing national pride."<sup>428</sup> The continuous demand by the congressmen for an official apology to the Korean people eventually led to the

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<sup>427</sup> Minutes of the Committee for Commerce and Industry no. 6, 130th session, the Secretariat of the National Assembly of the Republic of Korea, 1986.8.5 Committee for Commerce and Industry, pp. 1-2

<sup>428</sup> Ibid., p 5

meeting's adjournment for 20 minutes.

As the deputy director of the Patent and Trademark Office began a briefing about the adoption of the material patent system, more objections were raised by the congressmen. It was reported that, though Korea, with its poor experience and weak basis on the technology development and its unpreparedness for diverse settings for new materials such as laboratories, gene banks, and investigating systems, was facing many possible problems in introducing material patent systems. This included the increased burden on the Korean people due to additional payment of royalties, despite the “best efforts were made to carry the negotiation process in a direction advantageous to us, with consideration of such problems.”<sup>429</sup>

Some raised objection to the fact that only the USA, and no other country, was allowed entry in introducing the material patent system. “Negotiation must have good cause. Giving special advantage to the US only, succumbing under it, is really making a big hurt to our pride, even as a weak and small country.”<sup>430</sup>

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<sup>429</sup> Ibid., pp 21, 22

<sup>430</sup> Ibid. p 21

### 5.2.2 Economic Impact

Despite such criticisms and worries, the impact of ROK-US IPR agreement on Korean economy was weakly felt. There was a cooling effect on the dissatisfaction of the economic circle for the market opening by general performance improvement of the Korean economy,<sup>431</sup> and, following the withdrawal of the Section 301 investigation, no direct trade sanction was exerted, which created a time lag before the IPR agreement was implemented domestically.

The year 1986 was the best year for Korea since its independence, with its economy showing strong, across-the board growth. The country saw 12.2% increase of real GNP and 26% increase of export, thereby making a record-breaking current account surplus of USD 3.5 billion since the establishment of Korean government.<sup>432</sup>

The business situation in 1986 was influenced by benefits of three “blessings”, namely, low oil prices, low interest rates, and a strong Japanese Yen. Low oil prices had been cut almost USD 2 billion to oil-importing Korea and low interest rates had relieved the burden of returning foreign debt. At that time, the Korean won was weakly related to US dollar. In 1985, the Korean won was aggressively devaluated

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<sup>431</sup> Directorate of Intelligence, International Economic and Energy Weekly, “Seoul-Washington Trade Talks,” 1986. 6.13, p 2

<sup>432</sup> Ibid. pp 1-2

in response to the weakening US dollar, enhancing the competitiveness of Korean export goods. At the same time, the strengthening Japanese Yen made the Korean won even weaker, thereby adding to the export promoting effect of the exchange rate policy.<sup>433</sup>

Other factors were also pointed out: novices in Korean export industries, such as cars and electronic goods, saw good sales and the US domestic consumption on the whole increased. The export of Korean cars showed 121% annual growth, recording USD 1.7 billion, and that of electronic goods including PC and VCR showed 56% annual growth, recording USD 6.7 billion.<sup>434</sup>

The four major chaebols, Samsung, Hyundai, Gold Star, and Daewoo, began to set up their subsidiaries in the US since around 1986, making design and production camps and establishing distribution networks. All four of the chaebols announced investment plans of USD 1 billion for five years until 1990 to advanced memory production. That was a time when the US and Japan had the lead in DRAM market and technology, and Korea had some disadvantage to the US competitors and clear disadvantage to Japanese competitors, as Korea lagged behind in the market entry for 256K, and its learning rate was no faster than those businesses in the US and

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<sup>433</sup> Ibid. p 2

<sup>434</sup> Ibid. p 2

Japan, due to the paucity of experiences in semi-conductor production.<sup>435</sup>

To make the situation worse, the US began to initiate the IPR protection reinforcement, with foreseeable increase of the price of technology. As the intellectual property right is designed for reinforcing the exclusive right of its holders over their technology, its reinforcement will make its holders more advantaged in the royalty negotiation and the patent conflict and will make the price for technology use bigger.<sup>436</sup>

### **5.3 Initiation of the GATT Uruguay Round IPR Negotiation**

#### **5.3.1 Discussion of IPR in the GATT**

The discussion about the IPR issue within the international trading regime began in the latter part of the Tokyo Round, and in 1985, the discussion to incorporate the

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<sup>435</sup> Wheeler, David and Ashoka Mody, "Automation and World Competition: Korea's future in semiconductors, automobiles, and textiles," A Report to the Korean Traders Association on the Project "Development Strategy in the Information Age: Understanding the New Economics of Comparative Advantage." Boston University, 1986. p 3-46

<sup>436</sup> Ibid. p 3-66

IPR regime into the GATT system was accelerated. Since the mid-1970s, the trade of counterfeit goods increased among industrialized countries. The issue of IPR was first mentioned in the GATT context when the American proposal of “strengthening the rules and procedures that can prevent the trade of counterfeit goods based on the Article 9 of GATT,” which had been submitted during the July 1978 negotiation of Tokyo Round, was included in the Communique of Negotiating Parties on the Tokyo Round Negotiation.<sup>437</sup>

Up to this point, the official position of the American government was that “the US government regarded protection of IPRs largely as a technical matter and not as a trade policy concern broadly affecting US international competitiveness.” During the Tokyo Round negotiation that lasted from December 1978 to July 1979, there were negotiations among industrialized nations to conclude an Agreement Banning the Counterfeiting of Various Brand name Goods, but it could not be included in the Multilateral Trade Negotiation package.

The first meeting of GATT Special Committee was held to review the above draft agreement in September 1981. However, most developing countries argued that the matter should be discussed in the World Intellectual Property Organization, and the

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<sup>437</sup> Trade Policy Office, “*Urugqwai raundeu: Saeroun gukchemuyeog jilseoui Jeongae* (Uruguay Round: A new international trade policy unfolding) Korea Institute for Economics and Technology, 1988. 3, p 197

US did not push too strongly on this issue.<sup>438</sup> Thus the efforts to conclude the Agreement Banning the Counterfeiting of Various Brand-Name Goods did not materialize.<sup>439</sup>

During the 39<sup>th</sup> GATT Conference of Parties (COP) in November 1983, an unofficial meeting for the agenda setting to deal with the issue of trade of counterfeit goods within the GATT system was held. The GATT Secretariat wrote the secretariat documentation based on an eight-point survey,<sup>440</sup> and during the 40<sup>th</sup> GATT COP in November 1984, the issue was mandated to a group of trade policy and other experts, including those specializing in intellectual property rights (L/5758).<sup>441</sup>

The expert group pointed out that, although there was a general agreement about the need to seek a joint action to eliminate the barrier to trade created by the circulation of counterfeit goods, there was no consensus on whether such measures should be taken within the GATT framework.<sup>442</sup>

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<sup>438</sup> Son, Chanhyeon. “*Urugwai raundeu jicheok soyukwon hyeopsangwajewa urieui daeung bangan*(The Negotiation Strategy for Intellectual Property Rights in Uruguay Round)” *Policy Research 90-04*, p 134; Trade Policy Office, op. cit., p 197

<sup>439</sup> Son, Chanhyeon. op. cit. pp 33-34

<sup>440</sup> Trade Policy Office, op. cit., p 198

<sup>441</sup> Group of Experts on Trade in Counterfeit Goods Summary of Issues Raised and Views Expressed Prepared by the Secretariat, MDF/W/43, 18 June 1985, p 1

<sup>442</sup> Group of Experts on Trade in Counterfeit Goods Summary of Issues Raised and Views Expressed

The discussion so far about the discourse on IPR within GATT before the Uruguay Round was launched in 1986 suggests that since the discussion on trade of counterfeit goods began in the later period of the Tokyo Round, the US played a central role in promoting the discussion.

Before the GATT Ministerial Conference to be held on 15 September 1986 in Punta del Este of Uruguay, the Preparatory Committee (Prepcom) for the New Round had been working on drafting the negotiation agenda for eight months. However, until 22 August, the difference of opinion among member countries could not be reduced, and the controversy between the developed and developing countries was even more acute.<sup>443</sup>

Industrialized countries supported American proposal, but developing countries, especially Brazil and India were actively opposed to the IPR issue becoming a GATT agenda.<sup>444</sup> Most developing countries were extremely wary of the new issues of IPR to be discussed in GATT.<sup>445</sup>

The reasons for such opposition can be summarized into the following three

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Prepared by the Secretariat, MDF/W/43, 18 June 1985, pp 2-3; General Agreement on Tariffs and Trade Uruguay Ministerial Session – Background Notes, GATT/1395, 10 September 1986, p 21

<sup>443</sup> Directorate of Intelligence, “New Issues in the GATT Round: Intellectual Property and International Investment,” *International Economic & Energy Weekly*, 22 August 1986, DI IEEW 86-034, p 1

<sup>444</sup> *Ibid.* p 8

<sup>445</sup> *Ibid.* p 1

points. First, the GATT was not an adequate forum to deal with the IPR issue, and the issue should have been handled by the WIPO, which has the relevant expertise. Second, the sanctions against trade in counterfeit goods could easily be applied to goods that are not counterfeit goods. Third, the infringement of IPR was not as serious an issue as other more pressing trading issues.<sup>446</sup>

Due to these differences of opinions, the PrepCom had to send three different versions of the draft agenda to the ministers of member countries before the ministerial meeting. The first was a compromise text negotiated between forty-eight developing and developed countries, which did not contain an agreement on the IPR agenda. The second draft agenda was proposed by ten hardline Least Developed Countries (LDCs) led by Brazil, which excluded the IPR issue. The third draft was proposed by Argentina, which sought to compromise the first two drafts, but also excluded the IPR issue.<sup>447</sup>

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<sup>446</sup> Directorate of Intelligence, "New Issues in the GATT Round: Intellectual Property and International Investment," *International Economic & Energy Weekly*, 22 August 1986, DI IEEW 86-034, p 8

<sup>447</sup> Directorate of Intelligence, "New Issues in the GATT Round: Intellectual Property and International Investment," *International Economic & Energy Weekly*, 22 August 1986, DI IEEW 86-034, p 2

### 5.3.2 Negotiating the TRIPS (Trade-Related Aspects of IPRs)

The Uruguay Round Trade Negotiation was officially launched on 20 September 1986 in Punta del Este of Uruguay, and the IPR was included as negotiation agenda. Shortly after, fifteen negotiating group was established to work on the fifteen negotiating agenda stipulated in the Ministerial Declaration.<sup>448449</sup> The negotiation on the IPR issue was included as one of the Group on Negotiations in Goods (GNG), and was undertaken by the Negotiation Group on Trade Related Aspects of IPRs, including Trade in Counterfeit Goods, so called TRIPs Group.<sup>450</sup> According to the Ministerial declaration, the TRIPs group had the following objectives.<sup>451</sup>

- In order to reduce the distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of IPRs, and to ensure that measures and procedures to enforce IPRs do not themselves

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<sup>448</sup> Tariffs, nontariff measures, textiles, natural resources, agriculture, safeguards, MTN agreements, subsidies/CVDs, investment, tropical products, services, intellectual property, GATT articles, dispute settlement, and functioning of GATT system

<sup>449</sup> Office of USTR, Memorandum for the Economic Policy Council from the Trade Policy Review Group, "Uruguay Round: Review of US Policy," July 22, 1987, p 1

<sup>450</sup> Son, Chanhyeon, *op.cit.* p 135

<sup>451</sup> *Ibid.* pp 137, 138

become barriers to legitimate trade, the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines

- Negotiations shall aim to develop a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods, taking into account work already undertaken in the GATT

- These negotiations shall be without prejudice to other complementary initiatives that may be taken in the WIPO and elsewhere to deal with these matters

In the IPR negotiation, the negotiating objective of the US was “to negotiate international standards that provide adequate and effective protection of intellectual property rights, including enforcement and dispute settlement mechanisms.”<sup>452</sup>

Since the initiation of negotiations in 1987, until late 1988, little progress was made despite negotiations during eleven official meetings. Even the Montreal Ministerial Trade Negotiations Committee (TNC) held in December 1988 fell short of reaching agreement on the basic direction of subsequent negotiation. However, the negotiation began to be accelerated since the follow-up TNC in April 1989 produced the basic agreement on the subsequent negotiation (the so-called April

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<sup>452</sup> Office of USTR, Memorandum for the Economic Policy Council from the Trade Policy Review Group, “Uruguay Round: Review of US Policy,” July 22, 1987, p 3

Text).<sup>453</sup>

For major negotiating tasks, the following was discussed:

- Whether or not the basic principles of GATT, i.e. transparency, national treatment, and nondiscrimination (MFN) could be applied to IPR issues
- Setting standards for IPR protection
- Developing enforcement procedures that take into consideration the different national laws on IPR protection
- Establishment of dispute settlement procedure based on the GATT principle
- Setting a transition period to encourage participation of members

These agenda was discussed according to the classification of IPRs.<sup>454</sup>

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<sup>453</sup> Son, Chanhyeon, *op.cit.* p 135

<sup>454</sup> *Ibid.* pp 138-141

### 5.3.3 Korea's International Role and the TRIPS Negotiation

Ever since Korea received international attention as one of the NICs in the late 1970s, there were discussions on Korea's new role within the international economic order. American government documents observed that there was a growing awareness of Asia in the US, and in the 1980s Korea's importance in Asia and the world was growing even more. Korea's economic development was becoming a model for other developing countries as it had achieved both economic growth and distribution.<sup>455</sup>

Kim Jae Ik, a prominent liberalist of Korean Economic Planning Board commented that Korea's role in the 1980s should be "to promote liberal trading order and international investment, and to become the model for economic development so that other countries would follow suit."<sup>456</sup> In other words, Korea wanted to become a catalyst for freer trade,<sup>457</sup> and wanted to promote international investment by creating "an environment that is conducive to capital and technology

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<sup>455</sup> Office in Charge of the North America, Minute of the 1<sup>st</sup> ROK-US Policy Council Meeting. "Agenda and Our Basic Stance," General Official Document File 8917/12851, 1979. P. 1313

<sup>456</sup> Ibid. p 38

<sup>457</sup> Ibid. p 240

transfer from where it is abundant to where it is scarce.”<sup>458</sup>

The US argued that “Korea should publicize her own achievements, to show that development is possible, even with a minimum of resources. In this manner Korea can help to dispel the current pessimism in some countries, and promote interchanges of information on preparing the basic conditions for industrialization.” The US wanted Korea to become a model for developing countries.<sup>459</sup> The US said it would advise other LDCs to adopt Korean model.<sup>460</sup>

The US government further argued that “Korea must become the champion of more liberal trade, and progressive liberalization by industrializing nations. Our country should also stress the domestic benefits of unilateral liberalizations, such as Korea is practicing now, to encourage other countries to follow suit, and in particular promote the economic integration of the Pacific Basin through the forces of the market economy.”<sup>461</sup> In other words, US officials wanted Korea to be the champion of free trade and trade liberalization.

The US expected Korea to play an important role in preparing for the GATT

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<sup>458</sup> Ibid. p 241

<sup>459</sup> Ibid. 1979, p 236

<sup>460</sup> Ibid. p 238

<sup>461</sup> Ibid. p 236

negotiation as the leader of developing countries. Considering Korea's economic power and its commitment to multilateral trading system, the US wanted to encourage Korea to play a more active role in the GATT.<sup>462</sup> The US mentioned that "Korea's contribution to this process will be important. Developing countries in the GATT view Korea as an economic leader among the LDCs and will be looking to Korea for direction, while developed countries will continue to exert pressure on Korea to accept greater responsibilities for the trading system."<sup>463</sup>

However, the attitude that Korea had shown before the US-ROK IPR Agreement was concluded was passive. US officials observed that during the November 1982 preparation meeting of GATT Ministerial Korea acted as if it "perceived no clear economic or political advantage from supporting the US-led initiatives."<sup>464</sup>

In particular, Korea remained skeptical about the trade in advanced technology, which the US had been pursuing rigorously during the 1982 GATT Ministerial Conference, and opposed to the anti-counterfeit code. During the ministerial meeting, according to analysis by the US Department of State, "Korea was sharply negative about the North-South Round, services, and high-technology, but adopted

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<sup>462</sup> Department of State Briefing Paper, "GATT Ministerial Follow-up," 1983.3.30, Archives Unbound, p 3

<sup>463</sup> Ibid.

<sup>464</sup> Ibid.

Ministerial Declaration containing all of these items. Attention is now focused on implementing the Declaration and Korea will be encouraged to participate fully.”<sup>465</sup>

However, after the ROK-US IPR Agreement was reached on 21 July 1986, Korean government’s attitude toward IPR issues became more proactive. During the GATT Ministerial Conference that was held in preparation for the launching of the Uruguay Round from 15-19 September 1986, Korea’s Minister of Trade and Industry Woong-Bae Rha advocated the inclusion of the IPR issue in the Uruguay Round negotiating agenda.

“Korea advocates discussing both old and new issues because we believe that the subject matter of negotiations should reflect the major interests of all participants. The importance of resolving old issues is clear...As for new issues, consensus has yet to be reached on whether or not such issues as trade in services, trade-related investment, and intellectual property rights should be discussed in the New Round. In our view, trading nations should recognize that the world economy is constantly evolving and that the trading system needs to be more responsive to this change.

These beliefs underlie the unilateral reforms Korea has undertaken in the last five years to open up its market and to liberalize restrictions on foreign investment.

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<sup>465</sup> Ibid, p 3

These reforms have met with considerable resistance at home. Despite such resistance, the Government has stood firm in its faith and commitment to freer trade. We know that in spite of the painful adjustments we are obliged to make, liberalization in the longer run will make our economy stronger and richer. And, by opening our markets, we are doing our part to help invigorate the multilateral trading system that has contributed so much to our development over the last twenty-five years.”<sup>466</sup>

Rha stated that Korea supported the inclusion of IPRs in the Uruguay Round agenda. He also argued that, although Korea’s market liberalization reforms met with a lot of domestic resistance, it would facilitate the long-term growth of Korean economy. By doing so Korea would be doing its part for the multilateral trading system that allowed the rapid growth of Korean economy for 25 years.

Korea’s support for the IPR issue would have had a significant impact on the positions of other developing countries, given its position as an East Asian NICs displaying rapid economic growth, and especially in regard to the fact that Korea had been investing considerable portion of national resources in fostering high technology industries.

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<sup>466</sup> “Korea: Statement by His Excellency Woong-Bae Rha, Minister of Trade and Industry, at the Meeting of the GATT Contracting Parties at Ministerial Level: 15-19 September 1986, Punta del Este, Uruguay, pp 2-3.

In this regard, the conclusion ROK-US IPR Agreement would have had the following effects on the IPR negotiation during the GATT Uruguay Round.

First, the ROK-US IPR Agreement was the first instance of international agreement on IPR concluded in the context of trade dispute involving unfair trade practices. As such, it became a touchstone for establishing the trade-relatedness of the IPR.

Second, the Agreement showed the US's commitment to the IPR issue, by suggesting that it would be willing to initiate the Section 301 process if necessary.<sup>467</sup> An agreement to improve protection of patented and copyrighted works would attempt to lengthen patent terms, increase the patent protection for such goods as chemicals and pharmaceutical compounds, and extend copyright protection to computer software. In addition, it would create a dispute settlement mechanism to litigate contentious bilateral issues. This multilateral approach would supplement bilateral efforts by the US to improve protection in these areas.<sup>468</sup>

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<sup>467</sup> An agreement to improve protection of patented and copyrighted works would attempt to lengthen patent terms, increase the patent protection for such goods as chemicals and pharmaceutical compounds, and extend copyright protection to computer software. In addition, it would create a dispute settlement mechanism to litigate contentious bilateral issues (Directorate of Intelligence, "New Issues in the GATT Round: Intellectual Property and International Investment," *International Economic & Energy Weekly*, 22 August 1986, DI IEEW 86-034, p 7)

<sup>468</sup> Directorate of Intelligence, "New Issues in the GATT Round: Intellectual Property and International Investment," *International Economic & Energy Weekly*, 22 August 1986, DI IEEW 86-034, p 7

For the US, the strategy used in successfully concluding the ROK-US IPR Agreement, namely, the bilateral negotiation in the context of Section 301 investigation would become a model for the subsequent negotiations with developing countries, either bilaterally, or in multilaterally.

Third, by strengthening the Korean protection of IPRs, the Agreement changed Korea's negotiating strategy in the Uruguay Round TRIPs negotiation. Korea played a more active role in mediating the developed and developing countries in the formation of the IPR regime. Such efforts tried to reconcile the conflicting positions along the North-South divide, making the negotiation process more multipolar and multilateral.

Since the initial stage of negotiation, there were three unofficial groups in the TRIPs negotiation, dependent on their positions on IPR issue. Advanced countries, such as the US, Japan and European countries led the discussion, while Brazil and India tried to block the progress.<sup>469</sup>

Countries that had already discussed the IPR issue bilaterally with the US, such as Taiwan, Singapore, South Korea, Malaysia, Indonesia, and Thailand, who were "at various stages of improving their copyright, patent or trademark laws"<sup>470</sup> supported

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<sup>469</sup> Directorate of Intelligence, International Economic and Energy Weekly "Summit Issues: GATT Round Tactical Maneuvering," 10 April 1987, p7

<sup>470</sup> Directorate of Intelligence, International Economic and Energy Weekly "IPR: Enhanced Protection in Key Asian LDCs", 3 July 1986, p 21.

the IPR initiative. The US government observed that “moderate LDCs such as Singapore and South Korea will ... be a critical force in pressuring those with extreme positions to reach a compromise, allowing the negotiations to progress.”<sup>471</sup>

## 6. Conclusion

This study examined the process by which the protection of intellectual property rights (IPRs) became a central issue in the international trading system, from the initial stages of the Cold War, through détente to the mid-1980s, when the Cold War system began to collapse. This study tried to reinterpret the Cold War from the perspective of the evolving international trading system, paying attention to how technological development, competition and control affected the Cold War system, and what role the IPR system came to play in the process.

The study proposes a mechanism that assumes a dynamic relationship between the discourse and institutionalization. At key historical moments, discourses are institutionalized, through domestic and international political processes, as policies and legal texts to be implemented subsequently. If the practices that result from the

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<sup>471</sup> Directorate of Intelligence, International Economic and Energy Weekly “Summit Issues: GATT Round Tactical Maneuvering,” 10 April 1987, p9

implementation accumulate sufficiently, a new perception about the reality emerges, leading to new sets of discourses.

For the purpose of this analysis, historical documents that summarize the perception of the policymakers are thought to embody the major discourse of the time. This study selected discourses that were important in shaping the history of IP during the Cold War including the discourse of containment (mid-1940s ~ mid-1960s), détente (mid-1960s ~ mid-1970s), discourse on economic security (late 1970s ~ early 1980s), international competitiveness discourse (early 1980s ~ ), and the Intellectual Property discourse (mid-1980s ~ ). Each discourse, as embodied in these historical documents, will be analyzed, paying attention to the historical background of their formation, and their impact on subsequent institutions and practices.

During the containment period, the US government sponsored the rapid accumulation of intellectual capital. During détente, intellectual property (IP) became a diplomatic resource that precipitated the economic exchanges between the East and West, and led to the recognition of the economic and security value of knowledge.

As East-West trade during détente intensified, new discourses began to emerge. The denial approach argued that the duality of technology, especially advanced technology, might result in increased security and economic capability of the Soviet

Union, posing a long-term threat to Western security. It further argued that the West's superior economic and technological power needed to be used as a leverage to bring about changes in the international behavior of the Soviet Union. On the other hand, the laissez-faire approach argued that the newly emerging techno-economic space in East-West relations need to be expanded, and should be governed by market-based approaches.

Until then, IPRs were more of a bargaining chip that promoted the exchanges and dissemination of technology in the US due to the enforcement of strong anti-trust laws. Internationally, active international technology transfer occurred within the "Free World," due to US post-war diplomacy aimed at reconstructing the economies of its allies and establishing technological infrastructure.

As a result, Japan and East Asian NICs experienced a rapid catch-up of technological capacities, which began to be pronounced from the mid-1970s. The international competitiveness of Western industry began to decline relative to Japan, and Western economies began to strengthen the international competitiveness of their industries by changing trade and technology policies, including IPR-related policies.

The year 1979 became the turning point whereby discussion of economic issues became the dominant discourse in America. As Japan arose as a fierce competitor to US industry from the late 1970s in consumer electronics and advanced technology

goods, the economic issue dominated the 1980 US presidential election.

President Reagan regarded international competitiveness as a high priority in his administration. Lively discussion about competitiveness ensued, and in 1985, the Young Commission Report was published after an extensive discussion among policy makers and opinion leaders in various fields. As the report's subtitle "Global Competition: The New Reality" suggests, the report redefined the new reality of the international political economy from the point of view of a market-based approach.

Domestically, the US began to enact various policies to strengthen industrial competitiveness. Internationally, Japan and East Asian NICs began to be pressured to refrain from "dumping" their products in the American market, further open up their markets, and play a more productive role in US-initiated discussions in the international arena.

These discussions were published in various reports and policy announcements from around 1985. In addition to the publication of the Young Commission report and the announcement of the Plaza Accord, the establishment and implementation of American trade strategy was a notable step forward. According to the new strategy, the US government would launch a new negotiation round within the GATT framework with an aim to forge a new multilateral trading system. Protection of American IPRs, which it regarded as the source of American competitiveness, would be included as a high priority agenda item. According to the plan, America would

pursue negotiations bilaterally, and multilaterally, to promote IPRs in the global trading system.

The US-ROK IPR Agreement, which began in earnest with the initiation of the Section 301 investigation of Korean IPRs by the USTR, was an important stepping stone in the US effort to strengthen IPRs in the global trading system. The following section will examine the international competitiveness discourse and its institutionalization in the US and in the global trading system.

The process of negotiations that led to the conclusion of the US-ROK IPR Agreement has been analyzed using the framework of the two-level game, characterized by the intergovernmental negotiation (Level I), the government's negotiation with domestic political actors (Level II), and the exchange of influences between international actors and domestic actors (Reverberation). The negotiation process was analyzed using the ESTN two countries model that examines how the competing discourses converge in the final agreement, and how the process interacts with the domestic politics of Korea.

The bilateral IPR negotiations reached a turning point when the USTR's Section 301 case was initiated in November 1985. Therefore, the study understood the negotiation process moves on to Phase 2, after the 301 investigation was launched.

Phase 1 commenced from 1981 to October 1985, when US requests for increased Korean protection of IPRs, including the rights for computer software, copyrights

and process patents, began to be made more systematically. During this period, the Korean government was reluctant to respond with concrete action due to huge domestic political costs.

Phase 2 was from November 1985 to July 1986, a period that began with the initiation of USTR's investigation of unfair trade practices under Section 301, until the final conclusion of the US-ROK IPR Agreement.

The domestic political, economic and legal impact of the Agreement and the international consequences were examined. Shortly after the US-ROK IPR Agreement was reached, GATT's 8<sup>th</sup> Round of multilateral trade negotiation, i.e. the Uruguay Round was initiated in Punta del Este, Uruguay. IPR issue was included as the GATT agenda. In the subsequent seven and a half years of multilateral negotiations, the Korean government's position was significantly affected by its domestic legal infrastructure induced by the US-ROK IPR Agreement.

The conclusion US-ROK IPR Agreement had the following effects on the IPR negotiation during the GATT Uruguay Round.

First, the US-ROK IPR Agreement was the first instance of an international agreement on IPRs concluded in the context of trade dispute involving unfair trade practices. As such, it became a touchstone for establishing the IPRs relationship with trade.

Second, the Agreement showed the US commitment toward the IPR issue by suggesting that it would be willing to initiate the Section 301 process if necessary. An agreement to improve protection of patented and copyrighted works would attempt to lengthen patent terms, increase the patent protection for such goods as chemicals and pharmaceutical compounds, and extend copyright protection to computer software. In addition, it would create a dispute settlement mechanism to litigate contentious bilateral issues. This multilateral approach would supplement bilateral efforts by the US to improve protection in these areas.

For the US, the strategy in successfully concluding the US-ROK IPR Agreement, namely, the bilateral negotiation in the context of Section 301 investigation would become a model for the subsequent negotiations with developing countries, either bilaterally, or in multilateral fora.

Third, by strengthening Korean protection of IPR, the Agreement changed Korea's negotiating strategy in the Uruguay Round TRIPs negotiation. Korea played a more active role in mediating the developed and developing countries in the formation of the IPR regime. Such efforts tried to reconcile the conflicting positions along the North-South divide, making the negotiation process more multipolar and multilateral.

In conclusion, it can be argued that the US-ROK IPR Agreement was a case in which the US utilized Korea's international status as the model for developing

countries in its efforts to strengthen IPRs in the multilateral trading system. From the ROK point of view, the US-ROK IPR negotiations were a process by which it sought to minimize the political and economic costs of the Agreement, while fulfilling the role expected of it as a trading nation and adapting to the changing global system for IPR protection.

In the history of global trading system in the latter half of the 20<sup>th</sup> century, the rise and establishment of IPRs was the central feature of the changing technological and trade environment and went hand-in-hand with the evolving economic and security landscape of the Cold War. The discourse concerning IPRs gradually replaced the Cold War ideological competition as the new ideology and principle of the era of globalization.

# Appendix 1

## RECORD OF UNDERSTANDING ON INTELLECTUAL PROPERTY RIGHTS<sup>472</sup>

### A. COPYRIGHTS

1. The Government of the Republic of Korea (ROKG) will draft a comprehensive copyright bill which will be submitted to the National Assembly before the end of September 1986. The ROKG will exert its best efforts to ensure that the legislation is enacted so as to become effective no later than July 1, 1987.

2. The ROKG will accede to the Universal Copyright Convention (UCC) and Geneva Phonograms Convention and will take the necessary steps to obtain the approval of the National Assembly for accession so as to make those conventions effective with respect to Korea within 90 days of the effective date of the new copyright law.

3. The copyright law which is enacted will be comprehensive in coverage, will provide protection to traditional works, e.g., those enumerated in Article I of the UCC, and will conform to the UCC. Copyright protection for computer programs

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<sup>472</sup> White House Staffing Memorandum, "Record of Understanding on Intellectual Property Rights," Presidential Determination RE: Korean Intellectual Property and Insurance Unfair Trade cases, 8/12/1986, casefile #401111, BE005, US-Korea Patent Agreement, Ronald Reagan Presidential Library

will be recognized in the new copyright law.

4. Copyright protection for computer software will be described in the Computer Program Protection Law, to become effective at the same time as the new copyright law. The provisions of the Computer Program Protection Law will be consistent with the copyright protection afforded other literary works. An interministerial committee (the Program Deliberation Committee ) will be established by law to ensure that administration of copyright protection for software conforms to administration of copyright protection for other works.

5. Protection for sound recordings for a term of 20 years will be included in the new copyright law as a neighboring right, complementing the existing Phonograms Law. In addition, the protection of sound recordings against unauthorized reproduction, importation and distribution will be strengthened through stricter enforcement of Korea's Phonograms Law.

6. The ROKG will study the feasibility of extending copyright protection to data bases as compilations. In the meantime, the new copyright law will provide for protection of copyrightable works whether or not they are incorporated in a data base.

7. The ROKG will study the feasibility of extending protection to semiconductor chips with an intention to provide protection against unauthorized reproduction.

8. The ROKG will study satellite telecasts and cable TV, with a view toward protecting them under the new copyright law.

9. The ROKG will implement the translation compulsory licensing provisions in the new copyright law and the implementing regulations to conform with Article Vter of the UCC. The provisions

of the new copyright law concerning the use of copyrighted works for the purpose of school education shall be implemented in a manner fully consistent with international copyright as reflected in the fair use provisions of the Tunis Model Law on Copyright for Developing Countries. Provisions permitting the reproduction of computer software when the author is unknown or cannot be found will be implemented in a manner consistent with the provisions of Article Vquater of the UCC.

10. The ROKG will strengthen penalties against copyright infringement under the new copyright law so that the rights of both domestic and foreign copyright owners can be protected effectively. Such penalties will be consistent with the nature and severity of penalties for other offenses under Korean law.

11. The ROKG will extend liability for copyright infringement under the new copyright law to include the same entities (sellers and distributors) as may be found liable for violation under Korea's Motion Picture Law and Phonograms Law.

12. The new copyright law will provide a term of life plus 50 years for works whose authors are individuals, and a term of 50 years from first publication in the country of origin for works authored by juridical entities, such as corporations.

13. Through administrative guidance, printed materials copyrighted in the United States and published during the ten year period and computer software created and first published in the five year period prior to the year in which the new copyright law becomes effective will be prevented from unauthorized reproduction, publication and distribution from the effective date of the new copyright law. As for sound recordings, video recordings, motion pictures and performances, through stricter enforcement of relevant laws, the ROKG will deny permission for their importation, reproduction, publication or distribution (deny approval of application in the case of performances) in the absence of a valid license or contract.

## B. PATENT RIGHTS

1. A comprehensive bill to amend the patent law to include patent coverage for chemical and pharmaceutical products and new uses of chemical and pharmaceutical products will be introduced to the National Assembly by the end of September 1986. The ROKG will exert its best efforts to secure enactment of the bill by the end of 1986. Regulations, guidelines and other administrative mechanisms will be formulated so that applications for patents may be accepted by the Office of Patents

Administration no later than July 1, 1987.

2. In drafting the proposed legislation, the ROKG will establish a patent term of 15 years from the date of publication of the patent application.

3. Measures related to Articles 45 and 59 of the patent law will be modified so that non-exclusive licenses will be granted only in those situations in which the dependent patent represents a substantial technical advance over the dominant patent.

4. Measures related to Articles 51 and 52 of the patent law will be modified to reduce the discretionary power of the Office of Patents Administration to grant non-exclusive licenses.

5. Patent protection for new microorganisms will be effective at the same time as for chemical products and pharmaceuticals.

6. Korea will accede to the Budapest Treaty in 1987.

7. Through administrative guidance, certain products which are patented in the United States after January 1, 1980, but are marketed neither in Korea nor in the United States prior to the effective date of the new patent law, will be protected by denial of permission to manufacture or market such products in Korea without authorized permission of the United States patent owner(s) for ten years from the effective date of the amended Korean patent law. The identification of these products will be decided upon in the consultative mechanism no later than the

effective date of the amended Korean patent law.

### C. TRADEMARKS

1. The ROKG amended Article 24 of the Presidential Decree accompanying the Foreign Capital Inducement Act to remove the requirement for technology inducement as a condition for accepting applications for trademark licenses. By removing this requirement, the trademark license will be permitted to continue beyond the life of any accompanying technology inducement agreement, and joint venture or raw material supply agreements will no longer be necessary for trademark licensing.

2. Korea has completely repealed export requirements on goods covered by trademark licenses, and has lifted restrictions on royalty terms in licenses, under the new Ministry of Finance guidelines established in September 1985. No other restrictions, such as restrictions on duration or amount of royalties, are imposed on trademark licenses.

3. Under the Office of Patent Administration guidelines established in 1984, import bans or restrictions constitute "just cause" under Articles 20 and 45 of the Trademark Act, thereby precluding cancellation for non-use or rejection of renewal of a trademark registration of goods subject to such restrictions.

4. Korea has adopted and implemented guidelines which prohibit domestic entities

from registering trademarks that are identical to or resemble those owned by foreign entities, regardless of whether the foreign mark is "well-known" in Korea.

#### D. ENFORCEMENT

The ROKG will exert its best efforts to ensure adequate protection of intellectual property rights through strict enforcement of the relevant laws, and will make public administrative rules and regulations affecting the -protection of intellectual property rights. The ROKG also will ensure adequate protection of proprietary data, direct all Korean law enforcement agencies to give high priority to enforcement of intellectual property rights, and will enact effective penalties for intellectual property rights violations.

#### E. CONSULTATIVE MECHANISM

Korea and the United States agree that consultations will be held under the auspices of the Korea-US Economic Consultation Trade Subgroup regarding (1) any matter relating to the implementation of the understanding reached with respect to the 301 case on intellectual property rights and (2) other issues related to intellectual property of interest to either party. Based on the commitments contained in this record of understanding, and in anticipation that implementation of these

commitments will proceed as scheduled, the United States Government has terminated the investigation into Korea's protection of intellectual property initiated under Section 302(c) of the Trade Act of 1974, as amended.

For the Government of the  
United States of America

For the Government of the  
Republic of Korea

## Appendix 2

Memorandum on the South Korea-United States Copyright, Patent, and Trademark Rights Agreement<sup>473</sup>

Memorandum for the United States Trade Representative

Subject: Determination Under Section 301 of the Trade Act of 1974

To our mutual benefit, the Governments of the United States and the Republic of Korea (Korea) have reached an agreement resolving the investigation initiated under Section 302(c) of the Trade Act of 1974, as amended (19 USC. 2412(c)), of Korea's previously ineffective protection of intellectual property rights. The sustained, cooperative efforts of both our Governments and the successful outcome of these efforts demonstrate how we can work together constructively to achieve a more open world trading system. Therefore, pursuant to Section 301 of the Trade Act, I have determined to accept the agreement described below as an appropriate and

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<sup>473</sup> White House Staffing Memorandum, "Memorandum for the United States Trade Representative," Presidential Determination RE: Korean Intellectual Property and Insurance Unfair Trade cases, 8/12/1986, casefile #401111, BE005, US-Korea Patent Agreement, Ronald Reagan Presidential Library

feasible action to resolve this investigation and therefore to terminate the investigation. I direct the United States Trade Representative (USTR) to notify the Government of Korea of my approval of the agreement and to take any actions necessary to implement and monitor it.

#### Reasons for Determination

On November 4, 1985, in response to my request, the USTR initiated an investigation into the adequacy of Korean laws governing the protection of intellectual property rights. Korean laws deny patent protection for pharmaceutical and agricultural chemical products and do not provide copyright protection for computer software and audio recordings. Under Korean trademark law, Korean firms have been permitted to register trademarks similar or even identical to foreign trademarks that are not "well known" in Korea. Moreover, there has been a lack of effective enforcement of existing laws pertaining to copyright protection for literary works. Pursuant to Section 301 of the Trade Act of 1974, as amended, I have determined that the prior policy of Korea of denying effective protection to intellectual property rights was unreasonable and a burden or restriction on US commerce.

Representatives of the Governments of Korea and the United States intensively negotiated concerning amendments to existing Korean laws and improved enforcement by the Government of Korea of existing laws. As a result of these negotiations, we reached an agreement regarding actions the Korean Government will take to improve dramatically Korea's protection of copyright, patent, and trademark rights. Korea has agreed to take the following actions:

- introduce for enactment by July 1, 1987, comprehensive copyright laws explicitly covering computer software;
- accede to the Universal Copyright Convention and Geneva Phonograms Convention by October 1987;
- introduce amendments to its patent law to extend product patent protection for chemicals and pharmaceuticals and for new uses of these products;
- adhere to the Budapest Treaty and extend patent protection to new microorganisms; and
- remove requirements for technology inducement and exportation previously applied to trademarked goods and to remove restrictions on royalty terms in

trademark licenses.

Korea and the United States have also agreed to establish a consultative mechanism to discuss matters relating to implementation of this agreement and other issues related to protection of intellectual property.

This agreement represents a major achievement in our efforts to obtain effective intellectual property protection for American industries. Thus, this agreement will encourage freer trade with the Republic of Korea and remove trade distortions.

This determination shall be published in the Federal Register.

Ronald Reagan

[Filed with the Office of the Federal Register, 4:47 p.m., August 14, 1986]

Note: The memorandum was printed in the ``Federal Register'' of August 18.

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## 국문초록

본 연구에서는 냉전의 형성기에서 시작하여 데탕트, 냉전의 해체 및 글로벌화가 본격화된 80년대 후반에 이르기까지 국제 통상 체제에서 지적재산권의 확보와 보호가 핵심적인 위치를 차지하게 되어 가는 과정을 고찰하였다.

한미 지재권 협정을 냉전사의 역사적인 맥락 속에 이해하기 위하여 국제통상 체제의 형성, 전개라는 측면에서 냉전을 재해석하고, 기술의 발전, 교류, 경합, 판매, 통제가 냉전체제에 어떤 변수로 작용했으며, 이 과정에서 지적재산권 제도는 어떤 역할을 부여 받았는지를 일차사료를 통해 분석했다. 또한 냉전 시기의 대외정책 및 국제협상이 결정되는 메커니즘을 안보, 경제, 기술에 관한 담론-제도화-실행의 상호작용을 중심으로 모형화했다.

본 연구에서는 지적 재산이 축적되고 지재권 보호 논리가 대두하는 데 있어 중요한 분기점을 제공한 담론으로 봉쇄 (containment), 데탕트 (détente), 경제 안보론 (discourse on economic security), 국제 경쟁력 (international competitiveness) 담론, 지적 재산권 (Intellectual Property) 담론을 선택하고 각각의 논의가 해당 시기의 정책 결정 과정을 통해

국내법, 국제법 등으로 제도화 되고 이후의 실행으로 이어지는 과정을 분석했다.

1970년대 중반 이후 미국에서는 국제 통상, 기술 교류 등에 대한 태도에 관한 두 가지 흐름이 경쟁하고 있었다. 첫째는 뷰시 보고서에 제기된 기술 안보론 등 여전히 안보를 최우선으로 하면서, 데탕트 이후 급증해온 동서 교역의 안보적 함의를 경계하고, CoCom의 통제를 강화, 재정비해야 한다는 봉쇄적 담론이었다.

둘째는 데탕트 시기 이후 재등장한 자유 시장주의(laissez-faire)적 국제관계 담론으로, 국제 관계의 전략적 균형의 성립으로 정치·안보적 고려로부터 비교적 독립적인 경제·기술의 영역을 인정할 필요가 있으며, 시장 원리에 입각한 교류의 활성화가 장기적으로 안보·외교 정책적으로도 안정을 가져오는 데 기여할 것이라는 시각이었다. 이 두 가지의 경쟁하는 담론은 1980년대 이후에도 시기 별 분야 별로 중요성과 강조점을 달리하면서 계속 나타나게 되었다.

1970년대 후반, 특히 1979년을 계기로 미국 내에서의 담론은 경제 이슈로 초점이 모아졌다. 일본의 대두는 미국의 쌍둥이 적자와 대량 해고 사태 등 악화된 경제 여건과 맞물리면서 1980년 미 대선에서 시장주의가 논의를 주도하게 되었다. 레이건 대통령은 국제경쟁력의 증진을 최우선

정책 과제 의 하나로 삼았고, 1985 년에 각 계 의 전문가 의견 을 수렴 하여 발표 된 영 위원회 보고서 (Young Commission Report)가 발표 되었다. 이는 국제 정치 경제 환경 의 새로운 현실 을 시장주의 의 관점 에서 재정 의 한 것으로 볼 수 있다.

미국 은 국내 적으로 경쟁력 을 강화 하기 위한 제도 를 정비 했고, 국제 적으로는 일본 과 동아시아 신흥 공업 국 (NICs)들 에 대해 미국 시장 에 대한 덤핑 금지, 통상 개방 및 다자주의 협상 에서의 적극적 참여 등이 요청 되었다. 1985 년부터 는 이러한 논의 들이 무르익 어 여러 가지 보고서 와 정책 결정 으로 발표 되고, 실행 되기 시작 하였다.

1985 년 영 위원회 보고서 발표, 플라자 협정 (Plaza Accord)과 더불어 가장 주목 할 만한 결정 은 미국 의 통상 전략 의 수립 과 실행 이었다. 즉, 새로운 다자적 통상 질서 를 만들기 위해 뉴 라운드를 개시 하기 로 결정 하고, 미국 경쟁력 의 원천 인 지적 재산권 보호 를 그 주요 의제 로 삼아야 한다는 결정 이었다. 이에 따라 미국 은 다각적 으로 지재권 강화 를 위한 협상 을 추진 했다.

한국 의 지재권 보호 실태 에 대한 미국 무역법 301 조상 무역 대표부 (USTR) 조사 의 개시 로 시작 된 한미 지재권 협상 은 이러한 미국 의 글로벌 통상 질서 형성, 특히 GATT 체제 내 에서의 지재권 강화 에 대한 구상

속에서 하나의 중요한 디딤돌로 제기된 것이었다. 한미 지재권 협정이 체결되기까지의 과정을 한미 간의 협상 (Level I), 한국 정부와 시민사회 간 (Level II), 미국과 한국의 시민사회 간 (Reverberation)에 펼쳐지는 양면 게임으로 분석했다. 경쟁하는 한국과 미국의 담론이 한미 간 지재권 협상 기간 동안 어떤 식으로 조율되었는지, 그것이 한국의 국내 정치와 어떻게 맞물렸는지를 분석했다.

한미 지재권 협상에서 한국 정부가 진행한 양면 게임은 한국에 대한 미국의 301 조 조사 개시 시점을 중심으로 협상 1 기 (1981-1985.11)와 협상 2 기 (1985.11-1986.7)로 나누었다. 협상 1 기에는 통상 문제를 언론 등을 통해 정치화함으로써 국내 정치적 원색을 줄이고 대미 협상력을 높이려 했지만, 중반 이후 (1986.12-1987.6)에는 협상의 공론화를 줄이고 미국의 요구에 적극적인 태도를 보였다.

당시 한국 정부의 의사결정 구조가 대통령이 대내외 정책을 다른 정치 행위자들로부터 독립적으로 결정할 수 있는 구조였기 때문에 한미 지재권 협상의 양면 게임에서 한국 정부의 협상력은 이론적으로 높지 않았다. 하지만 실제로 한미 지재권 협상에서는 국내 정치적으로 국가-시민사회 간의 긴장 관계와 국내정치 행위자들이 갖는 사실상의 권력 (de facto power)으로 인해 한국 정부의 대미 협상력이 증대되었다.

한미 지재권 협상 2 기에서는 한미 간 협상력과 비용을 변화시키는 구조적인 변화들이 있었다. 한국의 지재권 실태에 관한 미국 무역법 301 조 조사의 개시는 한국 정부의 잠재적인 협상 결렬의 비용을 크게 증가시킴으로써 최단 시간 내에 한미 지재권 협정이 체결되도록 하는 요인이 되었다.

결국 한미 지재권 협정 자체는 ‘과잉 개방’이라는 한국 산업계의 비판에도 불구하고 미국의 지재권 보호를 획기적으로 강화하는 방식으로 체결되어 국내법 개정이 이루어졌다. 물론 법적인 인프라와 실제 이행은 별개였고, 한국의 경우 업계와 관료제의 저항이 커서 이행이 쉽게 이루어지지 않을 것은 협상 당시부터 예상되었고, 이후에도 지속적으로 미국과 지재권 협상을 업그레이드해 나가게 되었다.

한미 지재권 협정의 체결로 일단 미국의 직접적인 무역 제재를 피했다는 점과 이행의 소극성 등의 상황은 삼저 호황과 맞물려 동 협정으로 인한 한국 경제의 즉각적인 타격을 완화하는 요인이 되었다. 하지만 한미 지재권 협정의 체결이 GATT 우루과이라운드 협상에 있어서는 법적, 정치적으로 일정한 역할을 했다고 볼 수 있다.

첫째, 한미 지재권 협정은 불공정 무역 사례라는 통상 분쟁의 맥락에서 국가 간에 지재권 보호에 대한 합의가 이루어진 최초의 사례가 됨으로써,

이제까지 국내 정책적 영역으로 간주되었던 지적권 보호가 통상 문제로 자리매김하는 데 기여했다.

둘째, 미국이 한미 지적권 협상을 성공적으로 체결하는 데 사용되었던 방법, 즉 무역법 301 조 상의 무역제재의 암묵적 위협 하에 양자 협상을 진행하여 지적권 제도 개혁에 대한 합의를 이끌어 내는 과정은 향후 미국이 GATT TRIPS 협상이나 개도국과 지적권 협상을 양자적으로 진행하는 데 있어서 활용될 수 있다는 점에서 지적권 협상의 모델이 되었다. 이는 지적권 보호에 대한 미국의 확고한 의지를 보여 줌으로써 지적권 강화가 피할 수 없는 관문이라는 인식을 심어 주는 한편, 개도국들이 301 조 협상보다는 다자적 규율을 택하는 것이 낫다고 판단하도록 하는 효과가 있었다.

셋째, 한국 국내법적으로 미국에게 높은 수준의 지적권을 보장해 주게 되었다는 점은 우루과이 라운드에서 한국의 협상 전략이 이전과 달라지도록 하여, 한국이 국제적 지적권 규율이 형성되는 데 있어 한국이 선진국과 개도국을 중재하는 역할을 하게 되었다. 이는 선진국과 개도국으로 나뉘어 대립하던 지적권 협상의 구도를 보다 다자적·다원적으로 전환하면서 지적권 논의의 절차적 정당성을 강화하는 효과가 있었을 것으로 보인다.

결론적으로 한미 지재권 협정은 미국의 입장에서는 다자통상 체제 내에서 지재권 강화를 추진하는 과정에서 개도국의 모델로서 주목 받고 있던 한국의 국제적 입지를 활용한 사례였고, 한국의 입장에서 볼 때는 협정 체결로 인한 정치적·경제적 비용을 최소화하면서 통상 국가로서 한국에게 기대되는 역할을 수행하고, 변화하는 지재권 규율 체제에서 최대한 유리한 입장을 취하고자 한 노력의 과정이었다고 평가할 수 있을 것이다.

20 세기 후반 국제 통상 역사에서 지적재산권 개념의 대두와 정립은 냉전 체제의 경제적, 안보적 동맹 구도의 재편과 맞물린 기술·통상 환경의 변화의 핵심에 자리하고 있었다. 현재 국제 통상에서 압도적인 중요성을 갖고 있는 지적재산권 개념은, 냉전 해체기에 국제 정치경제 질서 재편 과정에서 자본주의-사회주의의 이념적 대립을 대체하는 새로운 이념이자 원칙으로 확립되어 왔다고 볼 수 있다.

주요어: 한미 지재권 협정, 지적재산권, GATT 우루과이 라운드 지재권 협상, 동서 무역, 국제 경쟁력, 양면 게임