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A Study of the Arbitration Issue on the KOREA and the U.S. FTA

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〈 Contents 〉

Key Words : Korea and the U.S. FTA, ISD, NAFTA

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Ⅰ. Introduction

If there is no ISD system through an international legal review of the ISD, which is an indirect acceptance of the Korea-US FTA and a dispute settlement procedure, even if an investor suffers damage due to an illegal act of the host country, he or she must file a lawsuit through the court of the investment country. This is unreasonable in terms of investors, and it is difficult to guarantee the fairness and transparency of the trial. Foreign investment in a company always faces a lot of challenges and risks and as far as concerns go, the introduction of a neutral system that can guarantee its security is an essential factor in concluding an investment agreement such as an FTA.[1)]

A Korean company shall review the legal process of the U.S. Customs in relation to the application of origin in the future application of the KORUS FTA and Border Protection. In relation to the origin of the US Customs authority, there is a need to look into US customs laws that are used.[2)]

Export particulars and federal customs will be the main disputes with regard to whether an FTA origin dispute is subject to preferential tariffs in relation to the collection of customs duties. In cases where a trade agent sues federal customs for customs benefits, the case must be filed with the US Court of International Trade. The USTR exercises exclusive jurisdiction over trade-related disputes. This article stipulates that the Federal Trade Court exercises jurisdiction over civil lawsuits filed in the United States due to customs duties, tariff rates, fees, and others.[3)] Korea-China-Japan Korea has the most advantage in negotiations than Japan or China in that it signed the FTA with the United States first among Korea, China, and Japan. In other words, I think it is time to compare the experience and wisdom gained in the course of the Korea-US FTA negotiations so that it can occupy a favorable position in the Korea-US FTA negotiations. Korea, China, and Japan will have to establish a more rational network to deal with investment disputes.[4)]

The introduction of a new “Investment Dispute Arbitration Agency” in Korea, China, and

1) J. E. Alvarez, The Public International Law Regime Governing International Investment, Brill, July 1, 2011
2) Dell Products LP v. U.S., 642 F.3d 1055, 1061, C.A.Fed., 2011.
3) David A. Gantz, The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement, 19 Am.U.Int’l L. Rev. 679, 2004.
4) Christophe Bellmann and Richard Gerster(1996), “Accountability in the World.”

Japan that will reduce the possibility of unnecessary disputes and draw a reasonable direction is a pressing and urgent task. Even if the compensation amount is recovered, there is no obligation to transfer it to the investor. Finally, investors tend to be multinational corporations. In such case, it is increasingly difficult to determine which countries should exercise diplomatic protection because of the complexity of the ownership structure of multinational corporations and their spreading worldwide.[5)]

As example, it has been confirmed that the acts of administrative agencies and judicial authorities are also attributed to the state. In other words, in relation to the "indirect acceptance" clause under the Korea-US FTA, the parties will bear the rights and obligations under international law. If the State illegally accepts the property of investors and foreign investors, or if it is accepted for public purposes, if the appropriate compensation is not made, it will violate the contents of the KORUS FTA Agreement. As a result, it becomes responsible, as is the part of the country that embraces international legal fundamental principles such as acceptance and compensation obligations.[6)]

As the importance of the international investment law becomes very high due to the signing of the investment treaty, whether the general law has influenced the law and whether the international law intentionally deviated from the scope of the general system are considered. It is natural that international investment law should also include international law as a sub-domain in the general legal system. The basic rights and obligations underlying the obligations arising from the conclusion of agreements and treaties, such as the principle of liability in case of violation, are all applied by international and international law.[7)]

Ⅱ. FTA Preferential Tariff Dispute

1. Litigation Jurisdiction

In international law, the subject is the State and the individual is not recognized as subject. The right to diplomatic protection is, in principle, restructured as a violation of

5) Arghyrious A. Fatoutos, Toward an Investment Agreement on Foreign Direct Investment?, 10 ICSID Rev. Foreign Inv. L. J. 181, 1995.

6) Asif H. Qureshi(1996), "*The World Trade Organization: implementing international trade norms*", Manchester University Press.

7) Emilio Vinuesa, Bilateral Investment Treaties and the Settlement of Investment Disputes Under ICSID: The Latin American Experience, 8-FALL L. & Bus. Rev. Am. 50, 2002.

the rights of the State and is carried out as the right of the State by the country of the offense's origin.[8)]

There was no way in the proceedings to rescue their rights directly through international litigation. Beyond these traditional international legal procedures, it is not easy for a company to take responsibility for the transition of its problems to conflicts between countries. Therefore, by giving the investor the right to file a lawsuit directly, it is possible to prevent the investor's problem from being transferred to foreign affairs. This also implies that it would be more advantageous for investment host countries to solve legal problems than to receive diplomatic pressure from investing countries.[9)]

In the case of NAFTA, an FTA with indirect acceptance clauses was concluded for the first time, and the provision related to such indirect acceptance is controversial until the present Korea-US FTA. In the NAFTA agreement, a country or municipality must meet the following requirements in order to expropriate a foreign investor's investment assets. First for public purpose, second for non-discriminatory manner, third for the right of international law, including fair and equitable rights and sufficient protection and guarantees, shall be accorded to the investment of investors of other State parties. Finally, it must be compensated in such a way that it can be fully liquidated without delay at fair market just for acceptance.[10)]

The Canadian government prohibited imports (not a full ban) but the domestic production was approved. Imports are prohibited, but acknowledging domestic production means allowing domestic distribution. In order to protect domestic business, it can be said that it is an enactment law to discriminate foreign companies; therefore, even though it is a violation in international law, damages are inflicted on investors' property rights due to Canadian government regulations.[11)]

2. Accept Foreign Property

In the event that property damage is caused to a foreign investor by the policy of such a state, an international investor may request international arbitration under the provision of

8) Jeffrey Turk, Compensation for "Measures Tantamount to Expropriation" under NAFTA: What It Means and Why It Matters, Int'l L. & Mgmt. Rev. 41, 2005.
9) Lemans Corp. v. U.S., 660 F.3d 1311, 1315, C.A.Fed., 2011.
10) Ford Motor Company v. United States, 978 F.Supp.2d 1350 (United States Court of International Trade, 2014).
11) Hitachi Home Electronics (America), Inc. v. U.S., 661 F.3d 1343, 1345 C.A.Fed., 2011.

international law such as indirect acceptance and national right principle. This case suggests the possibility of the arbitration and the possibility of winning in case of damages caused by the unlawful policy of the host country. It is considered that this is a case requiring the publicness and related caution of the policy and legal system of our country.[12)]

Since there was no established definition of the indirect acceptance of NAFTA, there was no basis for judging to what extent it is an indirect acceptance. Therefore, if investors were found to have violated their property rights, they had recovered arbitration, regardless of the scope of the damage, and there was concern over the abuse of the ISD scheme. Of course, the validity of the arbitration process is a matter of judgment of the arbitration tribunal. In contrast, the KORUS FTA stipulated the scope of indirect acceptance.[13)]

Through acceptance annexes, it is judged that non-discriminatory measures for public welfare purposes, such as health, safety, environment, etc., did not constitute indirect acceptance, thereby reducing the possession of disputes. Conversely, a government that is anti-public and discriminatory as with the case of NAFTA, because there was no provision to ensure the transparency of the arbitration trial, the arbitration tribunal did not disclose relevant information, including the results of arbitration, unless the parties to the dispute agreed.[14)]

There was criticism that the arbitration trial was an actualist form and lacked transparency in the trial. However, the Korea-US FTA recognized these problems and stipulated the transparency provision of arbitration procedures. In other words, except for the protection information necessary for the hearings of the parties to the dispute that the Arbitral Tribunal shall publicly disclose to the public, it is believed that the Arbitral Tribunal has ensured transparency by stipulating appropriate procedural arrangements in consultation with the parties to the dispute.[15)]

Therefore, Korea should not be limited to the KORUS FTA only, but it needs to have a more advanced perspective ahead of the Korea-China FTA to be concluded and the Korea conclusion. The signing of a Korea-China-Japan FTA is highly significant in the area of economic integration in Northeast Asia. Many discussions are expected in the negotiation process, but the key point is the part about investor protection and compensation. As the disputes of rights between the foreign investors and the government of the host country or

12) Kaj Hober, Investment Arbitration in Eastern Europe: Recent Cases on Expropriation, 14 Am. Rev. Int'l Arb. 377, 2003.
13) Rudolf Dolzer, Indirect Expropriation: New Developments, 11 N.Y.U. Envtl. L.J. 64, 2002.
14) Yusuf Aksar, Implementing International Economic Law, Brill, September 1, 2011.
15) Vivienne Bath & Luke Nottage, Foreign Investment and Dispute Resolution Law and Practice in Asia, Routledge, November 16, 2011.

the local government are increasing especially, the need for policies such as the protection of foreign investing companies in Korea is part of sympathetic sentiments.

Therefore, the three countries in Korea, China, and Japan are required to partake in a dispute settlement mechanism that applies to both the international dispute settlement system and the relevant region. In the early stages of the dispute, through intervention, it is important to develop flexible negotiating ability in advance to find ways to obtain results that both parties can understand.[16)]

Therefore, we can think of ways to introduce a new mechanism of Korea, China, and Japan that will reduce the possibility of unnecessary disputes and draw a reasonable direction by utilizing the time of 6 months before the arbitration. In addition, it is necessary to examine how to utilize experts to resolve disputes quickly and to consider cooperation measures as an international arbitration bridge in Northeast Asia.[17)]

However, most of the studies related to existing rules of origin are limited to an interpretation of the treaty, and no studies have introduced or analyzed the attitude of the court in the domestic legal system of the FTA agreement. Although the interpretation of the origin of the FTA is important, it is urgently necessary for Korean companies to establish practical alternatives to avoid sanctions by the customs authorities of the other country in violation of the rules of origin. Even if it is sanctioned by the customs authorities, measures should be prepared to minimize the damage.[18)]

If small and medium-sized enterprises in Korea are to be sanctioned by the US customs authorities, it is expected that it will be difficult to overcome them through legal measures due to the limitations of physical and human resources. Therefore, it is imperative to prepare a reasonable legal countermeasure against the sanctions of the US customs authorities by closely examining the FTA rules of origin found in a large frame of the US Customs Act and by examining the precedents of the US courts.[19)]

16) Rudolf Dolzer, Fair and Equitable Treatment: A Key Standard in Investment Treaties, 39 Int'l Law. 87, 2005.
17) United States International Trade Commission, Official Harmonized Tariff Schedule, 2015.
18) Scott R. Jablonski, Foreign Investment Disputes Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States Chile Free Trade Agreement, 35 U. Miami Inter-Am. L. Rev. 627, 2003.
19) Spak, G. J. Hansen, F. R. and Hickman D. J., "2011 INTERNATIONAL TRADE LAW."

Ⅲ. Relationship between International Law and Domestic Law

1. Significance of ISD

Even if the compensation amount is recovered, there is no obligation to transfer it to the investor. Finally, investors tend to be multinational corporations, in which case there is a complexity of ownership structures of multinational corporations. It is becoming increasingly difficult to determine which country should exercise diplomatic protection because of the number of points spread all over the world.[20)]

The treaties promulgated by the Constitution of Korea and generally accepted international laws have the same effect as domestic laws. The term, as used in Article of the Constitution, refers to all kinds of international agreements in the form of documents. In Korea, "treaties concluded and promulgated by the Constitution and generally approved international laws" are responding positively to the fact that domestic effects are recognized without any special domestic legislative procedure.[21)] The Korea-US FTA is equivalent to the domestic law of Korea. In addition, the Parties to the Treaties cannot justify the violation of their obligations under international law on the grounds of their national law, which is a fundamental principle of common customary law, as well as the principle of least favoritism. The fundamental purpose of the treaty is to protect the national interests of the country, However, if it asserts only its interests, the establishment of the treaty itself becomes difficult. Although a treaty may restrict some of its sovereignty, it is complemented by other fields as much as it limits some, and it generates profits largely. As such, the Parties to the Treaty agree that, in some cases, the necessary part is to connect with the interests of the home country by drawing up a reasonable range of reservations. If the state violates its international obligations, it cannot take its own law by its excuse. At the domestic level, domestic laws are not invalidated if they conflict with international obligations although there may be cases where national liability problems arise and compensation is required.[22)]

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20) International Custom Products, Inc. v. U.S., 467 F.3d 1324‘ 1327 (C.A.Fed.,2006).

21) David A. Gantz, The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement, 19 Am.U.Int'l L. Rev. 679, 2004

Korea and the US have been obliged to fulfill their rights under international law through the Korea-US FTA. In countries with well-developed judicial systems, such as South Korea and the United States, it is sufficient to recover damages through court proceedings. There is also criticism of the need for ISD based on the fact that Korean companies have never tried to resolve disputes using ISD.[23] It will be difficult to accept the decision. If such a situation is repeated, it will come at the disadvantage of economical reasons such as the loss of investors' willingness to invest in the long term. Therefore, in resolving disputes, it is necessary to solve the dispute settlement with a system that is settled at global standard, This system is considered the ISD system. The ISD system is not only a foreign company that invests in Korea but also a Korean corporation that is in need of overseas business.[24]

2. FTA Preferential Tariff Dispute

A study on the rules of the origin of FTAs in the region centered on the rules of origin in relation to free trade agreements in Asia, including Korea, Japan, and China. The results of this study show that the progress of negotiations should be reflected in the future. It also analyzes the characteristics of the FTA rules of origin that are currently in force with the European and US governments.[25] For example In this study, we introduce the rules of origin in the Korea-US FTA, the criteria of origin determination, the rules of origin, and the rules of origin in textile and apparel. It analyzes the provisions of the origin verification system in an FTA in which Korea is a party. Further, this study systematically summarizes the articles related to the rules of origin in Korea and introduces the characteristics of the principle of origin determination for each. However, most studies related to existing rules of origin are limited to the interpretation of the treaty.[26] There is no study that introduces or analyzes the attitude of the court in the domestic legal system of the other country to the FTA agreement. Although the interpretation of the origin of the FTA is important, it is urgently necessary for Korean companies to establish practical alternatives to avoid sanctions

22) Jan Paulsson Nigel Rawding& Reed Lucy, Guide to Icsid Arbitration, Kluwer Law International; 2nd Revised Edition, December 15, 2010.
23) J. E. Alvarez, The Public International Law Regime Governing International Investment ,Brill, July 1, 2011
24) Surya P. Subedi, The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation", 40 Int'l Law. 121, 2006.
25) Gray, Kevin R. "Foreign Direct Investment and Environmental Impacts-Is the Debate Over?" RECIEL 11, 2002.
26) Miles, Kate, "International Investment Law and Climate Change: Issues in the Transition to a Low Carbon World", SIEL Working Paper, 2008.

by the customs authorities of the other country in violation of the rules of origin.[27] Even if it is sanctioned by the customs authorities, measures should be prepared to minimize the damage. If small and medium-sized enterprises in Korea are to be sanctioned by the US customs authorities, it is expected that it will be difficult to overcome them through legal measures due to the limitations of physical and human resources. Therefore, it is urgent to prepare reasonable legal countermeasures against the sanctions of the US customs authorities by closely examining the FTA rules of origin found in the US Customs Act and examining the precedents of the US courts.[28]

Ⅳ. Issues Related to ISD Due to the Korea-US FTA Agreement

1. Issues Related to ISD Needs

The Mexican federal government has all legal jurisdictions over hazardous wastes. The state concluded that the project was harmful to the surrounding environment. Meanwhile, it is known that the delaying of the project's approval by the government is caused by the opposition of local NGOs. It was argued that there was friction with the local community and a powerful anti-demonstration was run. In Mexico, environmental protection legislation is predominant, but industrial waste disposal facilities are in short supply. However, it is known that due to local selfishness, localization of waste treatment facilities is difficult.[29]

The arbitral tribunal defined the content of indirect acceptance under NAFTA as follows. Acceptance of the NAFTA is not only for the acceptance of the intentionally approved property, but also for the whole. Even though indirect investment does not have any benefit to the investment of the host country, if it has the effect of infringing the use of the economic interests of the property reasonably attributable to the investor, the use of property involves interference incidentally.[30] The fact that the municipal government made domestic

27) Schill, Stephan W. "Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change?" Journal of International Arbitration 24(5). 2007.

28) Vivienne Bath & Luke Nottage, Foreign Investment and Dispute Resolution Law and Practice in Asia, Routledge, November 16, 2011

29) Destler, I. M(2007), "American Trade Politics in 2007 : Building Bipartisande Organization", Journal of World Trade(December).

30) Arghyrious A. Fatoutos, Toward an Investment Agreement on Foreign Direct Investment?, 10 ICSID Rev.

disposition and virtually unfounded dismissal means that the investor believes in the explanation of the Mexican federal government that Mexico's action is considered indirect.[31)]

In countries with well-developed judicial systems, such as Korea and the United States, it is sufficient to recover damages through court proceedings. There is also criticism of the need for ISD based on the fact that Korean companies have never tried to resolve disputes using ISD. If an investment dispute occurs and dispute resolution by the ISD system is not possible, investors must file a lawsuit through the court of the investment jurisdiction in order to claim the right to the damage.[32)] The proceedings of an investor through the Court of Investment Custody will find it difficult to ensure neutrality and transparency in the trial. For example, if an investor who has felt that he or she has been infringed on property rights due to the legitimate laws and regulations of the host country has filed a complaint with a domestic court. No matter how acceptable the law is, it will be difficult to accept the decision. If such a situation is repeated, it will come at the disadvantage of economical reasons such as the loss of investors' willingness to invest in the long term. Therefore, in resolving disputes, it is necessary to solve the dispute settlement with a system established at global standard. This system is considered an ISD system. The ISD system is not only a foreign company that invests in Korea but also a Korean corporation that is in need of overseas business.[33)]

2. Determination of Origin

The origin of trade in trade transactions is the frontier for the implementation of tariffs and trade policies discriminatively by country. It is a standard used as a means of determining which goods are produced in a particular country. Therefore, it is also the customs clearance document which must be attached for the import and export of goods. This origin means the place of production of the commodity.[34)] It can thus be said that it is different from the concept of assembly of the commodity or simple passing country or technology provider. It is also distinguished from the geographical indications that combine

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Foreign Inv. L. J. 181, 1995.

31) Rainer Hofmann (Goethe-Universität Frankfurt am Main - Law) & Christian J.Tams(Univ. of Glasgow - Law), International Investment Law and General International Law,Nomos 2011

32) Christophe Bellmann and Richard Gerster(1996), Accountability in the World

33) Kelly M. Mann, United Mexican States v. Metalclad Corporation: The North American Free Trade Agreement Provides Powerful Private Right of Action to Foreign Investors, 35 Urb. Law. 697, 2003.

34) Ford Motor Company v. United States, 978 F.Supp.2d 1350 (United States Court of International Trade, 2014).

production sites and trademarks. [35]

From the point of recognizing that there is a possibility of a dispute, it is urgent to minimize the damage between the two parties and to introduce a support organization and system. On the legislative side, as shown in the NAFTA mentioned above, it has been confirmed that the ineffective governance of the government and the lack of cooperation between the central government and the local government can cause conflicts.[36]

3. Country of Origin Regulations

Cooperation is also required between the government and local governments. On the institutional side, the government directly operates the foreign investor system, by putting in place a system that can accommodate the needs and grievances of foreign investors, it reduces the possibility of unnecessary disputes.[37]

It is necessary to approach the direction to reduce the cost of resolving the dispute. The risk faced by investors in the host country is not only related to the government. There are many things that belong to pure business risks, such as breach of contract or rising raw material costs. For this reason, the investor may be the government's policy to cause the burden of the project to proceed in the host country. It is considered more complicated than causality if one claims to have been infringed by another by constituting an acceptance. Therefore, in the host country, one should not worry about only the possibility of the ISD filing by the investor ([38]) but should take an appropriate preventive system before such problems occur. In particular, it will assist foreign investors to take due consideration of laws and regulations that conflict with investment and related interests. It is necessary to have a bridging system that can solve this problem. In order for Korea to create business opportunities through an FTA with foreign countries, it must first prove that the origin of the produced goods is Korea.[39] Although it may be a little different to prove that the origin of the exported goods is Korea, it can be said that it is

35) Destler, I. M(2007), "American Trade Politics in 2007 : Building Bipartisande Organization", Journal of World Trade(December).

36) David A. Gantz, The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement, 19 Am.U.Int'l L. Rev. 679, 2004.

37) Kaj Hober, Investment Arbitration in Eastern Europe: Recent Cases on Expropriation, 14 Am. Rev. Int'l Arb. 377, 2003.

38) Lemans Corp. v. U.S., 660 F.3d 1311, 1315, C.A.Fed., 2011.

39) Jeffrey Turk, Compensation for "Measures Tantamount to Expropriation" under NAFTA: What It Means and Why It Matters, Int'l L. & Mgmt. Rev. 41, 2005.

similar to the logic of receiving the treatment of Koreans by proving that one's nationality is Korean. In general, in relation to the proving of origin of such goods, they must be produced completely in a specific country. In other words, if both the acquisition and production processes of raw materials are carried out in a specific country, the proof of origin will be achieved without any difficulty. If not, for example, some parts or materials are imported from foreign countries and the finished product is made in Korea.[40]

Ⅴ. Conclusion

All the regulations that infringe on the property of investment are not indirect accommodation, but the problem here is how to distinguish between them; namely, there is a question on how the government's actions are divided into regulations that do not require compensation and compensation for compensation. The recognition of the scope of indirect acceptance broadly allows investment protection because of the broad compensation provided by the government's policy, but if the scope of regulation does not exist to some extent, national policies cannot be implemented smoothly.[41] How the arbitral tribunal of the Investment Treaty recognizes indirect acceptance considers how these requirements are balanced. With respect to the substantive elements of acceptance and reward, NAFTA prescribes only the principle of compensation for acceptance and lacks judicial justice such as definition and scope of indirect acceptance. As a result, when actual disputes arise, various problems arise in determining the extent of indirect acceptance. However, the KORUS FTA regulations stipulate that the indirect judgments of acceptance and exceptions should be made so that there is no difficulty in judging when a dispute arises. Regarding the procedural element, ISD, the basic principles of NAFTA's filing of investor laws are essentially the same in the KORUS FTA. In NAFTA, however,[42] there are no rules related to the exemption of public order or transparency of arbitration, which came as a matter of concern and dismissed the arbitration award. In order to solve these problems, the KORUS FTA regulations have stipulated the exemption regulations such as the public order, with

40) Rudolf Dolzer, Fair and Equitable Treatment: A Key Standard in Investmen Treaties, 39 Int'l Law. 87, 2005.
41) Scott R. Jablonski, Foreign Investment Disputes Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States Chile Free Trade Agreement, 35 U. Miami Inter-Am. L. Rev. 627, 2003.
42) Vivienne Bath & Luke Nottage, Foreign Investment and Dispute Resolution Law and Practice in Asia, Routledge, November 16, 2011.

the transparency clause being newly established to ensure the transparency of the arbitration trial. Therefore, the ISD system, which is a dispute settlement procedure that can claim damages directly from the foreign country if the foreign investor is damaged due to violation of the agreement obligations of the host country, is a reasonable system.[43)]

Even if the investor suffers from the illegal act of the host country, one must file a lawsuit through the court of the Investment Promotion Bureau. This is unreasonable from the perspective of investors, and it is also difficult to guarantee fairness and transparency in the trial. Foreign investment in a company always faces a lot of challenges and risks as there is a great deal of concern: the introduction of a neutral system. It is considered to be an essential element in concluding an investment agreement. In addition, in the preceding clauses and cases, the ISD system is a fair and universal arbitration system, which is considered to be a necessary system to protect Korean companies investing abroad. One repeated issue is expected to come on the part of the KORUS FTA.[44)] South Korea has an advantage on negotiating power over Japan and China in that it first concluded an FTA with the United States. In other words, based on the experience and wisdom gained in the course of the Korea-US FTA negotiations, it seems to be the appropriate time to pay attention to the advantage of the Korea-China-Japan FTA negotiations. It seems that the countries involved need to construct a more reasonable network in the face of investment disputes.[45)]

43) Surya P. Subedi, The Challenge of Reconciling the Competing Principles within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term “Expropriation”, 40 Int’l Law. 121, 2006.

44) Spak, G. J. Hansen, F. R. and Hickman D. J., “2011 INTERNATIONAL TRADE LAW DECISIONS OF THE FEDERAL CIRCUIT”, American University Law Review, 2012.

45) Hitachi Home Electronics (America), Inc. v. U.S., 661 F.3d 1343, 1345 C.A.Fed., 2011.

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ABSTRACT

A Study of the Arbitration Issue on the Korea and the U.S. FTA

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International legal reviews on ISD, a procedure for resolving disputes under the Korea-US FTA, are examined from the perspective of law. If the ISD system does not exist, even if the investor suffers damage due to the illegal act of the host country, he or she must file a lawsuit through the court of the host country, which is unreasonable from the investor's point of view and makes it difficult to guarantee fairness and transparency. Some of the Koreans pointed out that there are some problems with the KORUS FTA dispute settlement regulations, and that the United States federal courts are taking a friendly attitude to the decisions made by the US Customs in determining the dispute by the KORUS FTA Agreement and the US Customs Act. In cases where the State does not violate international law but results in harmful consequences, the responsibility of one country is borne by the treaty. Foreign investment always comes with many challenges and risks. Therefore, the ISD system is a fair and universal arbitration system, which is considered to be a necessary system even for protecting the Korean companies investing abroad. In the investment treaty, compensation for the nationalization of foreign property and reimbursement under the laws of the host country were dissatisfied with foreign investors. In particular, some Koreans have pointed out that there are some problems in the KORUS FTA dispute resolution regulations and there is a need for further discussion and research. Based on the experiences and wisdoms gained in the course of Korea-US FTA negotiations, the dispute arbitration mechanism is urgently needed to reduce the possibility of disputes and to make amicable directions.

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