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Minimizing the Aftershocks of the Korea-U.S. FTA:
How to Manage Disputes Arising from the Two Countries' Discrepant Perspectives and Legal Systems

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After the U.S.-Korea Free Trade Agreement (KORUS FTA) is approved by the legislatures of Korea and the United States, it will likely provide a turning point for the countries' bilateral trade relationship. It is expected to expand the volume of trade and liberalize various domestic fields vis-à-vis the other country. The FTA also brings a wide range of new issues into the equation. One issue is likely to be the increase and diversification of legal disputes in covered sectors. In fact, to some extent this trend is inevitable as enhanced bilateral interaction and increased market presence will inevitably lead to more conflicts at various levels.

It is quite likely that traditional trade disputes (such as antidumping or countervailing measures) between the two countries will continue to increase in the FTA era. More important, the FTA will open the door for new types of legal disputes as well. They include investment disputes, nullification and impairment claims, forum-shopping issues, and complaints about nontariff barriers (NTBs). For these new issues, the two countries will have to navigate uncharted territory for a time. Given that even traditional trade disputes are getting more complex in recent bilateral disputes (as seen in recent zeroing and subsidy disputes), the addition of these new disputes to the bilateral relationship has the potential to create a new source of tension between the two countries. One of the grounds critics have resorted to in criticizing the KORUS FTA is that it pushes the Korean government into a situation where it has to defend itself against endless litigation by U.S. businesses and the U.S. government.

The problem is that the nature and intensity of the new disputes in the FTA era will be quite different from the ordinary legal disputes that the two countries have dealt with so far. Most of the time, it will be impossible to resolve these disputes by simply looking at the provisions of the agreement. Instead, one will need to look beyond the provisions of the agreement, to evaluate, for instance, the government's intent, an overall design of a particular government policy, or the fundamental structure of the administrative function of governmental agencies. This is far from an easy task.

Under these circumstances, it is critical that the two countries explore a path to effectively manage these disputes and find a mechanism to identify unnecessary disputes early on. One of the key tasks is the recognition that the legal systems of the two countries are fundamentally different and that there are differences of interpretation when observing the same situation. This recognition will be critical in approaching the new types of trade disputes expected to come about.

In fact, in the course of lengthy negotiations for the KORUS FTA, relevant statues and precedents of the two countries were extensively reviewed and discussed in an effort to adopt accurately phrased terms in the agreement. These initial discussions revealed only the tip of the iceberg, however, and there still remain big question marks concerning various issues. After the FTA goes into effect, it is recommended that the two countries make collective efforts to fill the gaps through various channels established by the FTA. There certainly will be a wide range of tasks to be accomplished to make the FTA achieve its intended objective. One of the tasks not to be forgotten in this process will be the continued efforts needed to ensure that the FTA dispute settlement mechanisms are not riddled with frivolous lawsuits and that any increase in legal disputes is managed in a constructive manner.

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Different Cultures, Different Perspectives, and Different Legal Systems

One of the fundamental principles of treaty implementation is that a party to a treaty cannot rely on domestic regulation or legislation to justify violation of its otherwise applicable treaty obligation.[1] This jurisprudence has also been consistently confirmed in the implementation of trade agreements as well.[2] Thus, when it comes to treaty implementation, what counts is the particular treaty provision at issue, and one does not need to look into domestic laws of a party. Stated as such, this seems to be a relatively simple principle.

The situation, however, could be different if the nature of the obligation under a provision of a treaty in question somehow requires a prejudgment on nontrade, national sovereignty–related issues. Resolving disputes of this sort invites inquiries into what is really going on in the decision-making process of the party concerned, which then leads to examination of various aspects of the domestic legal system and the administrative system of that party. The situation can become worse if the parties to a treaty possess fundamental differences in their legal, administrative, or political systems. Then, any legal disputes could easily turn into value disputes as to whose approach to a particular issue is more appropriate and desirable.

Although there are a lot of similarities between the legal systems of Korea and the United States as a result of gradual convergence over the years,[3] there still remain fundamental respective peculiarities. These peculiarities appear to stand ready to complicate the implementation of the FTA.

Different Cultures and Different Perspectives

Recent disputes between Korea and the United States have somehow been premised upon the cultural context: that is, different notions on the role of the government, the relationship between the governmental sector and the private sector, and societal characteristics. It has been said that one of the unique traits of Asian culture is that people ascribe to their government a paternal authority and role.[4] Apparently, this trait still persists and affects economic regulation of countries affected by this culture. As a result, compared with its Western counterparts, the governments in Asian countries are more directly involved in regulating economic activities of private entities in their jurisdictions.[5]

The same may well be true for Korea. When it comes to regulation of markets, the government of Korea has traditionally taken a hands-on policy in order to achieve the government's goals.[6] If a problem is observed in the market, the government has usually been quick in responding to the situation rather than waiting for the market to respond on its own. Sometimes it works out and sometimes it does not.

This phenomenon, however, has caused constant concern on the part of foreign countries, particularly Western countries including the United States and the European Union. Foreign countries tend to think that the government of Korea is illegitimately intervening in the market to drive governmental goals. They are of the view that the government of Korea orchestrates the players in the market for the purpose of artificially inflating the competitiveness of Korean companies while putting foreign companies in a disadvantageous position or sometimes keeping them out of the Korean market.[7] The government of Korea counters that it is simply adopting and implementing legitimate governmental policies as with any other government and dismisses their allegations.[8] As for Korea, this difference in culture and perspectives has led to numerous recent legal disputes at the international and domestic tribunals.

In short, regarding the proper role of a government, there seems to be a gap between Korea and Western countries, which apparently stems from differences in culture and perspectives as to what a government can do and how the government can do it. This discrepancy would most vividly present itself in a dispute where government's intention and policy appropriateness are extensively examined. When the disputes and debates heat up in the future, this discrepancy in a cultural context would play an important role, for better or worse.

Different Legal Systems and Environments

Cultural discrepancies directly lead to discrepancies in the legal systems as well because the law is a reflection of the society it governs.[9] For instance, a disposition of a particular case may well be affected by this discrepancy in culture and perspectives between Korea and the United States.[10] Likewise, regulation of business entities and activities is not the same. Traditionally, Korea has relied more than the United States on unofficial contact and policy coordination. Even if key legislation and regulations are adopted during the FTA era, agency practice and invisible norms could still fall short of legislation and regulations that are ostensibly consistent with the FTA. This is so because the changes required by the FTA include not only statutes and regulations but also policy guidelines and practice.[11] In the context of Korea and its culture, it may be the case that despite official changes

and reforms, some critics might still dispute whether true changes have been made.[12]

Resorting to unofficial contacts and guidelines has been perceived by the United States as evidence of a lack of transparency, which allegedly constitutes a significant challenge for U.S. businesspeople operating in Korea.[13] The fact that a similar problem has been alleged with respect to Japan tends to show that this may be a reflection of these countries' peculiar regulatory systems, which can trace back to cultural differences.[14] It is true that invisible guidelines should be avoided at all costs if they are meant to circumvent otherwise applicable treaty provisions, but if mistrust stems from the cultural context it may take time to eliminate. This alleged nontransparency and unofficial regulation could turn into a source of increasing disputes with the United States when fueled by an economic nationalistic tendency.[15]

Furthermore, the fact that the two countries have different legal systems (a civil law system for Korea and a common law system for the United States) sometimes further complicates the situation. In interpreting a provision of a treaty, for instance, the two systems take different approaches to statutory construction.[16] Judicial procedures, administrative investigations, and administrative decision-making procedures also show differences: the role of the judge in the two countries is different as Korea follows the so-called inquisitorial approach while the United States follows the adversarial approach;[17] the judge possesses more leeway in pursuing the substantive truth in Korea, and plea bargaining is basically not permitted in Korean criminal procedure. As such, U.S. businesspeople participating in administrative procedures in Korean government agencies sometimes complain that they cannot expect the level of procedural due process protection they are used to in the United States or that they have difficulty in solving a dispute promptly through a mutually agreeable solution.[18]

Finally, dissimilarities in the respective legal systems would be more acutely presented if the legal services market were to be opened in Seoul. Korea is finally on the verge of opening up its legal market to foreign attorneys. The legislation proposed by the Ministry of Justice is currently pending in the National Assembly, and the KORUS FTA will open wide the Korean legal services market to the U.S. attorneys. The penetration of these attorneys will further increase the interaction (both conflict and convergence) between the two legal systems.[19]

Examples: Recent Disputes Brought before the World Trade Organization

Recent disputes between Korea and the United States have evidenced the new dynamics of the bilateral disputes mentioned above. These disputes have mainly evolved from indirect-subsidization claims, and they prompted the two governments to realize the existence of still significant differences in applying key norms of trade agreements.[20] Foreign governments claim in these disputes that the government of Korea is managing the Korean financial market for the benefit of Korean companies, which negatively affects their economic interest by distorting the competition mechanism in their own and third countries' markets and by excluding their companies from the Korean market.

How These Differences Could Play Out in the KORUS FTA

The different cultures, perspectives, and legal systems of the United States and Korea could play important roles in several important issues.

Investment Disputes

One of the key issues of the KORUS FTA is the introduction of investment-related provisions and their dispute settlement procedure in Chapter 11 of the agreement. Issues contained in this chapter had been on the table until the last minute of the bilateral negotiations.[21] More specifically, the KORUS FTA has introduced an international dispute settlement mechanism under which an investor of a party can bring a legal action at an international tribunal against the government of the other party in which he or she made an investment when the government violates the applicable provisions of the agreement in a manner that negates the purpose of the investment.[22]

One of the key issues to be reviewed in this procedure is the concept called "indirect expropriation," which occurs when a governmental measure is tantamount to an expropriation, even if an actual expropriation does not happen.[23] The problem with this inquiry is that it inevitably involves examination of a wide range of national policies, such as environmental policies, security policies, and financial policies, as long as a foreign investor claims that his or her investment has virtually evaporated because of the host government's policy at issue. This is a highly fact specific inquiry, and the reviewing panel should look into the whole spectrum of the governmental measures at issue: The panel should examine the government's intent in adopting the measure, true objective of the measure, impact of the measure on the market, and

the interaction of the government and interested groups in the course of formulating the measure in addition to the extent of the alleged loss of the foreign investor.

Obviously, this is not an easy question. The way Korea sees a particular issue may be quite different from the way the United States sees the same issue. Also, the way Korea (or the United States) sees the problem may be different from the way the panelists (arbitrators) see the same issue.

Nullification and Impairment

A similar problem could also arise in the nonviolation nullification and impairment claims. The KORUS FTA includes the nonviolation nullification and impairment claim as a cause of action for the dispute settlement procedure.[24] This is a claim originally included in Article 23:1(b) of the GATT 1994, and it has been incorporated, with some adjustment, into the KORUS FTA as well. This claim is unique in that one party can lodge a legal claim against the other even if there is no violation of the agreement in the first place. In fact, the World Trade Organization (WTO) panel opined that because of this unique nature this claim should be approached with caution and treated as an exceptional remedy.[25]

According to the jurisprudence, the inquiry into this claim requires determination whether (1) the claimant state possessed "legitimate expectation" for improved market competition in the respondent state as a result of the market opening agreement[26] and (2) the claimant state can reasonably anticipate that measures at issue will be adopted.[27] Resolution of this type of dispute is also fundamentally premised upon the examination of the government's intent in adopting the measure at issue, the objective of the measure, the impact of the measure on the market, and the interaction of the government and interested groups in the country. Here again, the two countries could show stark differences with respect to the same factual situation. The same would also apply to the decision makers.

Subsidies

The United States has continuously expressed its concern over the Korean government's subsidization of targeted industries. The U.S. criticism has particularly focused on the indirect-subsidy provision through financial sector intervention for the benefit of Korean companies.[28] These indirect-subsidy claims also require a similar inquiry into the inside of the government policy formulation and appropriateness of the government policy. As recent bilateral subsidy disputes have shown, this line of inquiry will place the two governments in the midst of endless legal disputes, both domestic and international.

NTBs and Disguised Measures

Instead of tariffs, NTBs are increasingly becoming obstacles for legitimate international trade, igniting an increasing number of international trade disputes.[29] These are measures adopted by countries to further governmental objectives, such as environmental protection, public health enhancement, or consumer protection, that somehow carry trade restrictive implications in a manner that negates the market liberalization effect through trade agreements. Although some NTB measures are indeed good-faith exercises of countries' national sovereignty, others are probably disguised trade restriction measures that are adopted in order to circumvent otherwise applicable agreements. Because it is difficult to distinguish good-faith regulatory measures from bad-faith NTBs, the disputes among countries surrounding this issue are increasing now, and they are expected to increase in the future as well.

NTB disputes also ultimately involve government policy formulation mechanisms in general and the appropriateness of the government policy at issue. Such difficult and volatile issues as the government's intent, the objective of the policy, and available policy choices for the government would all be examined here as well.

Not surprisingly, the NTB issue has long been one of the main topics of bilateral discussions. The United States is of the opinion that Korea maintains certain standards, technical regulations, and conformity assessment procedures that are burdensome and appear to have a disproportionate effect on imports.[30] The FTA generally imposes tighter rules in various sectors than the WTO-based multilateral rules, so the allegations of NTBs seem bound to surge.

For example, although there is a national security defense in the FTA,[31] it is not entirely clear what the definition of national security in actual application will be. Realizing this loophole, Korea has been contemplating adopting a domestic statute that clarifies the definition of the term.[32] But it is anyone's guess whether the United States will agree with the Korean definition when Korea raises such a defense in a particular case. Increasing regulation on the grounds of national security by the United States can also lead to trade friction. For instance, some countries have complained that some of counterterrorism measures of the United States have turned into de facto trade barriers.[33] As such, it may not be certain that the two countries will be on the same page when it comes to national secu-

rity. As shown in this example, the disputes over NTBs or disguised measures will also likely intensify in the FTA era.

Implementing Mechanisms of International Law

Difficulties arising from different cultures, perspectives, and legal systems could be further complicated by differences in constitutional frameworks. Like many countries, Korea has adopted a constitutional system under which international agreements are directly incorporated into the domestic legal system of Korea.[34] Thus, when the KORUS FTA becomes effective, provisions of the agreement automatically become a part of the Korean domestic law, which then can provide a cause of action for a person before a Korean court. Unlike Korea, the United States has maintained the position that trade agreements do not directly apply to the United States and that implementing legislation is necessary.

Having to adopt implementing legislation is not usual in the Korean context. This has led to criticism in Korea that the treaty obligation between the two countries is not equal in that Korea is strictly bound by the treaty provisions but the United States can have one more protective layer (the implementing legislation) in which it can have more flexibility.

This criticism is erroneous and probably has been caused by an inaccurate understanding of obligations under international law. Implementing legislation does not offer a mechanism for the United States to circumvent otherwise valid treaty obligations; instead, it is a requirement under the U.S. Constitution. Nonetheless, such an argument may find political support if the United States adopts implementing legislation that is somehow different from the FTA itself.

Federalism

Another area of constitutional framework that has caused controversy in Korea is the federalism of the U.S. system. In various places, the FTA notes the distinction between federal authority and state authority in the United States. For example, the KORUS FTA provides that "regional level of government means, for the United States, a state of the United States, the District of Columbia, or Puerto Rico, but for Korea, this is not applicable."[35] Serious discussions have also been prompted by the KORUS FTA regarding the division of authority between the federal government in Washington, D.C., and respective state governments. These discussions were triggered by the claim of the U.S. government that there are some issues that are not within the authority of the U.S. government under the U.S. Constitution.

This is simply the unique nature of the U.S. Constitution, however, and should not pose a problem. Here again, though, the controversy may intensify when some of the measures taken by U.S. state governments turn out to be outside of the FTA norms for some reason.

How to Minimize the Discrepancy Problem

What can be done to deal with these discrepancy problems and the ensuing disputes? The following solutions can be contemplated.

Dispelling Misperceptions

First, it seems imperative that the two sides continue to attempt to achieve a more accurate understanding of the legal systems and political systems of the other side. As for Korea, in the course of the FTA negotiations the Korean government had to thoroughly examine the constitutional structure and legal regime of the United States, at a level unprecedented in terms of both quantity and quality.[36] It is indeed interesting to note how much study has taken place recently about the constitutional system, legal system, and political system of the United States as a result of the FTA negotiations. Despite the 60-year close relationship between the two countries, recent debates and controversy over the KORUS FTA indicate that there is still a long way to go before the two countries are fully and accurately apprised of the unique traits of the other side. Indeed, some of the sticky issues turned out to have been caused by misunderstandings and misperceptions.

To effectively manage the types of disputes likely to occur in the FTA regime, it is highly recommended that the two countries continue their mutual exploration process so that they can dispel misunderstandings and misperceptions step by step. This will then allow each party to better understand the domestic systems and policies of the other party. Of course, this will not prevent disputes from arising, let alone solve them, but at least it will lessen the chance that the two countries will not become bogged down in unnecessary disputes, as we have observed in a recent instance. The looming disputes touching upon national sovereignty and policy formulation could be effectively contained. So, this mutual exploration process may have just begun and will have to maintain its pace for the FTA to be implemented as it was designed.

Identifying and eliminating areas of misunderstanding and misperception requires continued dialogues between

the two countries through various channels and at various levels. As it currently stands, the FTA is scheduled to establish a variety of committees in the covered sectors. These committees should operate as forums for active discussions, debates, and explanations for the pending issues. If these committees simply turn into inactive fossils, where only political or diplomatic remarks are exchanged rather than meaningful discussions, they would be a waste of an important opportunity.

At the same time, bilateral exchanges at private levels should also be increased. Differences in respective domestic systems are usually identified by scholars, practitioners, or businesspeople who actually encounter government officials of the other party. Hence, exchanges at this level should also be expanded for this purpose.

Dispelling Myths

When it comes to trade disputes, it appears that the KORUS FTA has somehow been "oversold" by its proponents. This has apparently created an overly rosy picture in the minds of ordinary people with respect to various disputes arising under the FTA. For instance, responding to critics of the KORUS FTA, proponents of the agreement stress that traditional trade disputes will ultimately decline[37] and that the new types of disputes will provide an opportunity for Korea to upgrade its regulatory system to the global level.[38]

It is certainly true that the KORUS FTA stands ready to bring mutual benefits to the two countries in the long run, particularly to Korea by expanding its market share in the U.S. market and by upgrading its domestic regulatory system to the global standard. It does not seem to follow from this fact, however, that the disputes will be reduced over time and that new disputes will provide a test-run experiment for the future. In fact, a more reliable prediction would be that disputes will increase and intensify during the FTA era. In addition, maybe the hope of learning from disputes will be seen as a naive approach: all the disputes will be critical and real, and, thus, learning from the disputes will be quite costly.

An FTA does not mean that partner countries constitute one economic entity. If that were the case, trade disputes the partner countries face might actually decrease. Such an economic unity could be categorized as a customs union, an example of which can be found in the European Union.[39] An FTA is simply an agreement in which the parties agree to further open up their domestic markets vis-à-vis their selected trading partners. So, in this setting, opening up a domestic market to a particular trading partner would probably translate into increasing trade frictions and disputes with that trading partner.

Market liberalization with respect to two selected countries inevitably means more competition between the products from producers in those two countries. More competition usually means more complaints from domestic industries. These complaints usually take the form of trade remedy measures under the WTO regime or under an FTA regime. Just as the number of traffic incidents increases with increasing traffic, so does the number of trade disputes with increasing trade volume. In terms of the number of antidumping duty orders and countervailing duty orders currently being imposed, Korea takes fourth place, after China, India, and Japan.[40] Increased market presence in the FTA era could bring more disputes in both the United States (through investigations by the U.S. Department of Commerce) and Korea (by investigations by the Korea Trade Commission). These are not outcomes of bad-faith efforts by a party to circumvent otherwise applicable provisions of the FTA; rather, most probably they are simply selected natural outcomes from market liberalization.

This reality should be more appropriately described and delivered so as to dispel any myths. Otherwise, one could argue that the other side is abusing the dispute settlement system of the FTA or that the other side fails to implement the agreement in good faith. This will certainly invite the new types of disputes mentioned previously.

Good-Faith Implementation of the Agreement

The FTA is the outcome of a careful balancing of the interests of the two countries involved. Rights and obligations, and positive aspects and negative aspects, are opposite sides of the same coin. Each party should recognize a reasonable level of expectation by the other party and make efforts to preserve it.

The two countries need to look at the KORUS FTA as a new framework for regulating the bilateral economic relationship. For the framework to survive the upcoming rough tests, the benefits should be mutual. A parochial position to maximize a unilateral benefit may work from time to time but will ultimately disintegrate the framework. If the discussions so far could be called "placing and applying nuts and bolts to build a house," once the FTA goes into effect we would have to think about "structural beams and supporting pillars to maintain the house." This basic stance, coupled with continued efforts to catch a better glimpse of the silhouette of the other side's system, would help contain the surge of possible new disputes identified here.

Furthermore, the nature of upcoming disputes does not necessarily guarantee that those disputes can be avoided even if the parties attempt to abide by the terms and conditions of the agreement. An increase in indirect measures (questions about the true intent of a measure) or in borderline measures (questions about other nontrade, sovereignty-related areas) can make it increasingly difficult to determine whether a violation of a trade agreement has indeed taken place. Recent disputes between Korea and the United States are not simply garden-variety trade disputes that can be relatively easily resolved through ordinary negotiations or the dispute settlement process at the WTO.[41] These disputes indeed sit on the fence between violations and nonviolations and between the parameters of the agreement and exclusive area of national sovereignty. Under these circumstances, it is quite likely that there will be more complex disputes between the two countries during the FTA era.

If that is the case, it is critical that Korea and the United States maintain basic trust toward each other when it comes to the implementation of the FTA. If mutual trust is somehow undermined, it is almost certain that these kinds of indirect or borderline disputes will increase further. Trust can be maintained through good-faith implementation of all the provisions of the FTA. There may be some unnoticed loopholes in the agreement that will be found later, but the parties should refrain from taking advantage of them; instead, they should make collective efforts to deal with loopholes in ways that achieve the objectives of the agreement.

This is particularly the case when one considers that the implementation of the KORUS FTA does not simply end by looking at what appears in the text. Its implementation requires not only carrying out the action stipulated in the agreement but also actions or inaction not explicitly stipulated in the agreement but nonetheless necessary to achieve the objectives of the agreement.

Taking a Prudential Approach

When it comes to new disputes and dispute settlement procedures, the parties might want to be careful in exercising their rights and obligations under the agreement. Even if a particular action is authorized under the agreement, it would be desirable if a party contemplating the action is cautious about actually initiating the action, particularly during the initial stage of the agreement. Despite the fact that the agreement contains very detailed provisions covering almost all key sectors, there are still areas that remain uncertain or subject to further discussion in actual application. Under these circumstances, if one party brings a legal action against the other without engaging in thorough prior discussions, the latter will be placed in an embarrassing position, particularly in the sort of disputes mentioned above.

This could have an unnecessary political impact and lead to unnecessary trade disputes. If the United States brings a legal action against Korea, for example, or vice versa, it could carry significant political implications. Such a situation might not turn on whether the claim is legitimate or valid because the fact that the FTA had been used as a mechanism to force one party to amend a national policy itself would carry significant implications for domestic constituents.

Of course, if one party violates the agreement, the other party should be able to resort to the legal procedures. The FTA is not an exception. However, given that the FTA has already invited heated controversies (at least in Korea) in the short time it has been under consideration, it would make more sense not to rush to legal disputes in the initial stage of the agreement if at all possible.

Conclusion

The KORUS FTA is not simply about opening up the market. It means closer economic cooperation and coordination of the two countries in various fields. Therefore, assuming that establishing a closer relationship between the two countries is a worthwhile objective, the FTA will provide critical momentum to move in that direction.

At the same time, however, the agreement introduces new legal issues and new dispute settlement mechanisms that have not been tried before in the Korea-U.S. bilateral relationship. Because the trade disputes at the Korea-U.S. bilateral level are getting more complex, the addition of these new legal issues and mechanisms is likely to increase the number of disputes and intensify the nature of the disputes. Investment disputes, nullification and impairment claims, and subsidization claims are good examples of the kind of disputes that might increase. Furthermore, how to approach these disputes and how to reach determinations about them are likely to be significantly affected by such fundamental national concepts as the relationship between the government and the private sector, the proper role of the government, and similar issues on which the two countries do not seem to possess the same opinion.

Owing to the inherent nature of these new types of disputes, they have the potential to trigger more new disputes and intensify existing ones. Unless managed effectively, these new disputes over new procedures may end up deepening misperceptions and misunderstandings, which

in turn could lead to further disputes and legal actions under the FTA. Thus it is imperative for the two countries to recognize this aspect of the FTA and engage in a continuing effort to minimize the problems. Disputes are inevitable in any FTA regime, but Korea and the United States can certainly try to avoid unnecessary ones.

In fact, the harder part has not begun yet. That will come during the actual implementation stage, once the FTA is approved by the legislatures of the two countries. Although there are other, and probably more, important issues in the FTA package, the complexity and potential of the new legal disputes appear to have been underestimated. Good-faith implementation of the FTA and attainment of the objectives of the FTA depend significantly on how we prepare ourselves and manage these new issues in the years ahead.

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Endnotes

[1] The Vienna Convention on the Law of Treaties, Article 27, promulgated in 1969, provides:
Internal Law and Observance of Treaties
A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. . . .

[2] See, for example, United States: Sections 301–310 of the Trade Act of 1974, WT/DS152/R (December 22, 1990), footnote 652; United States: Import Measures on Certain Products from the European Communities, WT/DS165/R (July 17, 2000), para. 6.81; Mexico: Measures Affecting Telecommunications Services, WT/DS204/R (April 2, 2004), para. 7.244.

[3] Joseph J. Norton, "'Banking Law' in the Twenty-First Century," in *Making Commercial Law: Essays in Honour of Roy Goode*, ed. Ross Cranston, 302 (Oxford: Clarendon Press, 1997).

[4] In Japan, for example, there is continuing tension between the new legal regime and the traditional legal regime. The former has been affected by the influx of Anglo-American jurisprudence while the latter is based on the notion that social values—not only profit maximization—need to be taken into account when it comes to corporate governance; see Luke Nottage, "Nothing New in the (North) East? Interpreting the Rhetoric and Reality of Japanese Corporate Governance," *Comparative Research in Law and Political Economy* 2, no. 1 (2006): 1.

[5] See, for example, Japan: Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R (April 22, 1998), §10.43–10.46.

[6] Anna Fifield, "OECD tells S Korea to Reform Economy," *Financial Times*, June 20, 2007.

[7] See United States: Countervailing Duty Investigations on Dynamic Random Access Memory Semiconductors from Korea, WT/DS296/R (February 21, 2005) ("U.S.-DRAMs"), paras. 7.6-7.8, 7.49-7.50, 7.59; European Communities: Countervailing Measures on Dynamic Random Access Memory Chips from Korea, WT/DS299/R (June 17, 2005) ("EC-DRAM"), at paras. 7.38-7.46.

[8] See U.S.-DRAMs, paras. 7.9, 7.48, 7,54, 7.57-7.58; EC-DRAMs, paras. 7.23-7.30.

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

[10] George C. Christie, "Some Key Jurisprudential Issues of the Twenty-First Century," *Tulane Journal of International and Comparative Law* 8 (2000): 217.

[11] This is particularly the case because under the KORUS FTA, a "measure" is defined as any law, regulation, procedure, requirement, or practice. See KORUS FTA, Article 1.4. For instance, in the FTA, the United States underscores the importance of the low-key guidance of the Financial Supervisory Service, a financial watchdog in Korea, in the context of financial regulation. See Annex 13-B, Section D of the KORUS FTA.

[12] For instance, although during the 1993–2005 period Japan adopted various pieces of legislation for the restructuring of its corporate governance in response to increasing outside criticism of Japanese culture, opinion is divided about the true extent and impact of such reform. See, generally, Nottage, "Nothing New in the (North) East?"

[13] For instance, USTR states in the Korea section of its 2008 *National Trade Estimate Report on Foreign Trade Barriers* that the lack of transparency in Korea's financial regulatory system is problematic for all U.S. financial services providers. Improvement in notice and comment periods is necessary for foreign suppliers to have input into the regulations that will be imposed upon them. It also states that "some U.S. investors have raised concerns about a lack of transparency in investment related regulatory decisions, including by tax authorities, raising concerns about possible discrimination." Office of the United States Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers* (Washington, D.C.: USTR, 2008), 343; see also Bruce Klingner and Anthony B. Kim, "Economic Lethargy: South Korea Needs a Second Wave of Reforms," Backgrounder no. 2090 (Washington, D.C.: Heritage Foundation, December 7, 2007), 1 ("Current performance reflects a strengthening recovery, but inconsistent economic policies, lingering systemic deficiencies, and increasingly competitive rivals create significant long-term challenges."), 5 ("Layers of regulations and lingering government intervention persist, and the lack of economic opportunities, particularly among young people, encourages further frustration.").

[14] A similar concern is also raised when it comes to Japan. Obviously, one can expect differences between the situation in Korea and the situation in Japan, but there is constant concern that regulation in Japan is also not transparent and has caused barriers to trade. Scott Bradford, "An Analysis of a Possible Japan-U.S. Free Trade Agreement" (presented at New Asia-Pacific Trade Initiatives Conference, Japan Economic Foundation and PIIE, November 27, 2007, 21–22.

[15] "Minister Regrets Negative Sentiment on Foreign Capital," *Korea Times*, February 16, 2006.

[16] George C. Christie, "Some Key Jurisprudential Issues of the Twenty-First Century," *Tulane Journal of International and Comparative Law* 8 (2000): 219.

[17] Moshe Cohen, "The Burden of Proof in Comparative and International Human Rights Law: Civil and Common Law Approaches with Special Reference to the American and German Legal Systems," *American Journal of International Law* 93 (1999): 556, 557.

[18] United States Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers*, 344.

[19] Indeed, a quite drastic change is currently taking place. As recently as 2003, one observer commented that Korea seemed to be a country that had in place one of the most restrictive stances toward the opening of the market in legal services. See Misasha Suzuki, "The Protectionist Bar against Foreign Lawyers in Japan, China, and Korea: Domestic Control in the Face of Internationalization," *Columbia Journal of Asian Law* 16 (2003): 385, 403. But Korea has recently adopted a U.S.-style law school system that is now scheduled to open in March 2009, mainly in an effort to deal with the fast-changing legal environment and the opening of legal services to other countries.
[20] See, generally, arguments of parties in U.S.-DRAMs, EC-DRAMs, and Korea-Measures Affecting Trade in Commercial Vessels, WT/DS273/R (April 11, 2005).
[21] "Upcoming High Level Negotiations for KORUS FTA," Press release no. 07-175, Ministry of Foreign Affairs and Trade, March 26, 2007, available at http://www.mofat.go.kr/press/pressinformation/index.jsp
[22] See KORUS FTA, Section B, Chapter 11.
[23] Annex 11-B, 3, of the KORUS FTA defines indirect expropriation as "an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure."
[24] KORUS FTA, Article 22.4(C).
[25] See Japan: Measures Affecting Consumer Photographic Film and Paper, WT/DS44/R, §10.35.
[26] Ibid.
[27] Ibid., §10.77.
[28] United States Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers*, 338.
[29] *How to Design, Negotiate and Implement a Free Trade Agreement in Asia* (Manila: Asia Development Bank, Office of Regional Economic Cooperation, April 2008), 12.
[30] United States Trade Representative, *National Trade Estimate Report on Foreign Trade Barriers*, 335.
[31] KORUS FTA, Article 23.2.
[32] Song Jung-a, "South Korea to Tighten Foreign Investment Rules," *Financial Times*, December 28, 2007.
[33] Bradford, "An Analysis of a Possible Japan-U.S. Free Trade Agreement," 22.
[34] Constitution of the Republic of Korea, Article 6.
[35] KORUS FTA, Article 1.4.
[36] Some examples follow: (1) There have been discussions on the holding and reasoning of major decisions of the U.S. Supreme Court on the "taking" of private property based on Article 5 of the U.S. Constitution. One of the key issues raised was the so-called indirect expropriation, which is extensively based on the jurisprudence about taking by the U.S. Supreme Court. (2) Serious studies and discussions have also taken place concerning the role of the U.S. Congress in the negotiation and conclusion of trade agreements. One of the issues posed has been how much authority the U.S. Congress has when it comes to the negotiation and ratification of trade agreements such as the KORUS FTA. (3) The treaty-making process of the United States has also been extensively reviewed. A question was raised with respect to the legal validity of the documents negotiated and signed by the USTR on the basis of its own authority that did not go through the treaty-making process—or through the executive-agreement-making process, for that matter, in the United States. (4) Serious discussions have also been prompted by the KORUS FTA regarding the division of authority between the federal government in Washington, D.C., and the respective state governments. These discussions were triggered by the claim of the USTR that there are some issues that are not within the boundary of the federal government under the U.S. Constitution, and Korea needed to confirm what those issues were. (5) Also examined was the reason why the United States needs to adopt implementing legislation for the KORUS FTA. Having to adopt implementing legislation is not usual in the Korean context because in Korea most agreements become part of Korean domestic law the moment they are promulgated.
[37] Policy Clarification Press Release, no. 25, Government-Business FTA Special Commission of Korea, April 18, 2007.
[38] Policy Clarification Press Release, no. 21, Government-Business FTA Special Commission of Korea, April 11, 2007.
[39] Article 24 of the General Agreement on Tariffs and Trade and Article 5 of the General Agreement on Trade in Services apparently treat an FTA and a customs union in the same manner. There is, however, significant difference between the two. A customs union is a more advanced stage of economic integration than an FTA, in which the partners basically have a single market with full or virtually full policy coordination, as we see in the European Union. In an FTA partners do not have a single market; rather, they agree to open their domestic markets further with respect to their FTA partners.
[40] "Antidumping and Countervailing Duty Orders in Place as of January 18, 2008, by Country," United States Department of Commerce, http://info.usitc.gov/oinv/sunset.nsf/0a915ada53e192cd8525661a0073de7d/96daf5a6c0c5290985256a0a004dee7d/$FILE/orders-ctry-tbl.pdf
[41] In early days of the WTO, most of the disputes between Korea and the United States were about dumping or safeguards. The trend has changed in recent years, and subsidization claims and disguised-measure claims are on the rise.

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