법제교류 연구 15-18-⑤
International Legal Collaboration Research 15-18-⑤

Current Issues in Korean Law

Sang-Mo Lee · Kwang-Dong Park · Song-Min Hong
Sun-pil Eum · Seung-Hwan Choi · Gyooho Lee

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

법제교류 연구 15-18-⑤
International Legal Collaboration Research 15-18-⑤

Current Issues in Korean Law

Sang-Mo Lee · Kwang-Dong Park ·
Song-Min Hong · Sun-pil Eum · Seung-Hwan Choi ·
Gyooho Lee

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

Current Issues in Korean Law

Researchers: Sang-Mo Lee(Research Fellow, KLRI)
Kwang-Dong Park
(Senior Research Fellow, KLRI)
Song-Min Hong(Research Fellow, KLRI)
Sun-pil Eum(Professor, Hongik Univ.)
Seung-Hwan Choi
(Professor, Kyunghee Univ.)
Gyooho Lee(Professor, Chung-Ang Univ.)

Oct. 30, 2015

한국법제연구원
KOREA LEGISLATION RESEARCH INSTITUTE

요 약 문

Ⅰ. 배경 및 목적

□ 연구의 배경

○ 한국법제를 체계적으로 소개할 수 있는 저서를 영문으로 발간함으로써, 한국법제에 대한 이해를 증진하고 해외에서의 한국법 연구를 활성화할 필요성이 제기되고 있음

□ 연구의 목적

○ 본 연구는 헌법, 행정법, 형법, 상법, 민법, 경제법, 지적재산권법, 국제법, 국제통상법 등의 각 분야별로 한국법제의 최근 동향과 쟁점을 조사 연구하여, 외국인 입장에서 많은 관심을 가지고 있는 한국법제를 소개하고자 함

Ⅱ. 주요 내용

□ 한국 민주주의와 선거관리위원회

○ 1948년 한국이 건국된 이후의 역사는 민주주의의 발전을 위한 작용과 반작용의 역사였음.

- 이 과정에 주목할 만한 것이 바로 선거법제의 정비와, 독립적인 선거관리기구의 설립 및 운용임.

○ 지금까지 선거관리위원회는 대체로 그 역할을 효과적으로 수행하여왔다고 할 수 있으나, 한국 민주주의의 심화를 위하여 선거관리위원회의 역할이 더욱 강조되고 있음.

○ 선거관리위원회는 다른 국가기관이나 정치세력으로부터 독립적인 지위에서 전문성・투명성・윤리성・책임성의 제고를 통하여 선거관리의 신뢰도를 수준 높게 유지하여야 함.

○ 한국 민주주의의 발전을 위해 선거관리위원회는 정당정치 발전의 지원, 민주시민교육의 충실화, 통일시대를 대비한 선거제도 및 선거관리체계의 정비에 힘써야 함.

○ 산업화와 민주화를 성취한 한국의 경험을 이론화하여 세계의 신흥민주국가에 커다란 도움을 줄 수 있어야 함

□ 식품관련 법제

○ 한국의 식품안전 관련법률은 '식품안전기본법'을 중심으로 법의 목적과 관리대상에 따라 농림수산식품부와 보건복지부를 포함한 다수의 소관 부처에서 다원적으로 시행되고 있음.

○ 농림수산식품부가 관리하는 법은 농수축산식품의 생산단계의 식품안전 및 품질에 관련된 법이 주를 이루며 보건복지부가 관리하는 법은 식품위생과 국민건강에 관련된 법이 주를 이루고 있음.

○ 한국의 농수산식품 안전관리와 검사・검역제도는 품목별, 취급단계별로 농림수산식품부와 보건복지부로 이원화되어 있음.

○ 한국의 식품안전관리제도에는 농산물우수관리제도(Good Agricultural Practice: GAP), 친환경농산물 및 유기가공식품 인증제도, 위해요소 중점관리기준제도, 원산지표시제도, 이력추적제도 등이 있음.

Ⅲ. 기대효과

□ 한국법제를 체계적으로 소개할 수 있는 저서를 영문으로 발간함으로써, 한국법제에 대한 이해를 증진하고 해외에서의 한국법 연구를 활성화함

□ 한국법제에 대한 소개를 통하여 한국에 대한 관심을 유발시켜 학문적 교류 뿐만 아니라 입법모델로서의 한국법제의 가치 제고함

주제어 : 한국 민주주의의 발전, 선거관리위원회령발전소 규제, 식품안전, 식품안전관리, 인체건강, 식품안전기본법, 식품위생법

Abstract

Ⅰ. Background and Purpose

□ Background of this study

○ The objectives of this study are to promote understanding of Korean legislation and vitalize foreign research on Korean law by publication of books in English that introduce Korean legislation systematically

□ Purpose of this study

○ The primary purpose of this study is not only to promote intellectual exchange but also to enhance the value of Korean legislation as a model legislation.

Ⅱ. Main Contents

□ Democracy and the Election Commission in Korea

○ The history of Korea after the foundation in 1948 has been a process of action and reaction for the development of democracy.

- In this process, the legislation of election laws and the establishment of an independent election management body have been at the center stage.

○ Although having accomplished good performance until now, the Election Commission should strive further to deepen democracy in Korea.

○ The Commission, as an independent constitutional agency, must maintain the reliability of the election management at a high level through the enhancement of professionalism, transparency, morality, accountability.

○ For the development of democracy in Korea, the Commission should endeavor to support the development of party politics, enhancement of democratic civic education, and to develop the electoral system and the election management system in preparation for the reunification era.

○ Korean experience of achieving industrialization and democratization in a relatively short time needs to be theorized in order to be a big help for the emerging democracies in the world.

□ Food-Related Laws and Systems

○ South Korean food safety-related laws are pluralistically administered by several relevant agencies including Ministry of Agriculture, Food and Rural Affairs (hereinafter referred to as “MAFRA”) and Ministry of Health & Welfare (hereinafter referred to as “MW”) according to the purpose and regulatory targets of laws, centered on the ‘Framework Act on Food Safety.’

○ The laws administered by MAFRA mainly include food safety and quality-related laws that regulate the production process for

agricultural, marine and livestock food, and the laws administered by MW mainly include food sanitation and public health-related laws.

○ South Korean agricultural and marine food safety management system and inspection and quarantine system are dualistically managed by MAFRA and MW in accordance with items and stages.

○ South Korean food safety management system includes Good Agricultural Practice (GAP), Eco-friendly Agricultural Product and Processed Organic Food Certification system, Hazard Analysis and Critical Control Point (HACCP) system, Place-of-Origin Indication System, and Traceability system.

Ⅱ. Expected Effects

□ This study will satisfie the needs for promotion of intellectual exchange by introducing Korean legislation to the world

□ It also will enhances the value of Korean legislation as a model legislation.

Key Words : development of democracy, Election Commission, od safety, food safety management, human health, Framework Act on Food Safety, Food Sanitation Act

Preface

This study will introduce Korean legislation where international community has a great interest through investigation and research on recent trends and issues of Korean legislation in the Constitution, administrative law, criminal law, commercial law, civil law, economic law, intellectual property law, international law, international trade law, and others, which will be done from 2015 to 2017. In 2015 as the first year, five papers each representing different areas have been selected.

However, editors of this study have decided to publish “Present Condition and Issue of Adoption Act in Korea” written by Park Kwang-Dong and “Major Issues over the Court’s Judgment related to War-Time Forced Labor” written by Lee Sang-Mo, co-researchers of this study, in 2016 for timeliness and harmony with other papers. In advance, we announce now that comprehensive study will be published in 2017 to celebrate the 10th anniversary of Legislation Exchange Aid Project in Korea Legislation Research Institute with 40~50 additional papers selected in the second and third year through editorial meetings.

Table of Contents

Chapter 1.

Democracy and the Election Commission in Korea

Sun-pil Eum
(Professor of Law, Hongik University)

▢ Overview

The history of the Republic of Korea (hereinafter "Korea") after the foundation in 1948 has been a process of action and reaction for the development of democracy. The Constitutional Assembly was elected on May 10, 1948, which was the first universal, equal, direct and secret election conducted in Korea. Since then, Korea has gradually institutionalized democratic systems through the long-term process of upward spiral, while sometimes repeating the retreat and the advance. In this process, the legislation of election laws and the establishment of an independent election management body have been at the center stage.

Right after the establishment of Korea, the Election Commission (hereinafter "EC") installed in the administrative branch managed elections. However, as the Commission was not able to secure the fairness of election, it was replaced by an independent body separate from the other state organizations, which has been a constitutional agency since the 1960 Constitution.

The Election Commission in Korea had not been able to play the constitutional roles properly until the authoritarian military governments ended in the late 1980s, because it was necessary to make appropriate legislations and practices supporting the function of the Commission.

Although it can be said that the EC has accomplished good performance until now, it should strive further to deepen democracy in Korea.

Above all, the EC must give attention to fair election administration conducted independently from other state organizations and political

forces. What is more important than its "structural" independence is independent culture, clear leadership and awareness of the missions of the EC. It must also maintain the reliability of the election management at a high level through enhancing professionalism, transparency, morality, and accountability.

In addition, for the development of democracy in Korea, the Commission should endeavor to support development of party politics and enhancement of democratic civic education, and to develop the electoral system and the election management system in preparation for the reunification era. Especially the Commission, as a think tank, must be able to formulate a national strategy for the development of Korean democracy.

Furthermore, the experience of Korea that has achieved industrialization and democratization in a relatively short time needs to be theorized, which will help educating electoral officials of the emerging democracies and transplanting Korean election management system. It is also necessary to try to operate successfully the Association of World Election Management Bodies (A-WEB) in which foundation Korea has taken the lead.

1. Historical Background

1.1. Transition of Election Management Bodies

1.1.1. Before the 1960 Constitution

Korea experienced a democracy for the first time through the first parliament election on May 10, 1948. However, this election was carried out according to the military decree No. 175 of the U.S. military administration. Korea had to establish her own election law for the National Assembly members, which was enacted later on April 12, 1950 (Act No. 121). Under the 1950 Election of National Assembly Members Act, the Election Commission had a structure of a hierarchy: National EC, Seoul/Do EC, District EC, and Vote District EC. The National Election Commission (hereinafter “NEC”) was established in the Ministry of the Interior, which meant that Korea's first EC was organized as part of the Executive branch. As a result, there arose the problem that it was difficult for the Commission to secure the neutrality and independence in election management because the staff of government agencies actively participated in the Commission.

The fairness of the election began to be gradually undermined by government intervention, money and violence. In particular, in the presidential election on March 15, 1960, election fraud had been committed openly. Election management became so nominal and the principles of democracy was so infringed that the 4.19 Revolution occurred as a people’s resistance resulting in President Syng-man Rhee’s resignation. And anti- government demonstrations by people, particularly by students, led to a government change.

1.1.2. After the 1960 Constitution

The 1960 Constitution that was amended after the 4.19 Revolution established the "National Election Commission" as a constitutional institution, the intention of which was to improve the fairness of the election and to prevent rigged and corrupt elections. The Commission was composed of three Supreme Court justices and six members who were nominated by political parties. The Chairperson was to be a Supreme Court Justice, which has been an important convention of the EC in Korea.

Many prerequisites for democratic electoral system were provided in the Constitution: licensing or censorship of speech and the press, and licensing of assembly and association should not be recognized, even if the freedom of expression could be limited. And in order to prevent the intervention by civil servants and police in the election, the provisions to ensure their political neutrality were placed. This showed the national aspiration for democracy in Korea.

The 1962 Constitution had more provisions on composition and authority of the Election Commission, term and status of the commissioners, etc. In accordance with these provisions, the Election Commission was founded on January 21, 1963 and is still in action.

In 1972 President Chung-Hee Park carried out a constitutional amendment in order to strengthen his regime. In the 1972 Constitution, the authorities of the Electoral Commission were expanded to "the fair management of elections and national referendums, and dealing with administrative affairs concerning political parties." The NEC was composed of nine members, each three of whom were selected by the President, the National Assembly and the Chief Justice of the Supreme Court respectively. The Chairperson of the NEC was appointed by the President.

In the 1980 Constitution which was amended after the sudden death of President Chung-Hee Park, the Chairperson of the NEC was to be elected from among the commissioners.

1.2. Historical Development of Election Management

The methods of election management in Korea have changed along with the development of democracy. In the beginning, the EC focused mainly on the management of technical matters of the election procedure before the democratization of Korea in the late 1980s. In other words, its primary concern was to manage elections and national referendums in accordance with the election laws and the National Referendum Act, and to promote voters' participation. Naturally, the EC took a conservative stance.

In June 1987, a direct election for the President was reintroduced by powerful protests of the people against the military regime. Along with expanding political freedom, the campaign began to overheat. Accordingly, a strong crackdown on election law violations was required. In April 1989, the Chairperson of NEC pointed out some illegal campaign activities that occurred in a re-election for a National Assemblyman. This triggered a powerful crackdown by the Commission on election law violations. The Commission continued to enforce strictly election laws and strengthened its investigative powers. In 1992 the Commission was given the authority to issue halt, warnings and correction order on election law violations, to accuse, and to request an investigation. This led to the expansion of investigation functions and to the activation of enforcement.

In 1994, a unified election management system was constructed through the integration of the existing election laws into a new election law, i.e. "Act on the Election of Public Officials and the Prevention of Election

Malpractices" (later changed to "Public Officials Election Act"). Along this, new systems of election, political party and political fund were installed for "implementing a clean and less costly election". And the Commission was allowed more authorities to investigate election crimes: to investigate illegal use of political funds, to inquire of or investigate relevant persons, to request them to submit relevant documents or other materials, and to request the accompanying to or appearance in the EC.

A revolutionary turning point for free and fair elections in Korea was the 2004 election for the 17th National Assembly members. The election could be conducted in the fairest manner in history thanks to an epoch-making betterment of the Public Officials Election Act and a definite will of the EC. In order to prevent election crimes, for example, cash rewards (up to KRW 50 million) were to be given to those reporting election crimes and a 50-fold administrative fine was to be imposed against those receiving money and goods in relation to election.

The Internet Election News Deliberation Commission (IENDC) was also established in order to monitor Internet media for ensuring accurate report of facts. IENDC can request inspection and submission of communication materials. The NEC also established the Cyber Election Surveillance Units in order to monitor vote rigging through the Internet.

Public opinion is very important in democratic political process, in particular, in the electoral process. The Election Poll Process Deliberation Commission was installed in 2014 in order to ensure the objectivity and reliability of the poll to predict the winner in the election.

The EC expanded its working area. Many private sector elections have entrusted to the Commission and it has helped them hold clean and fair elections.

2. Legal Structure of Election Management

2.1. Legal System of Election Management

The legal system of election management in Korea is a hierarchy composed of the Constitution, Acts, Decrees and NEC regulations.

2.1.1. Constitution

The 1960 Constitution, which established the election management body for the first time, only provided on how to compose the NEC and delegated other necessary matters (organization, powers etc.) to legislation. However, in the subsequent Constitutions, much more matters have been provided gradually about the EC and election management. In the current Constitution, under the title "Election Management" in Chapter 7, powers of the EC, term and status of the NEC members, relationship between the EC at each level and the government agencies are stipulated.[1)]

Article 114

(1) The Election Commissions shall be established for the purpose of fair management of elections and national referendums, and dealing with administrative affairs concerning political parties.

(2) The National Election Commission shall be composed of three members appointed by the President, three members selected by the National Assembly, and three members designated by the Chief Justice of

1) When an election management body is provided in the Constitution, the method of its composition is desired to be also stipulated. When the EC is organized, democracy and political neutrality should be considered. Democracy requires the consent of the National Assembly as a prerequisite to its composition, while political neutrality pursues non-partisanship or political balance.

the Supreme Court. The Chairperson of the Commission shall be elected from among the members.

(3) The term of office of the members of the Commission shall be six years.

(4) The members of the Commission shall not join political parties, nor shall they participate in political activities.

(5) No member of the Commission shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment.

(6) The National Election Commission may issue, within the limit of Acts and decrees, regulations relating to the management of elections, national referendums, and administrative affairs concerning political parties and may also establish regulations relating to internal discipline that are compatible with Act.

(7) The organization, function and other necessary matters of the Election Commissions at each level shall be determined by Act.

Article 115

(1) Election Commissions at each level may issue necessary instructions to administrative agencies concerned with respect to administrative affairs pertaining to elections and national referendums such as the preparation of the poll books.

(2) Administrative agencies concerned, upon receipt of such instructions, shall comply.

Article 116

(1) Election campaigns shall be conducted under the management of the Election Commissions at each level within the limit set by Act. Equal opportunity shall be guaranteed.

(2) Except as otherwise prescribed by Act, expenditures for elections shall not be imposed on political parties or candidates.

The Constitution has placed the EC as a necessary agency. The Commission has a variety of functions: fair management of elections and national referendums, administrative affairs of political parties. The functions of the Commission are more comprehensive than those of other countries. In particular, the NEC may issue, within the limit of acts and decrees, regulations relating to the management of elections, national referendums, and administrative affairs concerning political parties. This empowers the NEC to wield a kind of legislative power more than just administrative power.

On the other hand, major matters relating to election, referendum and political party shall be legislated by the National Assembly (Constitution, Article 41 Paras. 2, 3; Article 67 Para. 5; Article 118 Para. 2). And the resolution of election litigation belongs to the jurisdiction of the courts (Constitution, Article 101).[2)]

2.1.2. Act

The major acts relating to democratic political process in Korea are “National Referendum Act”, “Political Parties Act”, “Political Fund Act”, “Public Officials Election Act”, “Election Commission Act” and so on. And there is also an “Act on Public Organizations Entrusted Election” that manages the various elections for the heads of public entity which have important implications for our society.

---

2) Exceptionally, the NEC or Si/Do EC shall make decisions on the petitions on the local election - petition against the election or the elected person(s) (POEA, Article 219 - Article 220).

Among these, acts that regulate directly the management of elections for public officials are the Public Officials Election Act (POEA) and the Election Commission Act (ECA). The POEA regulates the electoral process for the President, National Assembly members, heads of local governments, and members of local councils, while the ECA governs the organization and functions of the EC.

The election management by the Commission, under the POEA, includes supervision of the preparation of the voters list, determination of voters by an integrated voters list, political party registration, candidate registration, campaign management, offering election information to voters, management of election expenses and political funds, management of voting and counting, and confirmation of election results.

The ECA stipulates the affairs of the EC as follows: the elections of national and local governments, national referendum, political parties, the entrusted elections under the "Act on Entrusted Elections for Public Organizations", and other affairs prescribed by the acts and regulations (Article 3).

2.1.3. Decree

Presidential decrees shall be issued in order to refine the requirement stipulated in acts. Currently important presidential decrees on the political process are the "Decree on National Referendum Act," and the "Decree on Public Officials Election Act". Other acts are embodied by the NEC regulations. It is a peculiar aspect of Korean political laws that they are embodied by the NEC regulations, not by administrative legislations such as presidential decrees.

2.1.4. Regulation of the National Election Commission

The NEC may issue, within the limit of Acts and Decrees, regulations relating to the management of elections, national referendums, administrative affairs concerning political parties. It may also establish regulations, compatible with Acts, concerning internal discipline. Important regulations are “Referendum Act Enforcement Regulation”, “Election Commission Act Enforcement Regulation”, “Public Officials Election Management Regulation”, Superintendent of Education Election regulation”, “Management of Administrative Affairs of Political Party Regulation”, “Management of Political Fund Regulation”, “Resident’s Referendum Management Regulation”, and so on.

In addition, recently the “Regulation on the Installation and Operation of the Constituency Demarcation Committee for the National Assembly Members” has been issued (2015.6.19.). For the Constituency Demarcation Committee that belonged to the National Assembly was transferred to the NEC.

Thus, the NEC can adequately govern the political process through the rule-making authority

2.2. Structure and Composition of the Election Commission[3)]

2.2.1. Structure

The EC has a four-tier structure consisting of the NEC and local ECs : Si (special metropolitan, metropolitan city)/Do (province) ECs, Gu (district)/Si

3) See the English brochure of the National Election Commission, 16-18. Also see the English version of homepage of the NEC (http://www.nec.go.kr/engvote_2013/01_aboutnec/03_01.jsp#)

(city)/Gun (county) ECs, and Eup/Myeon/Dong (township) ECs.[4)]

As of 2014, there are 17 Si/Do ECs, 250 Gu/Si/Gun ECs, and 3,473 Eup/Myeon/Dong ECs.

2.2.2. Composition

2.2.2.1. Nation Election Commission

The NEC consists of nine commissioners including one Chairperson and one Standing Commissioner. The President, the National Assembly, and the Chief Justice of the Supreme Court select three members respectively. Each commissioner should be confirmed by a personnel hearing in the National Assembly (National Assembly Act, Article 65-2). The Chairperson and the Standing Commissioner are elected from among the members to secure the political neutrality. It has been a practice that the Justice of the Supreme Court assumes the position of the Chairperson since 1963.

The term of the commissioners is six years. They shall not join political parties, nor shall they be involved in any political activities. Their positions are guaranteed by laws. No commissioner shall be expelled from office except by impeachment or a sentence of imprisonment without prison labor or heavier punishment. This is to ensure the independence and political neutrality of the EC. The same guarantee applies to judges.

2.2.2.2. Local Election Commission

Si/Do ECs are composed of the Chairperson, the Standing Commissioner, and commissioners. Each political party that has a negotiating group in the National Assembly recommends one person (who has voting rights

4) Overseas Voting Committees are set up at Korean overseas missions for the Presidential and the National Assembly elections.

and is not a member of any political party) as a commissioner. Three members including two judges are recommended by the Chief Justice of a local district court, and another three members are nominated by the NEC from a pool of scholars and individuals known for high academic and ethical standards. The Chairperson of the Commission is elected from among the members, and customarily the Chief Justice of a district court takes the position.

Gu/Si/Gun ECs are composed of the Chairperson, the Vice Chairperson, and commissioners. Members of Gu/Si/Gun ECs are appointed by Si/Do ECs. Each political party that has a negotiating group in the National Assembly recommends one person (who has voting rights, resides in the relevant Gu/Si/Gun and is not a member of a political party) as a commissioner. Six members are nominated by Si/Do ECs from a pool of judges, scholars and individuals known for high academic and ethical standards. The Chairperson and Vice Chairperson are elected from among the members, and customarily a justice of a district court is elected as the Chairperson.

Eup/Myeon/Dong EC consists of the Chairperson, the Vice Chairperson and commissioners. Each political party that has a negotiating group in the National Assembly recommends one person (who has voting rights, resides in the relevant Eup/Myeon/Dong and is not a member of a political party) as a commissioner. Four members are nominated by Gu/Si/Gun ECs from a pool of judges, scholars and individuals known for high academic and ethical standards. The Chairperson and the Vice Chairperson are elected from among the members.

3. Status of the Election Commission in the Constitution

3.1. Status of the Election Commission

3.1.1. Essential Body for Neutral and Independent Election Management

Election management, for its political and administrative function, is such susceptible to political influence from outside that it needs to be governed in the constitutional dimension for political neutrality.[5] This is requested as a constitutional imperative of 'electoral integrity'.[6] The most important factor with regard to electoral integrity is the presence of a neutral and reliable election management body.

The fairness of election management can be secured by the neutrality of election management body, and its neutrality comes from the personnel

---

5) This is the same with the opinion of the Constitutional Court: "…the local election is a democratic process to form a representative organ, as well as necessary means to realize representative democracy by securing democratic legitimacy. Accordingly, in order to fairly administrate election and voting process, it is necessary to have a separate and independent election administrative institution…" [Const. Ct., 2005 Hun-Ra7, June 26, 2005]. The Court thinks that the EC in the Constitution of Korea is an institution of this request.

6) The concept of electoral integrity (election with integrity) has naturally been a global concern as democracy is widespread. But there is no generally accepted definition of it. According to a report that dealt with the concept comprehensively, an election with integrity is defined "as any election that is based on the democratic principles of universal suffrage and political equality as reflected in international standards and agreements, and is professional, impartial, and transparent in its preparation and administration throughout the electoral cycle". [International IDEA and the Kofi Annan Foundation, The Report of the Global Commission on Elections, Democracy and Security, Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide, (September, 2012)]. For more details, Sun-pil Eum, Sungeo-ui Wanjunsung [Electoral Integrity], Hongik Law Review, Vol. 15, No. 3 (2014), 101-40.

and materiel independence. In this regard, at the Constitution level are prescribed composition method of the EC; term of office, political neutrality and guarantee of status of the commissioner.

3.1.2. Participator in the Democratic Process of Forming the Political Will of the People

The Korean Constitution includes a plurality of institutional elements of representative democracy, direct democracy and party-state democracy (*parteienstaatliche Demokratie*) as the methods of specific implementation of the principle of popular sovereignty. Accordingly, the people, as a sovereign, can express their political will by election, referendum, and activities of the political parties. The Constitution has placed the EC as an organization directly involved in the democratic formation of such political will (Article 114, Paragraph 1). According to the current Constitution, the Commission is not just a special constitutional institution for technically handling the affairs on elections, referendums and political parties. The Commission should be regarded as an agency that supports and manages the process of making popular political decisions in a democratic way regarding to the formation of state organ, the delegation of political power and the determination of national policy. Therefore it is necessary that the EC is responsible for the fairness of election as a monitor and regulator, and for the development of democracy as a facilitator as well. As a result, it should assume the roles of the initiator in the political legislation and of the supporter for democratic civic education.

3.1.3. Agency of Functional Power Control for the Constitutional Democracy

It seems to be consistent with the principle of separation of powers that election management is separated from political powers and entrusted to an independent constitutional institution. It is natural for the election management body to be a constitutional organization when the tradition and culture of democracy is fragile.[7] It was very prudent and wise in Korean constitutional history that the election management was not entrusted to the National Assemblymen or the President who are selected by elections, and that the EC was established as a separate institute equal in status to the National Assembly and the executive branch. An independent election management body is the "institutional basis of democratic transition." In this respect, the EC can be an institution to strengthen the constitutional democracy, based on the principle of functional separation of powers. In other words, the Commission can strengthen the constitutional democracy by the management of elections, referendums and administrative affairs of political parties.[8]

---

7) In the established democracies, it is sufficient to consider the functional allocation and rational operation of state powers without concern for the democratic constitution of the state institutions. However, in the case of a country that has undergone a democratic transition, it has become constitutional concern to establish an election management body, as a separate independent agency, responsible for the democratic formation of state organization. [International Institute for Democracy and Electoral Assistance, Electoral Management during Transition: Challenges and Opportunities, (2012.8), 5.

8) Regarding to this, very meaningful is the Constitution of Republic of South Africa which defines the EC as one of "state institutions to support the constitutional democracy" (Article 181).

3.2. Relations between the Election Commission and Other State Organizations

The EC maintains a close relationship of check and balance with other constitutional institutions for the fair election management.[9)]

First, with regard to the election legislation, if the NEC deems it necessary to enact or amend laws relating to an election, referendum, or political party, it may present its opinion in writing to the National Assembly (ECA, Article 17). The NEC may issue, within the limit of Acts and decrees, regulations relating to the management of elections, national referendums, and administrative affairs concerning political parties. On the other hand, the Constitutional Court may review, albeit restrictively, the constitutionality of the regulations of the NEC through the constitutional complaint procedure.

Secondly, in relation to the conduct of the election, ECs at each level may issue necessary instructions to the relevant administrative agencies such as the preparation of the poll books (Constitution, Article 115; ECA, Article 16). Administrative agencies concerned, upon receipt of such instructions, shall comply.

In addition, the EC can monitor and check the involvement in the elections of public officials including the President. Members or staff of each EC, upon discovering a violation of election laws in the course of their duties, shall halt the violation, issue a warning or correction order, and may request an investigation to the competent investigation authorities

9) For more details, Sun-pil Eum, Sungeo Gwanli Wiwonhoe-ui Hunbubsang Jiwi-wa Yughal [Status and Roles of Election Commissions in the Korean Constitution], Hongik Law Review, Vol. 16, No. 1 (2015), 231-33.

or bring a formal charge if the violation is deemed significantly detrimental to the impartiality of election or an order of suspension, warning, or correction is not complied with (ECA, Article 14-2).[10)]

Third, in relation to the election litigation, the EC maintains a functional cooperation with the courts. The NEC or City/Do EC shall make decisions on petitions on the local election - petition against the election or the elected person(s) (POEA, Article 219 - Article 220). The petitioner who has an objection to the decision on the validity of the election or the elected person may file a lawsuit in the courts (POEA, Article 222 - Article 223). In this respect, a petition on election is corresponding to an administrative appeal.

Fourth, with regard to the control of the performance of the EC, the National Assembly can evaluate the performance of the EC through inspection and investigation; the Board of Audit and Inspection (BAI) can inspect the job performance of the civil servants who belong to the EC. (BAIA, Article 24 Para. 3).

10) In June 2007, President Moo-hyun Roh made four speeches at meetings, key points of which were criticism against the opposition party and support for the ruling party. In June 2007, NEC held a meeting to review his remarks and found they violated relevant laws. NEC requested that the President abide by the duty of impartiality. Upon receipt of these notices, on June 21, 2007, President Roh filed a constitutional complaint claiming that NEC's notices infringed his individual freedom of expression of political opinions. In this case, the Constitutional Court holds that President's remarks violate the regulations of the Public Official Election Act, Article 9 Para. 1, and that the Notices of request for compliance with President's duty of impartiality toward election and the Public Officials Act, Article 9 Para. 1 as the basis of the Notices do not violate the Constitution. [Cons. Ct., 2007 Hun-Ma 700, Jan. 17, 2008]

4. Powers and Functions of the Election Commission

4.1. Management of Elections for Public Offices

The EC is responsible for overall management of the electoral process, except the enactment of election laws and the final decisions of election litigations.

The Commission manages elections for the President, National Assembly members, heads of local governments and local council members. The EC is responsible for the conduct and supervision of elections at each stage of these election procedures. The management of election by the EC includes redistricting, registration of preliminary candidates, preparation and supervision of the voters list, registration of candidates, management of campaigns, management of voting and counting, announcement of the elected.

First, the Constituency Demarcation Committee for the National Assembly Members, an independent redistricting committee that belongs to the NEC, delimits electoral districts.[11] The EC manages electoral campaign so that they should be conducted within the limit set by Act and oversees the enforcement of election expenses. In particular, the supervision of the election expenses is essential to ensure that elections are not fallen

11) According to the decision of the Constitutional Court that the permissible limits on population disparity in electoral districts should be beneath ±33⅓% of the average population of electoral districts (equivalent to setting the permissible maximum ratio between the most populous district and the least at 2:1) [Const. Ct., 2012 Hun-Ma 190(consol.), Oct. 30, 2014], there is a need to delimit the electoral districts. As the feeling of rejection against the redistricting committee that belonged to the National Assembly has increased, a new independent committee on boundary delimitation is to be established within the NEC.

into plutocracy and to maintain the legitimacy of the election. For this, the ECs have the power to investigate the election crimes, and political funds crimes as well.

The ECs at each level (excluding the Eup/Myeon/Dong EC) may pay reward money to the person who has filed a report on election crimes before the EC acknowledged them (POEA Article 262-3) and impose administrative fine against those who receive money, goods and food.

4.2. Management of National Referendum

There are two types of referendum that the Korean Constitution admits. One is the referendum on the national polices. The President may submit important policies relating to diplomacy, national defense, unification and other matters relating to the national destiny to a national referendum if he/she deems it necessary(Constitution, Article 72). The other one is on constitutional amendment. The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly (Constitution, Article 130 Para. 2).

The procedure of referendum is as follows: official notification of date and issue of the national referendum (by the President) → posting of the national referendum issue and campaigns → voting and counting → decision and promulgation (by the President).

4.3. Management of Administrative Affairs of Political Parties and Political Funds

The Constitution provides the freedom of establishing political parties and the protection of them by the state (Article 8, Para. 1, Para. 3).

Political parties, as political associations, actively form the political will of the people, represent various interests of the society, check the government and present policy alternatives as the ruling parties or the opposition. Political parties have public functions indispensable to modern representative democracy as mediators and channels by which people can exert influence on the state action. In this sense, affairs concerning political parties also require the fairness and impartiality like those regard to elections.

First, the EC provides support for administrative affairs regarding the registration and development of political parties (Political Party Act, Article 4 Para. 1). For the establishment of democracy within the party, the Commission may manage intra-party competitions held to recommend candidates or to elect party leaders at the request of the party (Political Party Act, Article 48-2).

Second, the EC is responsible for the management of political funds.[12] The EC strives to establish clean political culture by guaranteeing proper political fundraising, ensuring the transparency of political funds through the disclosure of their revenues and expenditures, and preventing irregularities involving political funds. The EC has the following tasks: administrative affairs concerning the registration of political fundraising associations; supervision of contributions and donations; distribution of the government subsidies and the funds contributed to the EC; audit on financial reports

12) The term “political funds” means party membership fees, supporters' contributions, deposits, subsidies, incidental revenues that are prescribed by the party constitution or party rules of every political party, money, securities or goods that are provided to persons who win elections for public office, candidates who are to run in an election for public office, persons who intend to become such candidates, supporters' associations and senior officials or staff in charge of clerical services of political parties or other persons who are engaged in political activities, and other expenses that they need to undertake political activities (Political Funds Act, Article 2, Subpara. 1).

filed by political parties, candidates, and political fundraising associations; and administrative support for raising political funds, etc.

Third, when the Constitutional Court orders the dissolution of a political party, the party shall be dissolved and such decision shall be enforced by the NEC according to the Political Party Act (Constitutional Court Act, Article 59, Article 60).[13]

4.4. Management of Consigned Elections and Residents' Referendums

Under the "Act on Entrusted Elections for Public Organizations" enacted in 2014, the EC has been entrusted with the management of elections for some public organizations, besides the public official elections.[14] Such consigned elections are, for example, ones for the heads of local agricultural, livestock, fisheries, and forestry cooperatives; for the Chairpersons of the National Agricultural Cooperative Federation (NACF), the National Federation of Fisheries Cooperatives (NFFC), and the Korea Federation of Small Businesses (KFSB); for directors of improvement project cooperatives for dwelling conditions, and for representatives for apartment residents.

---

13) For the first time in Korean history, a political party was forcibly dissolved by the Constitutional Court [Const. Ct., 2013 Hun-Da 1, Dec. 19, 2014).

14) After the democratization in Korea, several types of elections have been entrusted to the EC. Such are, for example, residents' referendums (since 2004), elections for the head of forestry, agricultural, fisheries and livestock cooperatives as well as elections for the President of national universities (since 2005), and residents' recall votes (since 2006), elections for representatives of apartment residents (since 2010). The management of these consigned elections has helped many private organizations and bodies operate democratically. For the first time in the history of Korea, elections for heads of local agricultural and livestock, fisheries, forest cooperatives were carried out at the same time on March 11, 2015. On that day, about 2.96 million voters participated in the elections of 1,149 Agriculture and livestock cooperatives, 82 fisheries cooperatives, 129 forestry cooperatives (total 1,360 elections). Seoul Shinmoon[Newspaper], (2014.9.11.), 6.

Also, the EC manages residents' referendums held to decide important matters that affect national policies or local residents. Residents' referendums have been managed by the EC since 2004.

4.5. Expression of Opinion on Acts and Subordinate Statutes

When wishing to enact, amend or repeal acts and subordinate statutes relating to election, referendum and political party, an administrative agency shall send the bills to the NEC in advance and ask for its opinion thereon. If the NEC deems it necessary to enact or amend acts relating to election, referendum, or political party, may present its opinion in writing to the National Assembly (ECA, Article 17).

5. Roles and Tasks of the Election Commission for Democratic Development[15)]

5.1. Pursuit of Electoral Integrity

The EC, more than anything else, should be a fair administrator of the electoral process. In other words, the Commission should not make favorable decisions on specific groups and parties in the course of election. It should keep political neutrality when interpreting and enforcing laws. Political neutrality is displayed as fairness (impartiality), which demands the EC to treat the parties equally.

In order to ensure the fairness of election management, the EC, as an independent operator of electoral democracy, should be independent of

15) Sun-pil Eum, supra note 9, 235-44.

other state institutions or political parties in decision-making process. For this, more important are independent culture, clear leadership, and devotion of the Commission members than its "structural" independence. The Commission must also maintain the reliability of the election management at a high level through enhancing professionalism, transparency, morality, and accountability. It is necessary to ask for an assessment of job performance of the EC, too.

5.2. Strengthening Political Rights

The EC should help people enjoy political rights including the right to vote, more than just apply and enforce election laws faithfully.

First, the EC ought to be able to provide voters with quality information on election for their reasonable political decisions. It is especially the case in the election period. Also, the accessibility to the election information is very important. The development of information and communication technology enables the EC to handle the affairs of election quickly and correctly (computerization of election affairs and information on candidates, Internet searching system, real-time Internet casting of ballot counting, etc.). Due to these services, voters are able to get the election information very easily and get accurate answers to questions on election laws in a rapid manner.

Second, the EC should do best to help voters (including the future voters) experience democratic voting. Elections in private sector are the good opportunity for such experiences. So, the EC should not spare the technical and administrative support for entrusted elections.

Third, it is necessary to provide a monitoring system so that voters can effectively screen the flow of political funds including election expenses.

Linked with the appropriate compensation, it will draw more active participation. Active surveillance of citizens on political financing will enhance the transparency of political fund.

5.3. Support for the Development of Democracy in Korea

The Korean Constitution suggests the national challenge in the preamble: “having assumed the mission of democratic reform …. To afford equal opportunities to every person and provide for the fullest development of individual capabilities in all fields, including political…. life by further strengthening the free and democratic basic order conducive to private initiative and public harmony….”.

Since the establishment of the 1987 Constitution, Korean democracy has developed more significantly than before. But, unlike expectation, it faces nowadays many barriers and even remains in a stagnant state in many aspects. Therefore, the national strategy and action plans for democratic development and ongoing schedule management are required. These are expected to be tasks of the EC whose main function is to manage, in a position separated from other political interests, the core ingredients of the democratic system such as elections, political parties and political funds.

First, the EC should exert every effort for the development of party politics. In order to hold democratically intra-party competitions which are very important in political party activities, the EC should be entrusted to manage them. It is also required for the EC to support the policy development of political party and to ensure the transparency of political funding.

Second, the EC, as a think-tank, should enhance the competence to establish a national strategy for the development of Korean. For example, a periodic assessment of Korean democracy (democratic audit, democracy assessment) may be a feasible task.

Third, the EC should research comprehensively how to improve systems of election, party and political funding, and then take a strategic approach in the legislative process. Not a few good bills for the political reformation are disposed in the National Assembly because they do not coincide with the partisan interests. For that reason, strongly demanded is the leading role of the EC in the legislation.[16)]

Fourth, it is necessary for the EC to cooperate closely with the Constitutional Court. The Court needs the experience and knowledge of the EC in reviewing the validity and relevance of politics-related laws; on the other hand, the EC requires a clear judgment of the Court on possible unconstitutionality of election laws. The EC needs to help the decisions of the Constitutional Court through the ongoing exchange of opinions.

5.4. Contribution to the Global Development of Democracy

Today's rapid globalization has organized the international cooperation in the area of election management and settlement of democratic systems.[17)] The electoral management bodies (EMBs) around the world share valuable information by sharing experiences and good practices to improve the

16) As its role in legislative process is relatively limited, it is very important for the EC to maintain close relation with political parties and the National Assembly in order to get their cooperation. The role of the EC can be regarded as “functional control” of the legislative power of the National Assembly or as “functional cooperation” with it.

17) Alan Wall et al., Electoral Management Design: The International IDEA Handbook (2006), 279-83.

electoral process and to establish the governance of elections. In addition, international organizations or international NGO that help the implementation of democratic elections have contributed greatly to enhancing the level of confidence in the election of the countries receiving assistance.

Now, there is a need to theorize the experience of Korea that has achieved industrialization and democratization in a relatively short time, which can be used for the education and training of officials of the emerging democracies and for the transplantation of the election management system.

It is also necessary for the EC to strengthen further the cooperative relationship with the existing international agencies on democracy and elections, and to try to lead successfully the Association of World Election Management Bodies (A-WEB)[18] in which foundation Korea has taken the lead.

To operate A-WEB successfully, the EC needs to find out a business that A-WEB can run successfully over a short term. It would be better if the new business is an international one that can be developed through cooperation with the United Nations as follows.

One is to invite electoral officials in emerging democracies for observation, education and training and to provide them with intensive consulting on election management issues. Lessons learned from trials and errors of Korea will be a big help to these countries.

---

18) A-WEB is, beyond the regional level, a global election network that tries to link all electoral management bodies around the world. By supporting the conduct of free, fair, transparent, and participatory elections, A-WEB contributes to the development of democracy around the globe. A-WEB provides training for election officials and organizes various election observations. A-WEB also plans and implements country programs to improve electoral democracy and works in collaboration with other international organizations with a goal of spreading the democratic election system around the globe and taking actions responding to the political and electoral issues of our time. For more details, see homepage of A-WEB (http://www.aweb.org).

The other one is to go out to emerging democracies and to diagnose objectively their condition and prescribe proper solution that fits their level. There is a need to take advantage of the human and material resources of Korean EC.

6. Conclusion

The emergence of the EC in Korean history is the manifestation of consciousness for election integrity and the product of expectations for it. However, the EC began to play the constitutional roles properly just after the authoritarian military governments ended in the late 1980s.

Appropriate legislations and practices were needed for the EC to perform their roles properly. In particular, the EC should have been able to make rules, express its opinion on legislations and investigation of election crimes. Also, the EC needed to be given the autonomy in the finance and personnel affairs. These were the infrastructures that helped the Commission perform its roles relatively efficiently.

The deepening and development of democracy in Korea is still a contemporary challenge. Therefore, focused on the roles of deepening Korean democracy, the Commission shall serve as a *de facto* “democratic development commission”.

First, the Commission shall be responsible for the fair management of electios. The Commission shall be independent of other state institutions and of political or partisan interests in any decisions as “an independent operators of electoral democracy”. Regarding this, of more importance are independent culture, prominent leadership, and commitment of the Commission members than a “structural” independence in any form. In

addition, the Commission shall maintain a high level of reliability in electoral management through enhancing professionalism, ethics, transparency and accountability.

Second, for the development of democracy in Korea, the Commission shall strive to support the democratization of political parties, the civic education, and rearrangement of the election management system in preparation for the unification era. Especially, as a think tank, the National Election Commission (NEC) should be able to develop a national strategy for the development of democracy in Korea. In this regard, it will be necessary to try a regular assessment of Korean democracy and to scheme out some institutional amendments.

Third, it is necessary to theorize Korea's experience in achieving the industrialization and democratization after the World War II, and to use it for the education and training of officials in the emerging democracies and the transplantation of an election management system. The A-WEB established by the initiative of Korea shall set its position among other international organizations, pursue cooperation with them, and set the priority in the business and finances for its sustainability. For that, it is the highest priority that the A-WEB finds out a business that can be successfully accomplished over a short term. For example, Korea can invite electoral officials of emerging democracies in order to advise them on their election administration issues, and reach out to emerging democracies in order to offer the reasonable solution for them. Korean vivid experience from the late 20th century to the 21st century that is different from that of the developed democracies in the Western Europe is a global asset which can be shared with emerging democracies in the world.

[References]

Frankenberg, Günter, “Democracy”, in: M. Rosenfeld et al.(eds.), The Oxford Handbook of Comparative Constitutional Law, Oxford University Press, (2012).

Gihong Eom, Segye Sungeo Gigwan Hyeobuihoe Changseol-ui Ggidae Hyogwa Mit Hyogwajeog Unyuong Bangan-e Gwanhan Yungu [A Study on the Benefits of and the Effective Management Plan for Establishing the Association of World Election Management Bodies], National Election Commission, (June 2013).

International IDEA and the Kofi Annan Foundation, Deepening Democracy: A Strategy for Improving the Integrity of Elections Worldwide, The Report of the Global Commission on Elections, Democracy and Security, September, (2012).

International IDEA, Electoral Management during Transition: Challenges and Opportunities, (2012).

International IDEA, International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections, (2002).

Jongcheol Kim, Jungchi Gaehyeog-eul Wihan Sungeo Gwanliwiwonhoe-ui Yeoghal Gwa Gwaje [The Role and Tasks of the Election Committee for Political Reform], Election Management, 50 (2004).

Jongsup Chong, Hunbubhag Wonlon [Constitutional Law], Parkyoung Publishing, (2015).

Jongwoo Lee, Jungchi Baljeon-eul Wihan Sungeo Gwanli Wiwonho-eui Yughal-gwa Gwaje [The Role and Tasks of the Election Commission

for Political Development], Journal of Parliamentary Research, 4(1), (June 2009).

Korean Political Science Association, Minju Jungchi Baljeon-eul Wihan Sungeo Gwanli Wiwonhoe-ui Balamjighan Yughal Mosaeg [A Study on the Role Model of the Election Commission for Democratic Political Development], (2009).

Nak-in Sung, Hunbubhag [Constitutional Law], Bubmunsa, (2015).

Saward, Michael(ed.), Democracy: Critical Concept in Political Science, Vol. I, Routledge, (2007).

Seokhan Hong, Sungeo Gwanli Wiwonhoe-ui Wisang-gwa Yughal-e Daehan Hunbubjeog Gochal", [Constitutional Review on the Status and Role of the Election Commission], Public Law, 42(3), (Feb. 2014).

Seunghwan Sung, Hunbub-gwa Sungeo Gwanli Gigu [Constitutional Law and Election Management Bodies], Kyungin Muhwasa, (2015).

Sun-pil Eum, Gughoe Uiwon Jiyeog Sungeogu Hoegjeong-e Gwanhan Hunbubjeog Gochal: Gijun, Juche, Sigi-reul Jungsim-euro [A Constitutional Inquiry into Boundary Delimitation in the National Assemblyman Election: Focused on Criteria, Boundary Authority and Timing], Journal of Parliamentary Research, 9(2), (Dec. 2014).

Sun-pil Eum, Jungdang Jungchi Jageum-ui Tumyeongseong Ganghwa Bangan [How to Make Party Finance More Transparent], Hongik Law Review, 13(4), (2012).

Sun-pil Eum, Sungeo-ui Wanjunsung [Electoral Integrity], Hongik Law Review, 15(3), (2014).

Sun-pil Eum, Sungeo Gwanli Wiwonhoe-ui Hunbubsang Jiwi-wa Yughal [Status and Roles of Election Commissions in the Korean Constitution], Hongik Law Review, 16(1), (2015).

Taehong Kim, Hunbubsang Sungeo Gwanliwiwonhoe-ui Gwonhan-gwa Guseongsang-ui Munjejum [Constitutional Problems on the Authorities and Composition of the Election Commission], Public Law Journal, 13(3), (2012).

Tscholsu Kim, Hunbubhag Sinron [Constitutional Law], Parkyoung Publishing, (2009).

Wall, Alan, Electoral Management Design: The International IDEA Handbook, International IDEA, (2006).

Young-sung Kwon, Hunbubhag Wonlon [Constitutional Law: A Textbook], Bobmunsa, (2010).

Young Huh, Jung-ang Sungeo Gwanli Wiwonhoe-ui Hunbubsang Jiwi-wa Gwonhan [Constitutional Status and Authority of the National Election Commission], Election Management, 41, (Dec. 1995).

http://www.nec.go.kr/portal/bbs/view/B0000256/417.do?menuNo=200056.

http://www.nec.go.kr/portal/contents.do?menuNo=200346.

Chapter 2.

Food-Related Laws and Systems in South Korea

Seung-Hwan Choi

(Professor of Law, Kyunghee University)

▢ Overview

South Korea's food safety-related laws are pluralistically administered by several related agencies, including the Ministry of Agriculture, Food and Rural Affairs (MAFRA) and the Ministry of Health & Welfare (MHW) according to the purpose and the regulatory targets of the laws, centered on the 'Framework Act on Food Safety.' The laws administered by MAFRA mainly include food safety and quality-related laws that regulate the production process for agricultural, marine and livestock food, while the laws administered by MW mainly include food sanitation and public health-related laws. South Korea's agricultural and marine food safety management system and inspection and quarantine system are dualistically managed by MAFRA and MW depending on the item and treatment stage. South Korea's food safety management system includes Good Agricultural Practice (GAP), Eco-friendly Agricultural Product and Processed Organic Food Certification System, Hazard Analysis and Critical Control Point (HACCP) System, Place-of-Origin Indication System, and Traceability System.

Inspection of imported 'processed food' is handled by Ministry of Food and Drug Safety (MFDS); inspection of livestock food by National Veterinary Research and Quarantine Service (NVRQS). Whether imported foods will be allowed to be domestically distributed or not is determined using four inspection methods, including document inspection, sensory test, close inspection and random sampling inspection after the submission of an import declaration.

Quarantine of imported 'animals and livestock' is handled by NVRQS under MAFRA. Where an application to import animals and livestock is submitted, whether they are classified as designated quarantine items or contraband goods is determined through document inspection, and whether or not import can be approved is determined through epidemiological investigation, clinical investigation or close inspection. NVRQS handles the designation of the region [country] subject to import prohibition by goods, import health requirements and exporting-country work-center management system as quarantine management system prior to import. MFDS operates an excellent importer registration system, prequalification registration system and foreign certified inspection services designation system for the effective safety management of imported foods.

The World Trade Organization's (WTO's) 'Agreement on the Application of Sanitary and Phytosanitary Measures' is an example of a multilateral food safety agreement, one of the parties to which is South Korea. 'Memorandum of Cooperation for Food Safety among South Korea, China, and Japan' that was signed in 2009 aims to strengthen the exchange and cooperation among these three countries for food safety. Considering the food safety problems that have arisen due to an increase in imported foods following the opening of the agricultural market, South Korea also signed 'Food Safety Cooperation Agreements' with China, Chile and Vietnam in 2003, June 2006 and May 2009, respectively.

Supreme Court precedents related to food safety include cases of occupational embezzlement and violation of the Food Sanitation Act, violations of the Food Sanitation Act and the Livestock and Fish Feed

Control Act, violations of the Agricultural Products Quality Control Act and violations of the Livestock Products Processing Act. Agricultural food safety incidents that have occurred since 2000 can mostly be attributed to the health hazards of imported foods from China. The detection in August 2004 of sulfur dioxide in early-ripening rice imported from China, parasite eggs in Chinese Kimchi in October 2005 and clenbuterol in Chinese broth in April 2009 triggered efforts to strengthen the food-related sanitation inspection system and international cooperation.

Disputes filed with the WTO regarding the safeguard measures taken by South Korean government for the safety of imported food include the cases of 'Korean import restrictions on Canadian beef' and 'Korean import restrictions on Japanese marine products.' A panel was established to handle the case of 'Korean import restrictions on Canadian beef,' but the trade dispute between South Korea and Canada was amicably settled by reaching a mutual agreement on 'Canadian Beef Import Sanitation Conditions' in June 2011. As of November 2015, a Panel is being formed by the Dispute Settlement Body (DSB) of the WTO to handle the case of 'Korean import restrictions on Japanese marine products' and this is the first WTO trade dispute related to the safety of food contaminated with radioactive materials.

1. Introduction

As food safety is an important factor directly connected to people's life and health, which are established by the South Korean Constitution as having the highest value, the Government has an obligation to protect public health. Domestic and international disputes regarding the safety of imported food have frequently occurred due to the opening of agricultural markets and the increase in the distribution of imported food following the recent conclusion and expansion of Free Trade Agreements (FTAs). The globalization and expansion of free trade following the proliferation of FTAs has contributed considerably to a rapid spread of various diseases through animals, plants and food. In particular, since the outbreak of mad cow disease in the UK, major countries including South Korea and the EU are managing food safety as preferential concern in national policy. South Korean laws and regulations and domestic and international disputes related to food safety will be introduced and reviewed here.

2. Major Contents of Food Safety Laws, Systems and Treaties

2.1. Food Safety-related Laws and Systems

South Korea's food safety-related laws include the Framework Act on Food Safety, the Food Sanitation Act, the Functional Health Foods Act, the Special Act on Safety Control of Children's Dietary Life, the National Health Promotion Act, the Agricultural and Fishery Products Quality Control Act, the Livestock Products Sanitary Control Act, the Act on the

Prevention of Contagious Animal Diseases, the Livestock Industry Act, the Livestock and Fish Feed Control Act, the Agrochemicals Control Act, the Pharmaceutical Affairs Act, the Act on Special Measures for the Control of Public Health Crimes, the School Meals Act, the School Health Act, the Drinking Water Management Act, the Liquor Tax Act, the Foreign Trade Act, the Industrial Standardization Act and the Act on Interstate Movement of Genetically Modified Organisms (see <Table-1>). The 'Framework Act on Food Safety' encompasses food safety-related laws and regulations directly and indirectly connected with food sanitation and safety control. South Korean food safety-related laws encompass about 200 laws and regulations, including enforcement decrees, enforcement rules, public notices, etc. The main contents will be briefly introduced here, with a focus on the Framework Act on Food Safety, the Agricultural and Fishery Products Quality Control Act and the Livestock Products Sanitary Control Act, which have a direct influence on public health.

<Table-1> Food safety-related laws and regulations

Relevant Agency	Relevant Law and Regulation	Target Food
Ministry for Agriculture, Food and Rural Affairs (MAFRA)	Agricultural Products Quality Control Act	Agricultural and Processed food
	Livestock Products Sanitary Control Act	
	Act on the Prevention of Contagious Animal Diseases	Fishery products and Processed food
	Livestock Industry Act	
	Livestock and Fish Feed Control Act	
	Agrochemicals Control Act	Livestock products and Processed food Salt
	Fishery Products Quality Control Act	
	Salt Industry Promotion Act	

Relevant Agency	Relevant Law and Regulation	Target Food
Ministry of Health & Welfare (MHW)	Framework Act on Food Safety Food Sanitation Act Functional Health Foods Act Special Act on Safety Control of Children's Dietary Life National Health Promotion Act Pharmaceutical Affairs Act Act on Special Measures for the Control of Public Health Crimes	Processed food
Ministry of Trade, Industry and Energy (MTIE)	Foreign Trade Act Industrial Standardization Act Act on Interstate Movement of Genetically Modified Organisms	Imported and Exported food LMO
Ministry of Environment (ME)	Drinking Water Management Act Water Supply and Waterworks Installation Act	Drinking water
Ministry of Strategy and Finance (MSF)	Liquor Tax Act	Liquor
Ministry of Education (ME)	School Meals Act School Health Act	School Meals

2.1.1. Framework Act on Food Safety

2.1.1.1. History

The Framework Act on Food Safety, enacted as Act No. 9121 in June 13, 2008 was revised for the ninth time on March 27, 2015. A comprehensive food safety information network was established to connect and integrate the information on food safety scattered among 12 agencies under the existing 'Framework Act on Food Safety,' but there was no legal basis

to continuously and stably connect and integrate the information managed by several agencies with a comprehensive food safety network. Given the lack of legal grounds, the relevant agencies were not obliged to provide information, and as such the comprehensive food safety information network was likely to become useless. Accordingly, the main purpose of the ninth revision is to stably and systematically establish and operate the comprehensive food safety information network by specifying that the commissioner of the Ministry of Food and Drug Safety(MFDS) has the obligation to establish and operate the comprehensive food safety information network to connect and integrate and open and share food safety information; that the commissioner has the right to request the head of a relevant agency to provide the data necessary for the smooth operation of the comprehensive food safety information network, and that the head of the relevant agency has the obligation to provide the requested data for the commissioner of MFDS.

2.1.1.2. Major Contents

The Framework Act on Food Safety aims to enable people to lead a healthy and safe dietary lifestyle by specifying the rights and obligations of people and the responsibilities of the State and local governments in the area of food safety, and by prescribing fundamental matters related to the establishment and coordination of food safety policies.

The State and local governments have responsibilities and obligations to establish and implement food safety policies to ensure that people can lead a healthy and safe dietary lifestyle. In cases where the State and local governments establish and implement food safety policies, they shall ensure that principles of scientific reasonableness, consistency, transparency,

promptness, and prevention are well maintained. In establishing the criteria and standards regarding food safety, the State and local governments shall establish science-based standards considering the life and safety of the people, and endeavor to comply with international standards, including the food standards of Codex Alimentarius Commission (hereinafter referred to as "Codex Commission") in accordance with the WTO Agreement (Article 4). People shall have the right to participate in establishing and implementing the food safety policies of the State and local governments, and to be informed regarding the food safety policies. Business operators shall be responsible for producing and selling food that is beneficial to and safe for the public health, and for checking and inspecting food safety at all times (Article 5).

In cases in which food causes or is feared to cause any critical hazard to public health, the Government shall establish and operate a system to urgently respond in order to prevent or minimize any harm to the public. In cases where it is revealed that food produced and sold contains hazardous substances, or where any potential hazard is suspected for other reasons, and subsequently, any critical hazard occurs or is feared to occur to an unspecified number of the public, the heads of the relevant central administrative agencies shall prepare emergency response plans including the following matters, undergo deliberation by the Committee thereon, and take necessary measures according to the applicable emergency response plans (Article 8).

Where the head of the relevant administrative agency determines that an emergency response is required for food, the head shall prohibit the production and sale of the relevant food until the status of the hazard is confirmed. No business operator shall produce or sell food which is

prohibited from being produced or sold. In cases in which the head of the relevant administrative agency deems that there has been no hazard to the public health, or such fear has disappeared, the head shall immediately revoke such prohibition, in part or whole (Article 16). The head of the relevant central administrative agency shall establish and implement policies to trace the history of the production and sale of food, and keep track of food which causes or is feared to cause a significant hazard to the public health (Article 18). In cases where food produced and sold fails to meet the criteria, standards, etc. for food safety determined by Acts and subordinate statutes related to food safety, subsequently causes or is feared to cause any hazard to public health, business operators shall immediately recall such food (Article 19).

In addition, the Framework Act on Food Safety prescribes basic plans for food safety management (Article 6), the Food Safety Policy Committee (Article 7), safety management of new food products (Article 21), hazard analysis critical control point (Article 22), disclosure of information (Article 24), the establishment and operation of a comprehensive food safety information network (Article 24-2), the collection of the opinions of consumers and business operators (Article 25), cooperation between the relevant administrative agencies (Article 26) and consumer participation (Article 28).

2.1.2. Food Sanitation Act

2.1.2.1. History

The Food Sanitation Act, Act No. 1007 dated January 20, 1962 has been revised 63 times, with the last revision taking place on May 18, 2015. The

main purposes of the 63rd revision are as follows: At 4,878mg/day, sodium intake in Korea is at the highest level among OECD member countries. Given that excessive sodium intake can cause different kinds of diseases including high blood-pressure and diabetes, one of the main purposes of the 63rd revision is to reduce sodium intake and protect the public health by introducing a system indicating comparative sodium content by food group for consumers so that they can easily recognize the sodium content of food. On the other hand, it is necessary to strengthen restaurant sanitation at the level of securing food safety against an increase in food service industries following a change in dietary lifestyle. As there is a fear that consumers will be confused by excessive issuing of restaurant certifications by local governments regardless of sanitation, there is a need for a unified restaurant certification system in order to objectively evaluate the level of restaurant sanitation. Accordingly, another main purpose of the 63rd revision is to enhance the level of restaurant sanitation through free competition among restaurants, and to earn the public's trust in restaurant sanitation by introducing a restaurant sanitation rating system to objectively evaluate the level of restaurant sanitation.

2.1.2.2. Major Contents

The purpose of the Food Sanitation Act is to contribute to an improvement in public health by preventing the sanitary risk caused by foods, promoting the qualitative improvement of food nutrition and giving accurate information on foods (Article 1). Any person who collects, manufactures, processes, uses, cooks, stores, subdivides, transports or displays foods or food additives for the purpose of sale (including offering such foods or food additives to many unspecified persons for purposes other than sale) must do so in a

clean and sanitary manner. Apparatus, containers and packages used for business purposes shall be handled cleanly and sanitarily (Article 3).

When foods are likely to cause a risk and have been known in Korea and abroad to contain harmful materials, the commissioner of MFDS shall swiftly assess the risk of such foods and determine whether such foods, etc. are harmful. The Commissioner of MFDS may temporarily prohibit business operators from selling foods, etc. for which preventive measures are required for public health, or from collecting, manufacturing, importing, processing, using, cooking, storing, subdividing, transporting or displaying such foods for sale until such risk assessment is completed; provided, however, that he/she shall take such prohibitive measures, when he/she deems that foods, etc. have caused or may cause imminent risk to public health (Article 15).

When the probability of risks to foods sold or being produced and sold for sale is raised in Korea or abroad on the basis of scientific grounds, or when foods have caused or may cause serious risks to public health, the Commissioner of MFDS shall prepare emergency response plans and take necessary measures, and prohibit the production and sale of the relevant foods until risk assessment is completed (Article 17).

In addition, the Food Sanitation Act specifically prescribes the prohibition of the sale of harmful foods, etc. (Article 4), standards and specifications concerning foods or food additives (Article 7), request for establishment of tolerance limit for pesticide residues (Article 7-3), food criteria and standards management plan (Article 7-4), food criteria and standards revaluation (Article 7-5), standards for labelling (Article 10), food nutrition labelling (Article 11), genetically modified organisms (GMO) labelling (Article 12-2), code of foods (Article 14), GMO safety assessment (Article 18), reporting

on Imported foods (Article 19), recall of harmful foods, etc. (Article 45), establishment of a Food Sanitation Deliberation Committee (Article 57), establishment of Korea Institute for Food Safety Management Accreditation (Article 70-2), administrative sanctions including corrective orders and cancellation of license (Article 71-84), food promotion fund (Article 89) and penal provisions (Article 93-102), etc.

2.1.3. Agricultural and Fishery Products Quality Control Act

2.1.3.1. History

The 'Agricultural and Fishery Products Quality Control Act,' Act No. 5667 dated January 21, 1999 had been revised 30 times as of June 22, 2015. The main purposes of the 30th revision are as follows: As global fishery product demand and its international trade volume are continuously increasing, fisheries are evaluated as having high growth potential. Although South Korea has had strengths such as various marine bio-resources and global production environment in the field of fisheries, it has continuously pursued production-oriented policies for that field. The main purpose of the 30th revision is to build an infrastructure that will enable Korean industries to actively enter global fishery markets in the future by reestablishing the mainstay of future fisheries to be changed according to the establishment of the Ministry of Oceans and Fisheries by a new administration, newly defining fisheries and fishermen and building a fishery statistics system, and institutionalizing the methods to develop and support fisheries that will help to create added value and new employment in fisheries.

2.1.3.2. Major Contents

The purpose of this Act is to contribute to increasing the income of farmers and fishermen, and to protect consumers by securing the safety of agricultural and fishery products, improving the merchantable quality thereof and facilitating fair and transparent trade through the appropriate quality control of agricultural and fishery products.

The Commissioner of MFDS shall formulate and implement a safety management plan each year to improve the quality of agricultural and fishery products and to produce and supply safe agricultural and fishery products. The Mayor of each City, the Governor of each province and the head of each City/Gun/Gu shall formulate and implement a detailed action plan to secure the safety of agricultural and fishery products produced and distributed in the area under his/her jurisdiction (Article 60). The Commissioner of MFDS or each Mayor/Province Governor shall conduct inspections to ensure the conformity to safety standards of agricultural and fishery products or farmland, fishing grounds, water, materials utilized or used for the production of agricultural and fishery products for the safety management of agricultural and fishery products (Article 61).

The Minister for Oceans and Fisheries shall determine and announce sanitary control standards for facilities where fishery products for export are produced or processed and sea areas where fishery products are produced to implement agreements with foreign countries or meet certain sanitary standards of foreign countries (Article 69). Where a designated sea area falls below sanitary control standards, the Minister for Oceans and Fisheries may restrict the production of fishery products in the designated sea area or cancel its designation, as prescribed by Presidential Decree (Article 77).

Agricultural products (excluding livestock products; the same shall apply hereafter in this Section) prescribed by Presidential Decree, such as agricultural products purchased, exported or imported by the Government, shall be subject to an inspection by the Minister of MAFRA to ensure such agricultural products meet standards established to support order for fair distribution and to protect consumers (Article 79).

In addition, the Agricultural and Fishery Products Quality Control Act specifically prescribes the Council on Quality Control of Agricultural and Fishery Products (Article 3-4), criteria and standards for agricultural and fishery products (Article 5), good agricultural practices (Article 6-13), quality certification of fishery products, etc. (Article 14-19), traceability (Article 24-27), geographical indications (Article 32-55), labeling of genetically modified agricultural and fishery products (Article 56-59), hazard analysis and critical control points (Article 70), inspection of fishery products and processed fishery products (Article 88-97), prohibited acts and confirmation, examination and inspection (Article 101-102), and penal provisions (Article 117-123), etc.

2.1.4. Livestock Products Sanitary Control Act

2.1.4.1. History

The Livestock Products Sanitary Control Act, enacted as Act No. 1011 dated January 20, 1962 has been revised 36 times as of May 21, 2014. The main purposes of the 36th revision are as follows: to introduce a system to promote sanitary management of livestock products through the new establishment of the provisions of ‘consumer’s request for sanitary inspection’ as per the ‘Food Sanitation Act,’ to efficiently respond to

hazardous incidents, to strengthen the safety sense of livestock product business operators and to confiscate illegal economic profits earned by severe violators of livestock product-related laws. In addition, it also aims to reestablish the legal provisions from which the incompetence and quasi-incompetence system was cited, in accordance with the abolition of the incompetence and quasi-incompetence system and the introduction of the adult guardianship system based on the revision of the civil code, and to eliminate any imbalance between the penal provisions on false advertising about livestock products under this Act and the penal provisions on similar acts under the 'Food Sanitation Act.'

2.1.4.2. Major Contents

The purpose of this Act is to contribute to the sound development of the livestock industry and an improvement in public health by prescribing matters necessary for the raising, slaughter and disposal of livestock and the processing, distribution and inspection of livestock products in order to promote the sanitary management of livestock products and an improvement in the quality thereof (Article 1).

If necessary for public sanitation, the Commissioner of MFDS may determine and publicly announce the processing standards of livestock products and the standards and specifications of the sanitation grade thereof (Article 4). The Commissioner of MFDS shall determine and publicly announce the matters related to the Hazard Analysis Critical Control Point by process and the application thereof to prevent substances harmful to the human body in each process from being infused into livestock products, and prevent livestock products from being contaminated thereby in the whole process of raising livestock, controlling raw material of livestock products

or treating, processing, packaging, distributing and selling livestock products (Article 9). Any slaughter business operator under Article 21 (1) shall undergo an inspection by an inspector on the meat of livestock treated in workplaces (Article 12).

Any person who intends to import livestock products for sale or for his/her business purposes shall report the fact to the Commissioner of MFDS, and he/she shall have an inspector conduct a necessary inspection of the relevant livestock products before the completion of customs formalities (Article 15). In cases in which livestock products slaughtered, treated, processed, packaged, distributed or sold in a specified country or area have been found to be harmful or are deemed likely to be harmful, the Commissioner of MFDS may prohibit the import or sale of said livestock products or the processing, packaging, storage, transportation or display of such livestock products for sale. Where the Commissioner of MFDS intends to prohibit such import or sale, he/she shall hear an opinion of the head of the relevant central administrative agency and go through the deliberation or resolution by the Committee in advance; provided, however, that where it is required to promptly prohibit the import or sale because it may cause harm to public health imminently, he/she may prohibit the import or sale immediately. In such cases, he/she shall go through deliberation or resolution by the Committee ex post facto (Article 15-2).

In cases where any livestock products that may cause harm are suspected as being present in livestock products, such as when it is known that any substance, the harmfulness of which may be suspected, is contained in livestock products, even if such harmfulness has not definitely been proven in Korea and abroad, the Commissioner of MFDS shall urgently assess the hazard of the livestock products and then determine whether the livestock

products in question are harmful. With respect to any livestock products for which it is necessary to take swift preventive measures for national health before the assessment of harmfulness is completed, the Commissioner of MFDS may temporarily prohibit the sale of said livestock products or the treatment, processing, packaging, use, import, storage, transport or displaying of such livestock products for sale. Where the Commissioner of MFDS intends to take temporary prohibition measures, he/she shall go through the deliberation by the Committee in advance: provided that where it is necessary to take swift prohibition measures because a serious harm may occur to public health, the Commissioner of MFDS may go through the deliberation by the Committee ex post facto (Article 33-2).

Furthermore, the 'Livestock Products Sanitary Control Act' specifically prescribes the establishment of a Livestock Product Sanitation Deliberative Committee (Article 3-2), standards for and specifications of livestock products (Article 4), standards for marks of livestock products (Article 6), sanitary control of livestock products (Article 7-10), inspections (Article 11-20), licenses and reporting on Business (Article 21-33), supervision (Article 34-38), penal provisions (Article 45-47), etc.

2.2. Food Safety Management System

2.2.1. Organization and Structure

South Korean agricultural and marine food safety management is dualistically handled by MAFRA and MHW depending on the item and the treatment stage. In the area of agricultural foods, MAFRA is responsible for safety management from the stage of cultivation to the stage before distribution, and MFDS is responsible for setting maximum residue limits

for harmful materials and safety management after distribution. In the area of livestock food products, MAFRA is responsible for safety management in the stages from raising livestock to selling livestock products, and MFDS is responsible for setting a maximum residue limit for harmful materials and safety management in final consumption stage. In the area of marine products, MAFRA is responsible for safety management from the stage of marine aquaculture to the stage before distribution, and MFDS is responsible for setting maximum residue limits for harmful materials and for safety management in the stage of consumption after processing and distribution.

2.2.2. Policies and Institutions

The South Korean food safety management system includes good agricultural practice (GAP), eco-friendly agricultural product and processed organic food certification system, hazard analysis and critical control point (HACCP) system, place-of-origin indication system, and traceability system. GAP, which is based on the Agricultural and Fishery Products Quality Control Act, has been implemented since 2003. The ‘eco-friendly agricultural product and processed organic food certification system’ based on the Environmentally-Friendly Agriculture Promotion Act has been implemented since 1993, and the processed organic food certification system has been implemented since 2008 based on the ‘Food Industry Promotion Act’.

HACCP, institutionalized by the ‘Food Sanitation Act’ in December 1995, applies to all marine products, livestock food products and foods that are domestically distributed and exported. A traceability system implemented for beef among agricultural and livestock foods has been applied since 2004 based on the ‘Cattle and Beef Traceability Act.’ An agricultural product

traceability system has been implemented since 2003 based on the 'Agricultural Products Quality Control Act.'

The food traceability system, which was introduced on the basis of the 'Food Sanitation Act' revised in 2007, has been implemented since July 2008. The place-of-origin indication system, which was introduced in July 1991 to prevent illegal distribution following an increase in imported foods, has been implemented based on the 'Foreign Trade Act,' the 'Food Sanitation Act,' the 'Agricultural Products Quality Control Act,' the 'Fishery Products Quality Control Act,' etc. and the provisions regarding place-of-origin indication were incorporated into one provision in the 'Act on Origin Labeling of Agricultural and Fishery Products,' which was enacted in February 2010.

2.3. Food Safety Inspection and Quarantine System

2.3.1. Imported Agricultural Food Inspection and Quarantine Procedures

Inspection of imported 'processed food' is handled by MFDS, while inspection on livestock food is handled by NVRQS. In the case of marine products, simply processed marine foods are handled by the National Fishery Products Quality Management Service and highly processed marine foods such as canned marine food and fish-paste are handled by MFDS. Whether imported foods will be allowed to be domestically distributed or not is determined using four inspection methods: document inspection, sensory test, close inspection and random sampling inspection after the submission of an import declaration.

Quarantine on imported ‘animal and livestock’ is handled by NVRQS under MAFRA, and the objects of quarantine are listed in the ‘Domestic Animal Infectious Disease Control Law.’ When an application to import animals and livestock is submitted, whether it falls under designated quarantine items or contraband goods is determined through document inspection, and whether its import can be approved or not is determined through epidemiological investigation, clinical investigation or close inspection. If its import is determined to be allowed, its import is approved by the issuance of a quarantine certificate, but if it is determined to be unqualified, it is returned or incinerated in principle.

2.3.2. Imported Food Safety Inspection System

NVRQS handles the designation of regions (countries) subject to import prohibition by goods, import health requirements and exporting-country work-center management system as a quarantine management system prior to import. MFDS operates an excellent importer registration system, a prequalification registration system and a foreign certified inspection services designation system for the effective safety management of imported foods. When an importer submits the original copy of an inspection result report or inspection certificate introduced to improve the effectiveness of imported foods inspection, which is issued by a certified foreign inspection service, this can replace the close inspection, and a full or partial exemption from inspection is allowed.

2.4. Food Safety-related Treaties

Treaties on food safety function as a normative mechanism to secure food safety in food trade. These treaties are meaningful in that when harmful

substances are detected in food, the treaties enable prompt and effective resolution through mutual cooperation and information exchange between the related countries. Major contents of food safety-related treaties signed between South Korea and other countries are introduced here.

2.4.1. WTO Agreement on the Application of Sanitary and Phytosanitary Measures

International norms regarding sanitation quarantine standards under the WTO are specified in the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter referred to as "SPS Agreement"), and the major contents of the SPS Agreement, which is composed of a Preamble, 14 Articles and 3 Annexes, are as follows:

First, the SPS acknowledges that Members have the basic right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, and also specifies the obligations to take sanitary and phytosanitary measures based on 'necessity requirements,' 'principle of non-discrimination,' 'principle of prohibition of disguised international trade restriction' and 'scientific evidence' (paragraph 1-3 of Article 2).

Second, the SPS obliges Members to harmonize international standards by prescribing that Members shall base their sanitary or phytosanitary measures on international standards, guidelines or recommendations (hereinafter referred to as "international standards"). Sanitary or phytosanitary measures which conform to international standards, guidelines or recommendations shall be deemed to be necessary to protect human, animal or plant life or health, and presumed to be consistent with the relevant provisions of this Agreement and of GATT 1994, provided that Members may adopt a higher level of

sanitary or phytosanitary protection than the international standards if there is a 'scientific justification' or if it is based on risk assessment developed by the relevant international organizations such as Codex Alimentarius Commission, International Office of Epizootics and International Plant Protection Convention (paragraphs 1-5 of Article 3).

Third, Members shall take into account the relevant factors including available scientific evidence and risk assessment methods developed by the relevant international organizations, and accordingly determine an appropriate level of protection (ALOP). When a Member has reason to believe that a specific sanitary or phytosanitary measure introduced or maintained by another Member is constraining, or has the potential to constrain, its exports, and that the measure is not based on the relevant international standards, guidelines or recommendations, or if such standards, guidelines or recommendations do not exist, an explanation of the reasons for the sanitary or phytosanitary measure may be requested and shall be provided by the Member maintaining the measure (Article 5).

2.4.2. Memorandum of Cooperation for Food Safety among South Korea, China and Japan

The main purpose of 'Memorandum of Cooperation for Food Safety among South Korea, China and Japan' signed in 2009 is to strengthen the interaction and cooperation among the three countries in the field of food safety. The highlights of the memorandum are pledges to share information on each country's own laws and inspection methods related to food safety, to promptly communicate the relevant information in the event of food safety-related incidents, to dispatch technology experts and to hold meetings.

2.4.3. Agreement of Cooperation for Food Safety between South Korea and China

The ‘Agreement of Cooperation for Food Safety between South Korea and China,’ which was signed in 2003 in consideration of food safety problems arising from an increase in imports of Chinese foods, was revised in 2007 to reflect concerns over food safety after the detection of parasite eggs in Chinese Kimchi in 2005.

The ‘Agreement of Cooperation for Food Safety between South Korea and China’ revised in 2007 provides that in cases where problems related to the safety of imported food occur in an importing country, the importing country shall promptly report the details of measures taken, such as prohibition of import and strengthening of inspections, to the exporting country; the exporting country shall promptly investigate the causes of the risks to safety and report the corrective actions to the importing country; the exporting country shall strengthen the cooperation for an on-site inspection and visit to investigate the information on the risks, and the two countries shall facilitate the utilization of a foreign certified inspection agency, an imported-foods prequalification registration system, and a food importer and exporter registration system.

South Korea also entered into ‘Agreements of Cooperation for Food Safety’ similar to the above Agreement with Chile and Vietnam, in June 2006 and May 2009, respectively.

3. Domestic Judicial Precedents and Domestic and International Dispute Cases regarding Food Safety

3.1. Domestic Judicial Precedents regarding Food Safety

3.1.1. Occupational Embezzlement and Violation of Food Sanitation Act

[Supreme Court 2014.4.10, Pronouncement, 2013do9171, Decision]

【The Summary of Decision】

① Under the Food Sanitation Act, any person who sells foods or food additives which contain or are likely to contain harmful substances, or are smeared or likely to be smeared with such substances, shall be subject to punishment, provided that foods deemed not to cause any harm to a human body by the Commissioner of MFDS are excluded from the objects of prohibition. Under the Enforcement rules of the Food Sanitation Act, the scope of foods whose sale is allowed is limited to “foods that conform to the standards and specifications of ingredients with respect to the manufacturing and processing of foods and that are deemed not to cause any harm to a human body by the Commissioner of MFDS through the deliberation of Food Sanitation Deliberation Committee notwithstanding the absence of the standards and specifications,” and so the sale of foods or food additives outside of this scope shall be prohibited.

② In cases where foods that contain poisonous or harmful substances are sold by business operators in markets, many consumers may eat them

without recognizing their dangers and consequently there is a fear that damage to human life and body can spread rapidly and widely. Once damage occurs, ex post facto remedial actions have little effect in most cases. The Food Sanitation Act, which has been enacted to contribute to the improvement of public health by preventing sanitary harm caused by food, promoting qualitative improvement of food nutrition and providing correct information on food, prohibits business operators from selling foods or food additives which contain or are likely to contain harmful substances, or are smeared or likely to be smeared with such substances. Therefore, even if poisonous or harmful substances are not contained in food or if they don't cause damage to human health, but if only such likelihood exists, their sellers are subject to punishment pursuant to the Food Sanitation Act (subparagraph 1 of Article 94, subparagraph 2 of Article 4).

3.1.2. Violation of Food Sanitation Act and Livestock and Fish Feed Control Act

[Supreme Court 2010.2.11, Pronouncement, 2009do2338, Decision]

【Summary of Decision】

① Scientific research results that are the grounds to prove a fact that corresponds to a criminal requirement should be strictly verified by admissible evidence investigated in accordance with due process of law.

② In cases where an item whose import declaration is completed for feed is sold as food, the item is classified as "an item for which mandatory import declaration is neglected," and thus the act of selling the item corresponds to a violation of the 'Food Sanitation Act.'

③ The cognizance of "an item for which mandatory import declaration is neglected" in a violation of 'Food Sanitation Act' and the cognizance of "imported feed" in a violation of 'Livestock and Fish Feed Control Act' are subjective factors of criminal requirements, and merely willful negligence is sufficient as subjective factor.

④ 'Fishing bait' is not nutrition for animals and fishes or necessary for their health or growth, and thus it does not fall under the category of 'feed' under the Livestock and Fish Feed Control Act.

3.1.3. Violation of Agricultural Products Quality Control Act

[Supreme Court 2012.10.25, Pronouncement, 2012do3575, Decision]

【Summary of Decision】

① Comprehensively considering the contents and legislative purposes of Law for the Quality Management of Agricultural and Fishery Products and the Enforcement Decree thereof, in cases where domestic beef is sold that are labeled with the name of a specific City, Province, Si, Gun or Gu as the place-of-origin, a labelling with a place irrelevant to the birth, raising and slaughtering of applicable cattle or a place of slaughtering notwithstanding the applicable cattle's being just slaughtered in that place directly after they are moved from the place of their birth and raising to that place only for slaughtering should be construed as "an act of marking the place-of-origin falsely or having the likelihood of confusing the place-of-origin and selling with the place-of-origin disguised" as prescribed in the above Act.

On the other hand, penal laws and regulations should be strictly construed and applied in accordance with the words and should not be construed

excessively extendedly or analogically unfavorably for defendants in principle. So, in cases where cattle born domestically are raised and slaughtered in places other than the place of birth, in the absence of relevant laws and regulations about how long a period the applicable cattle should be raised in a certain place to mark this place as the place-of-origin, the act of selling the beef of the cattle labeled with the name of the applicable City, province, Si, Gun or Gu, as the place-of-origin, where the cattle were raised for a certain short period, even if it is short, cannot be simply determined as a violation of the provision about the place-of-origin labeling.

② In cases where, in the absence of relevant provisions in the place-or-origin labeling-related laws and regulations, domestic cattle are moved from the place of birth or raising to a certain place for their slaughter but are not slaughtered on the day of arrival under the pretext of the recovery of their weight loss caused by the moving and the adjustment of the date of slaughter, and they are slaughtered after they are raised on feed, etc. for a certain period in the place, whether this act is equivalent to a simple preparatory act for slaughter or an act of raising should be reasonably judged on a case-by-case basis in comprehensive consideration of the species, ages and health conditions of the applicable cattle, the time period from their moving to slaughter, the types of the places where they feed and stay after their moving, the types of feed, the feeding methods and the state of their weight fluctuations, and otherwise whether there has been a violation of the provisions about the-place-of-origin labeling or not should not be uniformly judged based on an arbitrary determination of the period from their moving to slaughter.

③ In the event that a defendant is indicted on charges of a violation of the provisions about the-place-of-origin labeling by selling beef labeled

as ‘Korean beef from Hoengseong’ after purchasing and slaughtering cattle raised in places other than Hoengseong-gun, Gangwon province, the act of moving cattle born and raised in places other than Hoengseong-gun to a slaughterhouse in the neighborhood of Hoengseong-gun and slaughtering them at that slaughterhouse on the day of arrival but selling their beef labeled as ‘Korean beef from Hoengseong’ is a definite violation of the provisions on place-of-origin labeling, and otherwise, in cases where cattle were moved to Hoengseong-gun for slaughter but were not slaughtered on the day of arrival and were slaughtered after they fed on feed and stayed at cattle farms in Hoengseong-gun for more than a couple of months, whether this act is equivalent to simply a preparatory act for slaughter or an act of raising in a certain place should be reasonably judged through sufficient inquiries into the specific situations such as the time period from their moving to slaughter, the types of the places where they feed and stay after their moving, the types of feeds, the feeding methods and the state of their weight fluctuations, but instead, the original judgment of uniformly deeming the act of moving the cattle not born or raised in Hoengseong-gun to Hoengseong-gun and slaughtering them less than two months after their arrival as a preparatory act or simply an act of keeping, and thus convicting the defendants of the acts is based on a wrong interpretation and application of the provisions of the Act (Article 34-2, paragraph 1 of Article 17, paragraph 1 and 3 of Article 15, subparagraph 6 of Article 2) and lacks the necessary inquiry.

3.2. Disputes regarding Food Safety

Agricultural food safety incidents in Korea that occurred after 2000 were mostly attributed to the health hazards of imported foods from China. Examples include the ‘detection of lead in Chinese blue crabs’ in August 2000 when it was found that blue crabs imported from China had lead added to increase the weight; the detection in August 2004 of sulfur dioxide (SO_2), chemical residue of bleaching agent, exceeding permissible limits from early-ripening rice imported from China; the detection in July 2005 of malachite greens from eels imported from China; the detection in October 2005 of four species of parasites in Chinese Kimchi; the detection in January 2006 of residual pesticide from Korean paprika exported to Japan; the intrusion of foreign materials such as a rat's head in domestically distributed shrimp snacks (*Saewookkang*) found in February 2008; the detection in 2008 of melanin from Chinese dairy products and the detection in April 2009 of clenbuterol from Chinese broth concentrate. The above dispute cases triggered efforts to strengthen the food-related sanitation inspection system and promote international cooperation.

3.3. WTO Cases regarding Food Safety

3.3.1. The Case of ‘Korean import restrictions on Canadian beef’

On April 9, 2009, Canada filed complaints against the South Korean ‘Livestock Epidemic Prevention Act’ and the safeguard measures taken by the South Korean government from May 21, 2003 against Canadian bovine meats and meat products, claiming that it was a violation of WTO

Agreements. On May 21, 2003, the South Korean government prohibited the import of Canadian beef and their related products because a cow infected with spongiform encephalopathy (BSE) was found in Canada on May 20, 2003. The Act on the Prevention of Contagious Animal Diseases prohibits the import of beef and beef products of cattle less than 30 months of age and the specified risk materials (SRM) of the countries where less than 5 years has passed since BSE developed. As Canada was identified as a controlled BSE risk country by the Office International des Epizooties (OIE) on May 25, 2007, Canada officially requested South Korea to repeal the prohibition of the import of Canadian cattle and beef, etc. on June 1, 2007.

To resolve that unresolved dispute, a panel was established in the Dispute Settlement Body (DSB) at Canada's request on August 31, 2009 (DS391). Canada asserted that South Korea's import restrictions on Canadian beef and beef products violated SPS Agreement (Article 2-6, Article 8) and 1994 GATT (Article 1, Article 3, Article 11). South Korea and Canada sought bilateral solutions through the WTO dispute settlement procedure, and reached a bilateral agreement on Import Health Requirement for Canadian Beef in June 2011. On June 19, 2012, South Korea and Canada informed DSB that they would settle any dispute through bilateral consultation. The South Korean government restarted the import of Canadian beef by implementing the above Import Health Requirement for Canadian Beef on January 20, 2012.

3.3.2. Korean Import Restrictions on Japanese Marine Products

After the Fukushima nuclear accident in 2011, radioactive materials exceeding permissible limits were reportedly continuously detected from

vegetables and raw milk produced in Fukushima Prefecture and the neighboring Ibaraki Prefecture, as well as in water from public water utilities managed by 10 local governments including Tokyo. Accordingly, the South Korean government expanded the scope of foods subject to radioactive material inspection and increased its inspection frequency. The permissible limits of radioactive material in food are defined by the 'Specifications of and Standards for Foods,' which is a public notice of MFDS, pursuant to Article 7 of the 'Food Sanitation Act.' The permissible limits of radioactive iodine and radioactive cesium were strengthened. In the case of radioactive cesium, the standard for foods produced in Japan is 100Bq/kg, which is a stricter standard compared to 370Bq/kg for other foods.

As hundreds of tons of contaminated water from the site of the Fukushima nuclear accident have flowed into the sea each day, fears that marine products produced in the sea near Fukushima may have been contaminated with radioactive materials began to spread again from 2013. So, on September 6, 2013, the South Korean government took the temporary measure of prohibiting the import of all marine products produced in 8 prefectures in the neighborhood of Fukushima. On May 21, 2015, the Japanese government filed a complaint to the WTO regarding the South Korean government's import restrictions on September 6, 2013 on marine products produced in 8 prefectures in the neighborhood of Fukushima. Bilateral consultation conducted in accordance with dispute settlement procedures and rules failed to resolve the disputes, and so a panel procedure is being undertaken.

4. Conclusion

Recently, the amount of food imports has been increasing, with a growth in consumer interest in foods and the environment, as well as globalization and the expansion of free trade. Accordingly, there are increasing fears that imported foods can cause critical hazards to the human body. For this reason, the South Korean government has managed food safety as a preferential concern in national policy. South Korean food safety-related laws are pluralistically administered by several relevant agencies including MAFRA and MW according to the purpose and regulatory targets of the laws, centered on the 'Framework Act on Food Safety.' South Korea's agricultural and marine food safety management system and inspection and quarantine system are dualistically managed by MAFRA and MW, by item and by treatment stage. The South Korean food safety management system includes good agricultural practice (GAP), eco-friendly agricultural product and processed organic food certification system, hazard analysis and critical control point (HACCP) system, place-of-origin indication system, and traceability system. South Korea, as a WTO member, is actively exercising its rights and fulfilling its obligations under the SPS Agreement. With a view to strengthening exchanges and cooperation for food safety, South Korea has entered into 'Agreements of Cooperation for Food Safety' with China, Japan, Chile and Vietnam.

Most of the agricultural food safety incidents that have occurred in Korea since 2000 were related to the health hazards of imported foods from China. Supreme Court precedents include cases of violations of the Food Sanitation Act, the Agricultural Products Quality Control Act, the Livestock Products

Processing Act, etc. Disputes filed with the WTO against the safeguard measures taken by South Korean government for the safety of imported food include the cases of 'Korean import restrictions on Canadian beef' and 'Korean import restrictions on Japanese marine products.' Food safety-related trade disputes are caused by conflicts between the value of free trade and the value of human health and life. To effectively implement food safety-related health policies and properly handle food safety-related trade disputes, it is important to maintain a proper balance between these two needs, so that they can be harmonized and complemented without being contradictory and conflicting.

[References]

Hwang, Yun-Jae, Hyoung-Jin Jeon and Jae-Hwan Han, *A Study on Developing Tripartite Food Safety Cooperation among Korea, China, and Japan,* Korea Rural Economic Institute, 2010. 11.

Lee Gae-Im et. al., "Analysis on the Legal System of Food-related Laws in the Republic of Korea," *Journal of Rural Development,* Vol. 32, No.3, 2009. 10.

Ryu, Chang-Ho, *A Study on Systematization of Food Safety Laws*, Korea Legislation Research Institute, 2004. 11.

Korea Law Service Center: http://www.law.go.kr/main.html

Korea - Measures Affecting the Importation of Bovine Meat and Meat Products from Canada, WT/DS391/R, 3 July 2012.

Chapter 3.

Geographical Indications in South Korea

Gyooho Lee

(Professor of Law, Chung-Ang University School of Law)

▢ **Overview**

Under Korea-EU FTA,[19] GIs are defined as "(a) geographical indications, designations of origin, quality wines produced in a specified region and table wines with geographical indication as referred to in Council Regulation (EC) No 510/2006 of 20 March 2006; Regulation (EC) No 110/2008 of the European Parliament and of the Council of 15 January 2008; Council Regulation (EEC) No 1601/1991 of 10 June 1991; Council Regulation (EC) No 1493/1999 of 17 May 1999; and Council Regulation (EC) No 1234/2007 of 22 October 2007, or provisions replacing these regulations; and

(b) geographical indications as covered by the Agricultural Products Quality Control Act (Act No. 9759, Jun. 9, 2009) and the Liquor Tax Act (Act No. 8852, Feb. 29, 2008) of Korea."[20] According to Subsection C footnote 3 of the Korea-EU FTA, the protection of a geographical indication under the Sub-section C is without prejudice to other provisions in this FTA Agreement. This FTA's primary focus on GIs regards agricultural products and foodstuffs pursuant to Annex 10-A, which lists GIs for agricultural products and foodstuffs, and wines, aromatised wines and spirits based on Annex 10-B, which enumerates GIs for wines, aromatised wines and spirits. The GIs listed under the Korea-EU FTA will be protected within the borders of the other parties. However, the issue as to whether the GIs which becomes generic, such as Champagne for brandy, can be protected under the Korea-EU FTA need to be explored. The GIs with generic nature can not be protected under the Korean Trademark Law. However, they may be protected pursuant to the Korean Agricultural and Fishery Products Control Act.

Having examined a summary of the specifications of the agricultural products and foodstuffs corresponding to the geographical indications of Korea listed in Annex 10-A of the FTA, which have been registered by Korea under the Korean Act on Quality Control of Agricultural Products, the European Union undertakes to protect the geographical indications of Korea listed in Annex 10-A of the FTA according to the level of protection laid down in the Korea-EU FTA.[21] The Korea-EU FTA does not cover GIs for fishery products because both EU Regulations and the Korean referred to in the Korea-EU FTA do not. The Korea-EU FTA is the most important bilateral agreement Korea entered into in terms of protection of GIs.

In this regard, it should be noted that the total number of the registered collective marks for GI protection pursuant to the Korean Trademark Act as of August 21, 2015 amounts to 291 while the number of the registered GIs on basis of Agricultural and Fishery Products' Quality Control Act as of the same date is 169.[22]

19) http://www.fta.go.kr/webmodule/_PSD_FTA/eu/doc/Full_Text.pdf (last visited 1st September, 2015).

20) Subsection C, fn 2 of the Korea-EU FTA.

21) Article 10.18 (3) of the Korea-EU FTA.

22) http://www.agrinet.co.kr/news/articleView.html?idxno=139343 (last visited 30th August, 2015).

1. Legal Sources

GIs in Korea are primarily governed by: (i) the Trademark Act(Act No. 12751, amended on June 11, 2014, effective on June 11, 2014); (ii) the Act on Quality Control of Agricultural and Fishery Products (Act No. 12753, amended on June 11, 2014, effective on January 1, 2015); and (iii) and the Unfair Competition Prevention and Trade Secret Protection Act(Act No. 11963, amended on July 30, 2013, effective on January 31, 2014).(hereinafter "Unfair Competition Prevention Act")

2. GIs Protection under the Korean Trademark Act

2.1. Overview

The purpose of the Korean Trademark Act is to "to contribute to the development of industry and to protect the interests of consumers by maintaining the business reputation of those persons using trademarks through the protection of trademarks."[23] According to Article 2(1) 3-2 of the Korean Trademark Act, the term "geographical indication" refers to "an indication which identifies goods as being produced, manufactured, or processed in a region or locality where a given quality, reputation or any other characteristic of the goods is essentially attributable to their geographical origin."[24] Unlike GIs protection under the Act on Quality Control of Agricultural and Fishery products. The word, "homonymous geographical indication," means "a geographical indication which has the same sound as another person's geographical indication for the same

23) Article 1 of the Korean Trademark Act.
24) Article 2(1) 3-2 of the Korean Trademark Act.

goods, but is different in region or locality."[25] Pursuant to Article 2(1) 3-4 of the Korean Trademark Act, the term, "geographical collective mark,"[26] means "a collective mark which is intended to be used directly by a corporation composed solely of the persons who produce, manufacture, or process goods eligible for geographical indication as a business or which is intended to be used with respect to the goods of members of the corporation who are controlled by it." The term, "geographical certification mark," means "a certification mark with geographical indication used by a person who carries on the business of certifying the quality, origin, mode of production, or other characters of goods in order to certify whether the goods of a person who carries on the business of producing, manufacturing or processing goods satisfy specified geographical characters."[27] Any corporation jointly founded by the persons who produce, manufacture, process, or sell goods as a business or by the persons who carry on service business (in cases of a geographical collective mark, it is limited to a corporation comprised solely of the persons who produce, manufacture, or process goods eligible for the geographical indication as a business) may be entitled to have its collective mark registered.[28] Any person who can, as a business, certify and manage the quality, origin, mode of production or other characteristics of goods or service business may be entitled to have his/her certification mark registered in order to allow a person who carries on the business of producing, manufacturing, processing

25) Article 2(1) 3-3 of the Korean Trademark Act.

26) According to Article 2(1) 3 of the Korean Trademark Act, the term "collective mark" means "a mark which is intended to be used directly by a corporation jointly founded by the persons who produce, manufacture, process, or sell goods as a business or the persons who carry on service business or which is intended to be used with respect to the goods or services of members of the corporation who are controlled by it."

27) Article 2(1) 4-2 of the Korean Trademark Act.

28) Article 3-2 of the Korean Trademark Act.

or selling goods or a person who carries on a service business to use as a means of certifying that goods or service business related to their business satisfies specified quality, origin, mode of production or other characteristics: Provided, That where he/she intends to use a certification mark for goods or service business related to his/her own business, such certification mark shall not be registered.[29)]

Article 6 of Korean Trademark Act[30)] provides for distinctiveness requirement. Article 6 of the Korean Trademark Act prescribes that

Article 6 (Requirements for Trademark Registration)

(1) A trademark registration may be granted, except a trademark falling under any of the following subparagraphs:

1. A trademark consisting solely of a mark indicating, in a common way, the ordinary name of the goods;[31)]

2. A trademark used customarily on the goods;[32)]

3. A trademark consisting solely of a mark indicating in a common way the origin, quality, raw materials, efficacy, use, quantity, shape (including shapes of packages), price, producing method, processing method, using method or time of the goods;[33)]

4. A trademark consisting solely of a conspicuous geographical name, the abbreviation thereof or a map;

5. A trademark consisting solely of a mark indicating in a common way a common surname or name;

---

29) Article 3-3 (1) of the Korean Trademark Act.

30) It was amended on June 11, 2014.

31) It constitutes a generic mark under Abercrombie spectrum (e.g., apple for apple).

32) Whether it constitutes a generic mark under Abercrombie spectrum is questionable because it is used by the same type of businesses (e.g., Tex for fabric).

33) It constitutes a descriptive mark under Abercrombie spectrum.

6. A trademark consisting solely of a simple and ordinary mark;

7. A trademark, other than those as referred to in subparagraphs 1 through 6, which does not enable consumers to recognize whose goods it indicates in connection with a person's business.

(2) Even though it falls under any of paragraph (1) 3 through 6, a trademark which is recognized among consumers whose goods it indicates in connection with his/her business as a result of using the trademark before the application for trademark registration under Article 9, may be registered with only goods having used the trademark as designated goods."

Article 6 (1) 3 and 4 of the Korean Trademark Law includes geographical name. Hence, a conspicuous geographical term is not distinctive pursuant to Article 6 (1) 4 of the Korean Trademark Law. If it acquires distinctiveness by its use pursuant to Article 6 (2) of the Korean Trademark Law, it can be registered. Nonetheless, if Article 7 (1) is applied to it, it may not be registered. Also, the place of origin is not distinctive because it is a descriptive mark based on Article 6 (1) 3 of the Korean Trademark Law. If it acquires a secondary meaning by its use, it can be registered. However, if Article 7 (1) is applied to it, it may not be registered. In addition, even though conspicuous geographical terms or the places of origin are not distinctive, it can be registered as geographical indication collective marks or geographical indication certification marks. If Article 7 (1) is applied to them, they may not be registered.

In sum, Article 7 (1) of the Korean Trademark Law provides for requirements of unregistrable trademarks in spite of their distinctiveness.[34)]

34) Article 7 (Unregistrable Trademark)
(1) Notwithstanding Article 6, a trademark falling under any of the following subparagraphs shall be unregistrable: <*Amended by Act No. 4597, Dec. 10, 1993; Act No. 5355, Aug. 22, 1997; Act No. 6414, Feb. 3, 2001; Act No. 7290, Dec. 31, 2004; Act No. 8190,*

Jan. 3, 2007; Act No. 9987, Jan. 27, 2010; Act No. 10811, Jun. 30, 2011; Act No. 11113, Dec. 2, 2011>

1. Trademarks which are identical or similar to the national flag, the national emblem, colors, medals, decorations or badges of the Republic of Korea or seals or signs used for indicating supervision or certification by the Republic of Korea or public institutions;

1-2. Trademarks which are identical or similar to the national flags of allied nations of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as the "Paris Convention"), member nations of the World Trade Organization, or contracting parties to the Trademark Law Treaty (hereafter referred to as "allied nations, etc." in this paragraph);

1-3. Trademarks which are identical or similar to the titles, abbreviated names or marks of the Red Cross, the International Olympic Committee, or renowned international organizations: Provided, That where the Red Cross, the International Olympic Committee, or renowned international organizations have applied for trademark registration of its title, abbreviated name or mark, the same shall not apply;

1-4. Trademarks which are identical or similar to armorial bearings, flags, medals, decorations or badges of allied nations, etc. designated by the Commissioner of the Korean Intellectual Property Office after being notified from the World Intellectual Property Organization under Article 6-3 of the Paris Convention or to titles, abbreviated names, armorial bearings, flags, medals, decorations or badges of inter-governmental international organizations in which allied nations, etc. join: Provided, That where an inter-governmental international organization in which an allied nation or allied nations, etc. join applies for trademark registration of its title, abbreviated name (limited to an inter-governmental international organization in which allied nations, etc. join) or mark, the same shall not apply;

1-5. Trademarks which are identical or similar to seals or signs used for indicating supervision or certification by allied nations, etc. designated by the Commissioner of the Korean Intellectual Property Office after being notified from the World Intellectual Property Organization under Article 6-3 of the Paris Convention or their public organizations and used for the goods identical or similar to those for which such seals or signs are used;

2. Trademarks which falsely indicate a connection with a State, race, ethnic group, public organization, religion or famous deceased person, or which criticize, insult or are liable to defame them;

3. Trademarks which are identical or similar to famous marks indicating nonprofit business of the State, a public organization or its agencies or public corporations, or indicating nonprofit public services: Provided, That this shall not apply where the State, public organization or its agencies or public corporations, or the body of nonprofit public services, applies for trademark registration of such marks;

4. Where the trademark itself or the trademark is used for any goods, the meaning and contents, etc. of such trademark conveyed to consumers, are feared to be contrary to the virtuous customs that are deemed the prevailing moral sense of the ordinary people or to contravene public order;

5. Trademarks comprising of a mark which is identical or similar to, a medal, certificate of merit or decoration awarded at an exhibition held by or with approval by the Government of the Republic of Korea or at an exhibition held by or with approval by the government of a foreign country: Provided, That this shall not apply where a person who has been awarded a medal, certificate of merit or decoration has used it as part of his/her trademark on the same goods for which such medal, certificate of merit or decoration was awarded at the exhibition;

6. Trademarks containing the name, title or trade name, portrait, signature or seal, famous pseudonym, professional name or pen name of well-known other persons, or an abbreviation thereof: Provided, That this shall not apply where the consent of the person concerned has been obtained;

7. Trademarks which are identical with or similar to another person's registered trademark (excluding any registered geographical collective mark), the registration of which was made by an earlier application, and which are to be used on goods identical with or similar to the designated goods;

7-2. Trademarks which are identical with or similar to another person's registered geographical collective mark, the registration of which was made by an earlier application, and which are to be used on goods identical or recognized as identical with the designated goods;

8. Trademarks which are identical with or similar to another person's registered trademark (excluding any registered geographical collective mark), where one year has not elapsed since the date of extinguishment of the trademark right (in cases of a trial decision invalidating the trademark registration, the date when the trial decision became final and conclusive) and which are to be used on goods identical with or similar to the designated goods;

8-2. Trademarks which are identical with or similar to another person's registered geographical collective mark, where one year has not elapsed since the date of extinguishment of the geographical collective mark right (in cases of a trial decision invalidating the collective mark registration, the date when the trial decision became final and conclusive) and which are to be used on goods identical or recognized as identical with the designated goods;

9. Trademarks which are identical with or similar to another person's trademark (excluding any geographical indication) which is well known among consumers as indicating the goods of that other person and which are to be used on goods identical with or similar to such goods;

9-2. Trademarks which are identical with or similar to another person's geographical indication which is well known among consumers as indicating the goods of a specific region or locality and which are to be used on goods identical or recognized as identical with the goods using such geographical indication;

10. Trademarks which are liable to cause confusion with goods or services of another person because the trademark is recognized among consumers as designating the goods or services of the person;

In sum, the protection of GIs under the Korean Trademark Act are not limited to agricultural and fishery products. Also, the duration of protection

---

11. Trademarks which are liable to mislead or deceive consumers as to the quality of the goods;
12. Trademarks which are identical or similar to any trademark (excluding any geographical indication) which is recognized as indicating the goods of a particular person by customers in the inside or outside of the Republic of Korea, and which are used for unjust purposes, such as obtaining unjust profits or inflicting harms on the particular person;
12-2. Trademarks which are identical or similar to a geographical indication which is recognized as indicating the goods of a specific region or locality by customers in the inside or outside of the Republic of Korea, and which are used for unjust purposes, such as obtaining unjust profits or inflicting harms on the person entitled to use such geographical indication;
13. Trademarks consisting solely of three-dimensional shapes, colors, the combination of colors, sound or odor essential (in cases of service business, referring to the cases in which it is essential to the use and purpose of the service business) to secure the functions of goods requiring trademark registration or their packaging;
14. Trademarks consisting of geographical indications or including such indications with regard to the origin of wines or spirits in a member nation of the World Trade Organization, and which are to be used in connection with wines, spirits, or other similar goods: Provided, That where the persons entitled to use the geographical indications make an application for geographical collective mark registration of the goods concerned as designated goods under Article 9 (4), the same shall not apply;
15. Trademarks which are identical or similar to variety denominations registered under Article 111 of the Seed Industry Act and used for goods identical or similar to such variety denominations;
16. Trademarks which are identical or similar to geographical indications of other persons registered pursuant to Article 8 of the Agricultural Products Quality Control Act or Article 9 of the Quality Control of Fishery Products Act and used for goods identical or recognized as identical to the goods using such geographical indications;
17. Trademarks which are identical or similar to geographical indications of other persons protected pursuant to free trade agreements that have been concluded between the Republic of Korea and foreign countries in a bilateral or multilateral manner and come into effect, or trademarks which consist of such geographical indications or include such geographical indications, and used for goods identical or recognized as identical to the goods using such geographical indications.
18. One's trademark in cases where one applied for registration of identical or similar trademark for identical or similar goods while Knowing that another is using and is prepared to use his or her trademark through contractual relationship, such as partnership or employment relationship, or other ones.

of trademarks, including GIs, is 10 years from the date of registration.[35] But, whether PGIs under the Act on Quality Control of Agricultural and Fishery Products have duration of protection is unclear because this Act remains silent.

2.2. Cases

In Innsbruck case, the Korean Supreme Court held that the registered trademark, "INNSBRUCK + 인스브룩," constituted Article 6 (1) 4 of the Korean Trademark Law, which meant that it was a conspicuous geographic term because, as Innsbruck is the capital city of the federal state of Tyrol (Tirol) in western Austria, it has been famous for tourism and hosted the 1964 and 1976 Winter Olympics and because its history and landscape has been well-known though media and press.[36] In Java case, the Korean Supreme Court[37] held that:

(i) A conspicuous geographical name under Article 6 (1) 4 of the Korean Trademark Act does not necessarily mean a geographical name which indicates place of origin of an indigenous product of the locality linked to the geographical name of a specific goods. It merely a geographical, local name. Hence, as long as it is conspicuous, it falls under Article 6 (1) 4 of the Korean Trademark Act. It does not need to be recognized that it is specially linked to the designated goods; and

35) Article 42 (1) of the Korean Trademark Act; Gyooho Lee, Trademark Law-Explanations and Cases- 669 (1st ed. 2015).

36) Judgment rendered by the Korean Supreme Court on July 27, 2001, Case No. 99 Hu 2723 (Action seeking invalidation of registration).

37) In this case, the plaintiff was Sun Microsystems, Inc. while defendant was Commissioner of the Korea Industrial Property Office (currently Korea Intellectual Property Office).

(ii) The applied term, "JAVA," was a conspicuous geographic name under Article 6 (1) 4 of the Korean Trademark Act."[38)]

In British-American case,[39)] the Korean Supreme Court held that " The applied trademark, "British-American," for matches and lighters, was a conspicuous geographical name under Article 6 (1) 4 of the Korean Trademark Act."

In Pizza To go case,[40)] the Korean Supreme Court held that, in terms of the trademark, "Pizza To go," for Pizza, the phrase, "To go," was not a conspicuous geographical name and reversed and ramanded the appeal. Now, the following case deal with a trademark consisting of a geographical term and a descriptive mark.

[Figure] Plaintiff's trademark

In this case, plaintiff brought a lawsuit to revoke KIPO's denial for the plaintiff's application for registration of the mark in dispute.[41)] The designated goods are coffee, tea, cocoa, sugar, rice, tapioc, sago, artificial coffee, flour

38) Judgment rendered by the Korean Supreme Court on June 13, 2000, Case No. 98 Hu 1273 (Action to revoke the KIPO's denial of registration of the applied trademark).

39) Judgment rendered by the Korean Supreme Court on October 14, 1997, Case No. 96 Hu 2456. In this case, petitioner was British-American Tobacco Company Limited whereas respondent was the Commissioner of the Korean Industrial Property Office.

40) Judgment rendered by the Korean Supreme Court on August 22, 1997, Case No. 96 Hu 1682 (Chun-Woong Kim vs. Commissioner of KIPO).

41) In this case, plaintiff (petitioner) was the Coca-Cola Company while defendant (respondent) was the Commissioner of the Korea Intellectual Property Office.

and preparations made from cereals, bread, pastry and confectionery, ices, honey, yeast, baking powder, mustard, vinegar, sauces-condiments, spices, ice, treacle for food, treacle syrup, cooking salt, salt for food, salt for preserving foodstuff. The plaintiff's trademark are composed of the word "Georgia", figure of coffee beans, and figure of a coffee cup. In this case, the Korean Supreme Court held that "the word, "Geogia," is a conspicuous geographic name (a country name in Asia or a state name in America), and the figure of coffee beans is descriptive, and the figure of a coffee cup is descriptive because it describes that the ordinary consumers can associate it with drinking coffee." The Korean Supreme Court went on to hold that "Unless the combination of those marks create a new concept or a new distinctiveness, Article 6 (1) 4 of the Korean Trademark Act applies."

http://english.chosun.com/site/data/html_dir/2009/11/02/2009110200792.html (last visited 1st August, 2015)

In Ildong case, the Korean Supreme Court held that "Trademark "Ildong" is a conspicuous geographical name under Article 6 (1) 4 of the Korean Trademark Act."[42)]

42) Judgment rendered by the Korean Supreme Court on July 11, 2003, Case No. 2002 Hu 2464.

3. GIs Protection under the Korean Unfair Competition Prevention Act

3.1. Overview

Under Article 2(1)(d) and (e) of the Korean Unfair Competition Act, the following acts constitutes an unfair competition act: (i) an act of causing confusion about the place of origin by making false marks of the place of origin on goods, or on trade documents or in communications by means of advertisements of the goods or in a manner that makes the public aware of the marks; or by selling, distributing, importing or exporting goods bearing such marks; and (ii) An act of making a mark that would mislead the public into believing that goods are produced, manufactured, or processed at places, other than the actual places of production, manufacture, or processing, on goods, or on trade documents or in communications by means of advertisements of the goods or in a manner that makes the public aware of the mark; or selling, distributing, importing or exporting goods bearing such mark.

In addition, as to a geographic mark protected under a free trade agreement which is concluded bilaterally or multilaterally and takes effect between the Republic of Korea and a foreign country, or foreign countries, certain acts are prohibited in line with those international instruments.[43)]

43) Article 3-2 (Prohibition of Use of Geographic Mark Protected Under Free Trade Agreement, etc.) of the Korean Unfair Competition Act prescribes that:
"1. As to a geographic mark protected under a free trade agreement which is concluded bilaterally or multilaterally and takes effect between the Republic of Korea and a foreign country, or foreign countries, (hereafter referred to as "geographic mark" in this Article), in addition to the act of unfair competition under subparagraphs 1 (d) and (e) of Article 2, any person who does not have a legitimate source of right shall not conduct any of

3.2. Case

Well-known marks inclusive of geographic location, irrespective of whether it is registered, can be protected under Unfair Competition Prevention Act.[44] In University of Cambridge case, the Korean Supreme

---

the following acts with respect to the goods whose place of origin is not the one indicated in the geographic mark concerned (limited to goods that are identical to or recognized to be identical to the goods with the relevant geographic mark):

(a) Using a geographic mark separately, in addition to the authentic place of origin;

(b) Using a geographic mark which is translated or transliterated;

(c) Using a geographic mark with the expression of “kind”, “type”, “mode”, “counterfeit” or other expressions.

(d) Any person who does not have a legitimate source of right shall not conduct any of the following acts:

(5) An act of transferring or delivering goods with a geographic mark in a manner falling under any of the subparagraphs of paragraph (1), or an act of exhibiting, importing or exporting such goods for any aforementioned purpose;

(6) An act of delivering goods with a geographic mark in a manner falling under subparagraph 1 (d) or (e) of Article 2, or an act of exhibiting for any aforementioned purpose.

Notwithstanding the provisions of paragraph (1), a person who uses a trademark in a manner falling under any of the subparagraphs of paragraph (1) and has satisfied all the following requirements may continue to use the relevant trademark on the goods that have been used by the person:

That the relevant trademark shall be used at home prior to the date when the protection of a geographic mark commences;

2. The outcome of the use of the trademark pursuant to subparagraph 1 shall reveal that domestic consumers recognize the relevant trademark as the one indicated on any particular person’s goods on the date when the protection of a geographic mark commences.”

44) Articles 2 of Unfair Competition Prevention and Trade Secret Protection Act (‘Unfair Competition Act’) prescribes that

“Article 2” (Definitions)

The terms used in this Act shall be defined as follows: <*Amended by Act No. 11112, Dec. 2, 2011; Act No. 11963, Jul. 30, 2013*>

1. The term “acts of unfair competition” means any of the following acts:

(a) An act of causing confusion with another person's goods by using marks identical or similar to, another person’s name, trade name, trademark, or container or package of goods, or any other mark indicating another person's goods, which is widely known in

the Republic of Korea; or by selling, distributing, importing or exporting goods bearing such marks;
(b) An act of causing confusion with another person's commercial facilities or activities by using marks identical or similar to, another person's name, trade name, or emblem, or any other mark indicating another person's business, which is widely known in the Republic of Korea;
(c) In addition to the act of causing confusion provided in item (a) or (b); an act of doing damage to distinctiveness or reputation attached to another person's mark by using the mark identical or similar to, another person's name, trade name, trademark, or container or package of goods, or any other mark indicating another person's goods or business, which is widely known in the Republic of Korea; or by selling, distributing, importing or exporting goods bearing such marks; without good cause prescribed by Presidential Decree, such as the purpose of noncommercial use;
(d) An act of causing confusion about the place of origin by making false marks of the place of origin on goods, or on trade documents or in communications by means of advertisements of the goods or in a manner that makes the public aware of the marks; or by selling, distributing, importing or exporting goods bearing such marks;
(e) An act of making a mark that would mislead the public into believing that goods are produced, manufactured, or processed at places, other than the actual places of production, manufacture, or processing, on goods, or on trade documents or in communications by means of advertisements of the goods or in a manner that makes the public aware of the mark; or selling, distributing, importing or exporting goods bearing such mark;
(f) An act of falsely assuming another person's goods or an act of advertizing any goods or making a mark in any manner of leading the public to misunderstand their quality, content, manufacturing process, usage, or quantity, in latter goods or advertisement thereof, or selling, distributing, importing or exporting goods using such method or mark;
(g) An act of using a trademark, without good cause, on goods identical or similar to the designated goods of the trademark, or an act of selling, distributing, exporting; or importing goods with such trademark; by an agent or a representative of the owner of the trademark that is identical or similar to a trademark registered in any of the following countries or by a person who was an agent or a representative within one year of the date of such act:
(h) An act of registering, holding, transferring, or using a domain name identical or similar to, another person's name, trade name, or trademark, or any other mark, which is widely known in the Republic of Korea, by a person who does not have a legitimate source of right for any of the following purposes:
(i) The purpose of selling or lending a mark, including a trademark, to a person who has a legitimate source of right concerning the mark or a third party;
(j) Any other acts of infringing on other persons' economic interests by using the outcomes, etc. achieved by them through substantial investment or efforts, for one’s own business without permission, in a manner contrary to fair commercial practices or competition order;

Court held that “Even though a trademark or a service mark which merely consists of a conspicuous geographical name(s) is not protectible under the Trademark Act, it constitutes a business mark protected under Unfair Competition Prevention Act in cases where it is acknowledged widely. Similarity of the marks under Article 2 (1) (a) of the Unfair Competition Act depends upon perception of which, in specific trade practices, ordinary consumers or trading partners feels on the marks after

---

(k) In addition, an act which infringes another's economic interests by using an outcome derived from another's substantial investment or efforts, without authorization for one's own business in a way contradictory to fair trade practices or competition order.
<added on July 30, 2013>

2. The term “trade secret” means information, including a production method, sale method, useful technical or business information for business activity, that is not known publicly, is the subject of considerable effort to maintain its secrecy, and has independent economic value;

3. The term “infringement of trade secrets” means any of the following acts:

(a) An act of acquiring trade secrets by theft, deception, coercion or other improper means (hereinafter referred to as “act of improper acquisition”), or subsequently using or disclosing the trade secrets improperly acquired (including informing any specific person of the trade secret while under a duty to maintain secrecy; hereinafter the same shall apply);

(b) An act of acquiring trade secrets or using or disclosing the trade secrets improperly acquired, with knowledge of the fact that an act of improper acquisition of the trade secrets has occurred or without such knowledge due to gross negligence;

(c) An act of using or disclosing trade secrets after acquiring them, with knowledge of the fact that an act of improper acquisition of the trade secrets has occurred or without such knowledge due to gross negligence;

(d) An act of using or disclosing trade secrets to obtain improper benefits or to damage the owner of the trade secrets while under a contractual or other duty to maintain secrecy of the trade secrets;

(e) An act of acquiring trade secrets, or using or disclosing them with the knowledge of the fact that they have been disclosed in the manner provided in item (d) or that such disclosure has been involved, or without such knowledge due to gross negligence;

(f) An act of using or disclosing trade secrets after acquiring them, with the knowledge of the fact that they have been disclosed in a manner provided in item (d) or that such disclosure has been involved, or without such knowledge due to gross negligence;

4. The term “domain name” means a number, a letter, or a sign, or any combination of these, which constitutes an Internet address composed of numbers.”

observing entirely, objectively and detachedly in terms of appearance, appellation, and concept of both marks."[45] In this criminal case, victim's mark is "캠브리지 멤버스," and "CAMBRIDGE MEMBERS" for men's suits whereas the accused's mark is "캠브리지 유니버시티," and "UNIVERSITY OF CAMBRIDGE" for shirts.

4. Protection of PGIs under the Korean Act on Quality Control of Agricultural and Fishery Products

Article 2 (1) 8 of Agricultural and Fishery Products Quality Control Act prescribes that the term, "geographical indication" refers to "an indication displaying that agricultural or fishery products or processed agricultural or fishery products…., the reputation, quality and other attributes of which are essentially originated from the geographical characteristics of a specific region, are produced and processed in the specific region." The requirements for registration of geographical indication under the Agricultural and Fishery Products Quality Control Act appears to be much stricter than that for registration of trademark under the Trademark Act. Also, Article 2 (1) 9 of the Act prescribes that the term 'homonymic geographical indication' connotes that "a geographical indication, the pronunciation of which is identical to that of another person's geographical indication for the same item but refers to a different region." The Agricultural and Fishery Products Quality Control Act affords protection on geographical indication. In this Act a right to geographical indication stands for "intellectual property right to exclusively use geographical

45) Judgment rendered by the Korean Supreme Court on January 26, 2006, Case No. 2003 Do 3906 (Violation of Unfair Competition Prevention Act).

indications registered pursuant to the Act." In this regard, it should be compared to a right granted on geographical indication under the Trademark Act because the right to geographical indication pursuant to the Agricultural and Fishery Products Quality Control Act is clearly prescribed as a kind of intellectual property right.[46)]

Whether PGIs under the Act on Quality Control of Agricultural and Fishery Products have duration of protection is unclear because this Act remains silent. Also, the conditions for registration of PGIs under the Act on Quality Control of Agricultural and Fishery Products are not explicitly prescribed even though they can be inferred from the combined interpretation of the Act and Executive Decree for the Act on Quality Control of Agricultural and Fishery Products. In addition, the GI examination board under the Act is well qualified for the examination of GI application.

5. Conclusion

From the perspective of comparativists, the protection of GIs for fishery products have not been fully developed. A potential applicant for registration of trademark in China is strongly advised to apply for registration of a trademark in Chinese as well as in English and in his/her own language because a trademark in Chinese sounds totally different from one in English or his/her own language. That is, Chinese is ideogram whereas English and Korean are phonograms. In this regard, it should be noted that Japanese consists of katakana and hirakana as phonogram, and Chinese characters as ideogram. For example, BMW registered 寶馬 [Baoma] for BMW, by using Chinese characters. Territoriality principle applies to

46) Gyooho Lee, A Study on the Protection of Collective Marks and Certification Marks Indicating Geography, Vol. 2-3 Kyungwon Law Review 119, 143 (Nov. 2009).

trademark law. Even though a GI for a designated goods is conspicuous in Korea and can not be registered in Korea, it can be registered for the designated goods or other goods in Japan, China, and any other countries. To solve the territoriality principle applied to GIs, bilateral international agreements, such as the Korea-EU FTA, can be used.

However, those countries who implanted GIs protection into their legal system, such as Korea and China, have experienced some troubles, resulting in employing competing and, sometimes conflicting, legal schemes. In this regard, IP community need to delve into substantive aspects of GIs protection, including the scope and level of protection for GIs, conditions for registration of GIs, and duration of GIs protection. Also, effective enforcement and consistent procedure which deals with disputes pertaining to GIs protection need to be taken into account.

[Appendix]1. Legal Sources

Korea-EU FTA

ANNEX 10-A
GEOGRAPHICAL INDICATIONS FOR AGRICULTURAL PRODUCTS AND FOODSTUFFS

PART A. AGRICULTURAL PRODUCTS AND FOODSTUFFS ORIGINATING IN THE EUROPEAN UNION1 2(as referred to in Article 10.18.4)

FRANCE

Name to be protected Product	Transcription into Korean alphabet
Comte Cheese	꽁떼 / 콩테
Reblochon Cheese	르블로숑 / 레블로숑
Roquefort Cheese	로끄포르 / 로크포르
Camembert de Normandie Cheese	까망베르 드 노르망디 / 카망베르 드 노르망디
Brie de Meaux Cheese	브리 드 모
Emmental de Savoie Cheese	에멘탈 드 사부아 / 에멩딸 드 싸부아

GERMANY

Name to be protected Product	Transcription into Korean alphabet
Bayerisches Bier Beer	바이어리쉐스 비어
Munchener Bier Beer	뮌헤너 비어

ITALY

Name to be protected Product	Transcription into Korean alphabet
Aceto balsamico	아체토 발사미코
Tradizionale di Modena	트라디치오날레 디 모데나
Sauce - seasoning	(모데나의 전통 발사믹 식초)
Cotechino Modena Pork meat sausage	코테키노 모데나 (모데나의 코테키노 <소시지의 일종>)
Zampone Modena Pork meat	잠포네 모데나 (모데나의 돼지 앞발)
Mortadella Bologna Large pork meat sausage	모르타델라 볼로냐 (볼로냐의 모르타델라 <소시지의 일종>)
Prosciutto di Parma Ham	프로슈토 디 파르마 (생햄)
Prosciutto di S. Daniele Ham	프로슈토 디 산 다니엘레(생햄)
Prosciutto Toscano Ham	프로슈토 토스카노 (생햄)
Provolone Valpadana Cheese	프로볼로네 발파다나 (치즈의 일종)
Taleggio Cheese	탈레조 (베르가모 산 치즈의 일종)
Asiago Cheese	아시아고
Fontina Cheese	폰티나 (발다오스타 지역의 치즈의 일종)
Gorgonzola Cheese	고르곤졸라 (치즈의 일종)
Grana Padano Cheese	그라나 파다노 (치즈의 일종)
Mozzarella di Bufala Campana Cheese	모차렐라 디 부팔라 캄파나 (물소젖 치즈의 일종)

Parmigiano Reggiano Cheese	파르미자노 레자노(치즈의 일종)
Pecorino Romano Cheese	페코리노 로마노(로마의 페코리노 <양젖 치즈의 일종>)

PART B. AGRICULTURAL PRODUCTS AND FOODSTUFFS ORIGINATING IN KOREA (as referred to in Article 10.18.3)

Name to be protected Product	Transcription into Latin alphabet
보성녹차(Boseong Green Tea)	Green Tea Boseong Nokcha
하동녹차(Hadong GreenTea)	Green Tea Hadong Nokcha
[Omitted]	
고려홍삼(Korean Red Ginseng)	Red Ginseng Goryeo Hongsam
[Omitted]	

ANNEX 10-B GEOGRAPHICAL INDICATIONS FOR WINES, ROMATISED WINES AND SPIRITS

PART A. WINES, AROMATISED WINES AND SPIRITS ORIGINATING IN THE EUROPEAN UNION1 (as referred to in Article 10.19.1)

SECTION 1. WINES ORIGINATING IN THE EUROPEAN UNION

FRANCE

Name to be protected	Transcription into Korean alphabet
Beaujolais	보졸레
Bordeaux	보르도

Bourgogne	부르고뉴 / 버건디
Chablis	샤블리 / 샤블리스
Champagne	샹파뉴 / 샴페인 / 샹빠뉴
[Omitted]	

GERMANY

Name to be protected	Transcription into Korean alphabet
Mittelrhein	미털라인
Rheinhessen	라인헤센
Rheingau	라인가우
Mosel	모젤

ITALY

Name to be protected	Transcription into Korean alphabet
Chianti	키안티
Marsala	마르살라
Asti	아스티
Barbaresco	바르바레스코
Bardolino	바르돌리노
Barolo	바롤로
Brachetto d'Acqui	브라케토 다퀴
Brunello di Montalcino	브루넬로 디 몬탈치노
Vino nobile di Montepulciano	비노 노빌레 디 몬테 풀치아노
Bolgheri Sassicaia	볼게리 사씨카이아
Dolcetto d'Alba	돌체토 달바
Franciacorta	프란차코르타

Lambrusco di Sorbara	람브루스코 디 소르바라
Lambrusco Grasparossa di Castelvetro	람브루스코 그라스파로사 디 카스텔 베트로
Montepulciano d'Abruzzo	몬테풀치아노 다브루초
Soave	소아베
Campania	캄파니아
Sicilia	시칠리아
Toscana	토스카나
Veneto	베네토
Conegliano Valdobbiadene	코넬리아노 발도삐아데네

SECTION 2. SPIRITS ORIGINATING IN THE EUROPEAN UNION2 3

FRANCE

Name to be protected	Transcription into Korean alphabet
Cognac	꼬냑 / 코냑
Armagnac	아르마냑
Calvados	깔바도스 / 칼바도스

GERMANY

Name to be protected	Transcription into Korean alphabet
Korn / Kornbrand7	코언 / 코언브란드

UNITED KINGDOM

Name to be protected	Transcription into Korean alphabet
Scotch Whisky	스카치 위스키

PART B . WINES, AROMATISED WINES AND SPIRITS ORIGINATING IN KOREA (as referred to in Article 10.19.2)

SPIRITS

Name to be protected	Transcription into Latin alphabet
진도홍주(Jindo Hongju)	Jindo Hongju

Chapter 4.

Limitations and Exceptions to Copyright Protection in Korea

Gyooho Lee
(Professor of Law, Chung-Ang University School of Law)

▢ **Overview**

In term of the limitations to copyright protection, some countries recognize free use doctrine while others do fair use doctrine. Korea is one of the countries which allow both. The Korean Copyright Act (hereinafter KCA) prescribes the limitations to copyright protection as follows: (i) reproduction for judicial proceedings, etc. (Article 23 of the KCA)[47]; (ii) exploitation of political speech etc. (Article 24 of the KCA)[48]; (iii) use of public works (Article 24 bis of the KCA)[49]; (iv) reproduction for the purpose of school education (Article 25 of the KCA)[50]; (v) use for current news report(Article 26 of the KCA)[51]; (vi) reproduction of articles or comments on current events (Article 27 of the KCA) [52]; (vii) quotations from works made public (Article 28 of the KCA)[53]; (viii) public performance and broadcasting for non-profit purposes(Article 29 of the KCA)[54]; (ix) reproduction for private use (Article 30 of the KCA)[55]; (x) reproduction in libraries, etc. (Article 31 of the KCA)[56]; (xi) reproductions for examination questions (Article 32 of the KCA)[57]; (xii) reproductions in braille (Article 33 of the KCA)[58]; (xiii) reproduction, etc. for acoustically impaired persons, etc. (Article 33bis of the KCA) (revised on July 16, 2013 and effective since Oct. 17, 2013)[59]; (xiv) ephemeral sound or visual recordings by broadcasting organizations (Article 34 of the KCA)[60]; (xv) exhibition or reproduction of artistic works, etc (Article 35 of the KCA)[61]; (xvi) temporary copying (Article 35 bis of the KCA)[62]; (xvii) comprehensive fair use doctrine (Article 35ter of the KCA)[63]; (xviii) use by means of translations, etc. (Article 36 of the KCA)[64]; (xix) indication of

sources;[65] (xx) exception to application;[66] and (xxi) relationship with author's moral rights.[67]

As far as limitations and exceptions to copyright protection are concerned, subject matter of copyright, non-protectible works, copyright license, and duration need to be mention in addition to free use and fair use doctrines.

---

47) Article 23 (Reproduction for Judicial Proceedings, etc.) It shall be permissible to reproduce a work if and to the extent deemed necessary for the purpose of judicial proceedings and of internal use in the legislative or administrative organs; provided that such reproduction does not unreasonably prejudice the interests of the owner of author's property rights in the light of the nature of the work as well as the number of copies and the nature of reproduction.

48) Article 24 (Use for the Purpose of Political Speeches, etc.) It shall be permissible to exploit, by any means, political speeches delivered in public and statements made in the courts of law, the National Assembly, or municipal assemblies unless the exploitation is made after editing the speeches or statements of the same author.

49) Article 24 bis (Free Use of Public Works) (1) A work produced in the course of employment and already made public by the State or a local government, or a work of which the author's economic right is owned in its entirety by the State or a local government under a contract, may be used without permission of the State or a local government: Provided, That the same shall not apply when the work falls under any of the following cases:

1. Where it includes any information pertaining to national security;
2. Where it corresponds to an individual's privacy or confidential business information;
3. Where it includes any information of which disclosure is restricted under other Acts;
4. Where it is registered with the Korea Copyright Commission under Article 112, and is managed as State-owned property under the State Property Act or as public property under the Public Property and Commodity Management Act.

(2) The State may establish and enforce policies to promote the use of public works, as prescribed by Presidential Decree, in order to promote the use of works which are produced and made public by a public institution or of which the author's property right is owned in its entirety under a contract by a public institution pursuant to Article 4 of the Act on the Management of Public Institutions.

(3) When it is acknowledged as necessary for free use, the State or a local government may permit the use of public works among those prescribed in paragraph (1) 4, as prescribed by Presidential Decree, notwithstanding the State Property Act or the Public Property and Commodity Management Act.

50) Article 25(Use for the Purpose of School Education, etc.) (1) A work already being made public may be reproduced in textbooks to the extent deemed necessary for the purpose of education at high schools, their equivalents or lower level schools.
(2) Educational institutions established by special laws, Pre-Elementary Education Act, Elementary and Secondary Education Act, or Higher Education Act or operated by the state or local government or institutions belonging to state or local government and supporting teaching of educational institutions mentioned above may reproduce, perform publicly, display or transmit to the public a part of a work already being made public to the extent deemed necessary for the purpose of class teaching. Provided that the use of the whole parts of a work is deemed inevitable in the light of the nature of a work, and the purpose and manner of its exploitation, etc., use of the whole parts of the work shall be permissible.
(3) It shall be permissible for a person who receives education in the educational institutions described in Paragraph (2) to reproduce or interactively transmit the work already being made public within the limit regulated in paragraph (2) to the extent deemed necessary for the purpose of class teaching.
(4) A person who intends to exploit a work pursuant to Paragraphs (1) and (2) shall pay compensation to the owner of author's property rights according to the criteria for compensation as determined and published by the Minister of Culture and Tourism. Reproduction, distribution, public performance, broadcasting or interactive transmission of a work done at high schools, their equivalents or lower level schools as prescribed under Paragraph (2) is not obliged to pay compensation.
(5) The right to be compensated pursuant to Paragraph (4) shall be exercised by an organization which satisfies all of the following conditions and is regulated by the Minister of Culture, Sports, and Tourism. The consent of the organization shall be necessary when the Minister of Culture, Sports, and Tourism appoints such organization. The organization shall:
1. Consist of the persons who hold the right to receive compensation(hereinafter referred to as compensation right holder);
2. Not be for the purpose of profit making; and
3. Have ample capability to carry out its duties including collecting, distributing the compensation.
(6) When a compensation right holder requests, the organization regulated under Paragraph (5) may not deny exercising the right of a compensation right holder even if the compensation right holder is not a member of the organization. In this case, the organization shall have the authority to exercise judicial or non-judicial acts with regard to the right under its name.
(7) The Minister of Culture, Sports, and Tourism may cancel the appointment in cases where the organization under Paragraph (5) falls under any of the followings
1. Where an organization fails to satisfy the conditions stipulated in Paragraph (5);
2. Where an organization violates the work regulation with regard to compensation; and

3. Where it is concerned that the interest of a compensation right holder could be harmed due to the organization's suspension of its duties with regard to compensation for a considerable period of time.

(8) The organization regulated under Paragraph (5) may use the undistributed compensations, the date of notification of which has been made three or more years ago, for the public interest after obtaining authorization of the Minister of Culture, Sports, and Tourism.

(9) The necessary matters for appointment and cancellation of the organization, work regulations, notification of distribution of compensation, authorization of exploitation of undistributed compensation for the public interest, and etc. in accordance with Paragraphs 5, 7 and 8 shall be determined by the Presidential Decree.

(10) In the case where an educational institution conducts interactive transmission pursuant to Paragraph (2), necessary measures determined under the Presidential Decree including reproduction prevention measures shall be taken in order to prevent infringement on copyright and the rights protected under this Act.

51) Article 26 (Use for Current News Report) In the case of reporting current events by means of broadcasts, newspapers or by other means, it shall be permissible to reproduce, distribute, perform publicly, or communicate to the public a work seen or heard in the course of the event, to the extent justified by the information purpose.

52) Article 27 (Reproduction, etc of Current News Articles and Editorials) Current new articles and editorials about politics, economy, society, culture and religions published in the newspapers and Internet newspapers pursuant to Article 2 of Act on Promotion of Newspapers, etc. or in the news agency under the provisions of Article 2 of News Telecommunication Promotion Act may be reproduced, distributed, or broadcasted by other media organizations, unless any indications of prohibition of exploitation exist.

53) Article 28 (Quotations from Works Made Public) It shall be permissible to make quotations from a work already being made public; provided that they are within a reasonable limit for news reporting, criticism, education and research, etc. and compatible with fair practice.

54) Article 29 (Public Performance and Broadcasting for Non-Profit Purposes) (1) It shall be permissible to perform publicly or broadcast a work already made public for non-profit purposes and without receiving any benefit in return from audience, spectators or third persons: Provided, That the same shall not apply to cases where the stage performers are paid any normal remunerations.

(2) It shall be permissible to reproduce and play for the general public any commercial music records or cinematographic works, if no benefit in return for the relevant public performance is received from audience or spectators: Provided that the same shall not apply to the cases as prescribed by Presidential Decree.

55) Article 30 (Reproduction for Private Use) It shall be permissible for a user to reproduce by himself a work already being made public for the purpose of his personal, family or other similar uses within a limited circle; provided that this shall not apply to the reproduction by a photocopying machine that is set up for the public use.

56) Article 31(Reproduction, etc. in Libraries, etc.) (1) Libraries under the Library Act and the facilities (including the heads of the relevant facilities; hereinafter referred to as libraries, etc.) as prescribed by Presidential Decree among those facilities which provide books, documents, records and other materials (hereinafter referred to as books, etc.) for public use may reproduce the works by utilizing books, etc. held by the libraries, etc. (in the case of Subparagraph 1, including the books, etc. reproduced by or interactively transmitted to the libraries, etc. in accordance with the provision of Paragraph 3 hereof) in any of the following cases: provided that in the case of Subparagraphs 1 and 3, the works may not be reproduced in digital format.
1. Where, at the request of a user and for the purpose of research and study, a single copy of a part of books, etc. already made public is provided to him;
2. Where it is necessary for libraries, etc. to reproduce books, etc. for the purpose of preserving such books, etc.; and
3. Where libraries, etc. provide other libraries etc. with a reproduction of books, etc. that is out of print or scarcely available for similar reasons at the request of other libraries etc. for their collection purpose.
(2) Libraries, etc. may reproduce or interactively transmit their books, etc. to allow users to peruse them in such libraries, etc. by using devices capable of information processing such as computers, etc. In such case, the number of users who may peruse them at the same time shall not exceed the number of copies of such books, etc. held by the libraries, etc. or authorized to be used by the persons with copyrights or other rights protected according to this Act.
(3) Libraries, etc. may reproduce or interactively transmit their books, etc. to allow users in other libraries, etc. to peruse them by using computers, etc.; provided that, in those cases where all or a part of the books, etc. have been published for sale, such books, etc. shall not be reproduced or interactively transmitted unless a period of five years has elapsed since the publication date of such books, etc.
(4) In reproducing books, etc. pursuant to Subparagraph 2 of Paragraph (1), Paragraph (2) or Paragraph (3), libraries, etc. shall not reproduce such books, etc. in digital format if they are being sold in digital format.
(5) In reproducing books, etc. in digital format pursuant to Subparagraph 1 of Paragraph (1), or reproducing or interactively transmitting books, etc. for the purpose of allowing perusal inside other libraries, etc. pursuant to Paragraph (3), libraries, etc. shall pay the owners of authors' property rights compensation in accordance with the standards determined and published by the Minister of Culture, Sports, and Tourism; provided that said provision shall not apply to books, etc. (excluding those books, etc. which are, in part or in whole, published for a sales purpose) regarding which the state, local governments or schools as provided in Article 2 of the Higher Education Act hold authors' property rights.
(6) The regulation regarding compensation in Paragraph 5 to Paragraph 9 of Article 25, shall apply mutatis mutandis to foregoing Paragraph 5 with regard to distribution of compensation, etc.

(7) If books, etc. are reproduced or interactively transmitted in digital format pursuant to the foregoing Paragraphs (1) through (3), libraries, etc. shall take necessary measures as provided by Presidential Decree such as reproduction prevention measures in order to prevent infringement of copyrights and other rights protected under this Act.

(8) If National Library of Korea collect books, etc. to preserve online materials in accordance with Article 20 bis of Library Act, they can be reproduced.

57) Article 32(Reproduction for Examination Questions) It shall be permissible to reproduce and distribute a work already being made public in questions of entrance examinations or other examinations of knowledge and skills, to the extent deemed necessary for that purpose; provided that it is for non-profit purposes.

58) Article 33 (Reproduction, etc. for Visually Impaired Persons, etc.) (1) Published works may be reproduced and distributed in Braille for visually impaired persons, etc.

(2) The facilities (including the heads of relevant facilities) as prescribed by Presidential Decree among facilities for the purpose of promoting the welfare of visually impaired persons, etc. may record a published literary work, or reproduce, distribute or interactively transmit such work in a recording form for the exclusive use of visually impaired persons, etc. in order to provide such for the use of visually impaired persons, etc. without using it, in any way, for profit-making purposes.

The scope of visually impaired persons, etc. as provided in the foregoing Paragraphs (1) and (2) shall be determined by Presidential Decree.

59) Article 33bis (Reproduction, etc. for Acoustically Impaired Persons, etc.) (Revised on July 16, 2013, Effective since Oct. 17, 2013)

(1) Anyone may transform disclosed works etc. into sign language, and reproduce, distribute, perform or make public transmission, for acoustically impaired persons, etc.

(2) The facilities (including the heads of relevant facilities) as prescribed by Presidential Decree among facilities for the purpose of promoting the welfare of acoustically impaired persons, etc., may transform voices and sounds included in disclosed copyrighted works etc. into the way in which they can recognize such as subtitles, or reproduce, distribute, perform ,or make public transmission such subtitles etc. for their use to the extent to which it can provide such for the use of acoustically impaired persons, etc. without using it, in any way, for profit-making purposes.

(3) The scope of acoustically impaired persons, etc. as provided in the foregoing Paragraphs (1) and (2) shall be determined by Presidential Decree.

60) Article 34(Ephemeral Sound or Visual Recordings by Broadcasting Organizations) (1) Broadcasting organizations with the authority to broadcast a work may make ephemeral sound or visual recordings of the work for the purpose of their own broadcasting and by the means of their own facilities.

(2) Sound or visual recordings made pursuant to Paragraph (1) may not be kept for a period exceeding one year from the date of sound or visual recording, unless they are kept as materials for public records at places as prescribed by the Presidential Decree.

61) Article 35(Exhibition or Reproduction of Works of Art, etc.) (1) The owner of the original of a work of art, etc. or a person who has obtained the owner's authorization, may exhibit the works in its original form; provided that this provision shall not apply to the case of that the work of art is to be permanently exhibited in a street or park, outside the wall of a building, or other places open to the public.
(2) Works of art, etc. exhibited at all times at an open place as referred to in the proviso of Paragraph (1) may be reproduced and used by any means, except those falling under any of the following cases:
1. Where a building is reproduced in another building;
2. Where a sculpture or a painting is reproduced in another sculpture or a painting;
3. Where the reproduction is made in order to exhibit permanently at an open place, as prescribed under Paragraph (1); and
4. Where the reproduction is made for the purpose of selling its copies.
(3) A person who exhibits works of art, etc. under Paragraph (1), or who intends to sell originals of works of art, etc. may reproduce and distribute them in a pamphlet for the purpose of explaining and introducing them.
(4) A portrait or a similar photographic work produced by consignment shall not be exploited without the consent of the consignor.

62) Art. 35 bis (Temporary Copying in the Course of the Exploitation of a Copyrighted Work) A person who exploits a copyrighted work on a computer can copy the copyrighted work temporarily on the computer to the extent to which it is deemed necessary for its smooth and efficient information processing. Provided that it does not apply when the exploitation of the copyrighted work infringes its copyright.
Under Article 35 bis of the Korean Copyright Act, the term temporary copying falls under the umbrella of reproduction. Hence, as a countermeasure against inclusion of temporary copying into reproduction, a comprehensive fair use doctrine was adopted.

63) Art. 35 ter (Fair Use of a Copyrighted Work) (1) Any person can exploit a copyrighted work for report, criticism, education, research etc. unless its exploitation conflicts with the way of its ordinary exploitation and unreasonably prejudices the just interests of its copyright holder except that it falls under Arts 23 to 35 bis, or 101 ter to 101 uinquies.
(2) When a court determines whether the exploitation of a copyrighted work falls under section 1 of Art. 35 ter, it should take into account the followings:
1. The purpose and nature of the exploitation, such as its commercial or non-commercial nature.
2. The type and usage of the copyrighted work
3. The amount and importance of the exploited portion in the whole copyrighted work
4. The effect of the exploitation of the copyrighted work on current or potential market or value of the copyrighted work
As far as relationship between fair use exception and free use exceptions is concerned, overlapping application between them is recognized. Hence, Arts. 23 to 35 bis are illustrative lists of fair use.

1. Subject Matter of Copyright Protection

Copyright protects original expressions of a person's idea or emotions in the literary, scholastic or artistic fields. It is fundamental that to be protected, a work must be an original creation and it must express a person's idea or emotion. It is also fundamental that what copyright protects is the expression of the idea, not the idea itself.

1.1. Originality

In the Disney's Dalmation Dogs case,[68] the Korean Supreme Court stressed that in order to be protected under the Copyright Act, a work should be a creative production belonging to the category of original literary, scientific or artistic works. Originality is a required element. The originality required does not mean that a work must be completely novel. It merely means

64) Article 36 (Use by Means of Translation, etc.) (1) If a work is used in accordance with Articles 25, 29, 30, or 35 ter, the work may be used by means of translation, arrangement, or adaptation.
(2) If a work is used in accordance with Articles 23, 24, 26, 27, 28, 32, or 33, the work may be used by means of translation.

65) Article 37 (Indication of Sources) (1) A person who uses a work pursuant to this subchapter shall indicate its sources, except the cases as prescribed under Articles 26, 29 to 32, 34, or 35 bis.
(2) The indication of the sources shall be made clearly in the manner and to the extent deemed reasonable by the situation in which the work is used. If the real name or pseudonym of the author of a work is indicated, such real name or pseudonym shall be indicated.

66) Article 37bis (Exception to Application) Articles 23, 25, 30 and 32 shall not be applied to a computer program work.

67) Article 38 (Relationship with Author's Moral Rights) No provisions of this subchapter may be interpreted as affecting the protection of author's moral rights.

68) Judgment rendered by the Korean Supreme Court on October 23, 2003, Case No. 2002Do446.

that the work should not simply imitate those of others, but should contain an original expression of the author's ideas or emotions. To satisfy the originality element, it is sufficient that a work is created as a result of the author's own mental efforts and that the work distinguishes itself from preexisting works of other authors.[69] However, as far as a functional work is concerned, the case law in Korea states that the originality requirement would be met when a work is independently created and shows at least its author's creativity.[70] For example, in Yamaha case, the court held that photographic works such as pictures of goods and a manual for them are independently created and have at least a minimal level of creativity; thus, they can be protected by the Korean Copyright Act when those are commissioned by one and made by a professional photograph business to crystallize feature of his/her goods and to effectively express the image of its high-quality brand.[71]

In Designs for Typefaces case,[72] the Korean Supreme Court ruled that designs for typefaces aim by and large at promoting their practical function. Hence, even though they contain artistic elements, they will not be protected by KCA unless their artistic elements have an independent, artistic feature or value separated from its practical function. Therefore, the Court held that the designs for the plaintiffs' typefaces are not protected by KCA. This holding was declared prior to the revision of KCA in 2000, when the definition

69) Id.; Judgment rendered by the Korean Supreme Court on November 14, 1995, Case No. 94Do2238.

70) Judgment rendered by the Korean Supreme Court on on January 27, 2005, Case No. 2002do965.

71) Ruling rendered by Seoul Western District Court on March 22, 2006, Case No. 2005Kahap1848.

72) Judgment rendered by the Korean Supreme Court on August 23, 1996, Case No. 94Nu5632.

for works of applied art was introduced. Nonetheless, the case law still holds true in Typeface-related cases and thus the Court will not afford copyright protection to typeface in Korea.

1.2. Expression of Idea, Not Idea Itself

Copyright protects the expression of the idea, not the idea itself. Other persons may copy and exploit the idea expresed in the protected work, but they cannot copy the expression. Indeed, monopoly to the exploitation of the idea may be derived from patent, but not from copyright.

1.3. Expression of Idea, Not Facts

Copyright protects only the expression of idea, not facts. It has been observed as one of the most fundamental axiom in copyright law that no author may copyright the facts he narrates. The KCA specifically provides that the copyright protects works that express a human being's idea or emotions. Consistent with this principle, it excludes from the coverage of works protected news reports that transmit simple facts. InYonhap News case, in which the chief editor of a daily newspaper reproduced articles and pictures on Yonhap News and published them on it, the Korean Supreme Court held that it excluded from the coverage of works protected news reports that transmit only simple facts.

1.4. Works Which Are Not Protected

By the express provisions of the KCA, several works are not protected by copyright. These works are in the public domain and anyone may, as

a rule but subject to certain conditions, exercise the rights otherwise reserved exclusively for copyright holders.

In Korea, works of the government and news reports that transmit simple facts are not covered by copyright. The works of the government are enumerated by the KCA as the Constitution, laws, treaties, decrees, ordinances, rules, notices and public notifications issued by the State or local government units, judgments or orders of courts and those made in administrative procedures, and their respective compilations and translations.

The KCA states simply that these works are not protected by copyright. In other words, it does not impose any condition for their utilization or even commercial exploitation.

A good illustration is Yonhap News case.[73] In Yonhap News case, the defendant, the chief editor of A newspaper company, included some of the articles and pictures published on the Yonhap News in A newspaper company's newspaper. Hence, The Yonhap News company accused the defendant of the violation of the KCA. In Yonhap News case, the issue was whether articles and pictures on a newspaper were protected by the KCA. The Court held that "In the case where the chief editor of a daily newspaper reproduced and published on the newspaper the articles and pictures of the Yonhap News company, he is criminally responsible for the copyright infringement on basis of the creative elements other than current news reports which transmit simple facts."[74]

---

73) Judgment rendered by the Korean Supreme Court on September 14, 2006, Case No. 2004 Do 5350.

74) Article 7 of the KCA prescribes that No work which falls under any of the following subparagraphs shall be protected under this Act:
to 4. [omitted]
5. Current news reports which transmit simple facts.

2. Exceptions and Limitations to Protection of Economic Rights

2.1. Reproduction for judicial proceedings, etc. (Article 23 of the KCA)[75]

Article 23 of the KCA allows the reproduction of a copyrighted work for judicial proceedings or for the internal use of legislative or administrative offices. It also provides that such permission is circumscribed by the need to avoid unreasonable prejudice to the interests of the copyright holder in light of the nature of the work and the number of copies and nature of reproduction.

2.2. Exploitation of political speech etc. (Article 24 of the KCA)[76]

The KCA permits the exploitation by any means of political speeches delivered in public and statements made in courts, the National Assembly, or municipal assemblies.

---

75) Article 23 (Reproduction for Judicial Proceedings, etc.) It shall be permissible to reproduce a work if and to the extent deemed necessary for the purpose of judicial proceedings and of internal use in the legislative or administrative organs; provided that such reproduction does not unreasonably prejudice the interests of the owner of author's property rights in the light of the nature of the work as well as the number of copies and the nature of reproduction.

76) Article 24 (Use for the Purpose of Political Speeches, etc.) It shall be permissible to exploit, by any means, political speeches delivered in public and statements made in the courts of law, the National Assembly, or municipal assemblies unless the exploitation is made after editing the speeches or statements of the same author.

2.3. Use of public works (Article 24 bis of the KCA)[77]

According to Section 1 of Article 24 bis of the KCA, governmental works and works of local municipalities can be used by their users without authorization of the government or local municipalities.

2.4. Reproduction for the purpose of school education (Article 25 of the KCA)[78]

---

77) Article 24 bis (Free Use of Public Works) (1) A work produced in the course of employment and already made public by the State or a local government, or a work of which the author's economic right is owned in its entirety by the State or a local government under a contract, may be used without permission of the State or a local government: Provided, That the same shall not apply when the work falls under any of the following cases:
1. Where it includes any information pertaining to national security;
2. Where it corresponds to an individual's privacy or confidential business information;
3. Where it includes any information of which disclosure is restricted under other Acts;
4. Where it is registered with the Korea Copyright Commission under Article 112, and is managed as State-owned property under the State Property Act or as public property under the Public Property and Commodity Management Act.
(2) The State may establish and enforce policies to promote the use of public works, as prescribed by Presidential Decree, in order to promote the use of works which are produced and made public by a public institution or of which the author's property right is owned in its entirety under a contract by a public institution pursuant to Article 4 of the Act on the Management of Public Institutions.
(3) When it is acknowledged as necessary for free use, the State or a local government may permit the use of public works among those prescribed in paragraph (1) 4, as prescribed by Presidential Decree, notwithstanding the State Property Act or the Public Property and Commodity Management Act.

78) Article 25(Use for the Purpose of School Education, etc.) (1) A work already being made public may be reproduced in textbooks to the extent deemed necessary for the purpose of education at high schools, their equivalents or lower level schools.
(2) Educational institutions established by special laws, Pre-Elementary Education Act, Elementary and Secondary Education Act, or Higher Education Act or operated by the state or local government or institutions belonging to state or local government and supporting teaching of educational institutions mentioned above may reproduce, perform publicly, display or transmit to the public a part of a work already being made public

to the extent deemed necessary for the purpose of class teaching. Provided that the use of the whole parts of a work is deemed inevitable in the light of the nature of a work, and the purpose and manner of its exploitation, etc., use of the whole parts of the work shall be permissible.

(3) It shall be permissible for a person who receives education in the educational institutions described in Paragraph (2) to reproduce or interactively transmit the work already being made public within the limit regulated in paragraph (2) to the extent deemed necessary for the purpose of class teaching.

(4) A person who intends to exploit a work pursuant to Paragraphs (1) and (2) shall pay compensation to the owner of author's property rights according to the criteria for compensation as determined and published by the Minister of Culture and Tourism. Reproduction, distribution, public performance, broadcasting or interactive transmission of a work done at high schools, their equivalents or lower level schools as prescribed under Paragraph (2) is not obliged to pay compensation.

(5) The right to be compensated pursuant to Paragraph (4) shall be exercised by an organization which satisfies all of the following conditions and is regulated by the Minister of Culture, Sports, and Tourism. The consent of the organization shall be necessary when the Minister of Culture, Sports, and Tourism appoints such organization. The organization shall:

1. Consist of the persons who hold the right to receive compensation(hereinafter referred to as compensation right holder);
2. Not be for the purpose of profit making; and
3. Have ample capability to carry out its duties including collecting, distributing the compensation.

(6) When a compensation right holder requests, the organization regulated under Paragraph (5) may not deny exercising the right of a compensation right holder even if the compensation right holder is not a member of the organization. In this case, the organization shall have the authority to exercise judicial or non-judicial acts with regard to the right under its name.

(7) The Minister of Culture, Sports, and Tourism may cancel the appointment in cases where the organization under Paragraph (5) falls under any of the followings

1. Where an organization fails to satisfy the conditions stipulated in Paragraph (5);
2. Where an organization violates the work regulation with regard to compensation; and
3. Where it is concerned that the interest of a compensation right holder could be harmed due to the organization's suspension of its duties with regard to compensation for a considerable period of time.

(8) The organization regulated under Paragraph (5) may use the undistributed compensations, the date of notification of which has been made three or more years ago, for the public interest after obtaining authorization of the Minister of Culture, Sports, and Tourism.

(9) The necessary matters for appointment and cancellation of the organization, work regulations, notification of distribution of compensation, authorization of exploitation of undistributed compensation for the public interest, and etc. in accordance with Paragraphs

Under Article 25, the KCA allows certain limitations on copyright in order to promote public education.

First, it allows a work already made public to be reproduced in textbooks to the extent necessary for education at high schools and their equivalent or lower level schools.[79)]

Second, for the purpose of class teaching, it allows not only the reproduction, but also the public performance, broadcast and interactive transmission of a work -- in part or even in its entirety -- already made public. Particularly noteworthy among the allowable acts is interactive transmission, indicating the intent of the law to go beyond the physical borders of the traditional classroom and promote e-learning. If it cannot be avoided because of the nature of the work and the purpose of exploitation, the allowable acts may be exercised even in respect to the work as a whole. They may be exercised by educational institutions operated by the state or local governments or established by special laws, the Elementary and Secondary Education Act, or the Higher Education Act.[80)]

The exploitation of copyrighted materials under the first and second paragraphs is allowed, but it is not free for everyone. As a rule, the person who seeks to exploit them is required to pay compensation to the owner of the copyright. However, no compensation is required for the public performance, broadcast and interactive transmission of a work done at high schools and their equivalent or lower level schools.[81)]

5, 7 and 8 shall be determined by the Presidential Decree.

(10) In the case where an educational institution conducts interactive transmission pursuant to Paragraph (2), necessary measures determined under the Presidential Decree including reproduction prevention measures shall be taken in order to prevent infringement on copyright and the rights protected under this Act.

79) Article 24 (1) of the KCA.

80) Article 24 (2) of the KCA.

81) Article 24 (4) of the KCA.

One other condition is also prescribed. For the interactive transmission of copyrighted work, all schools are required to take necessary measures as may be determined by Presidential Decree, including reproduction prevention measures, to prevent infringement of copyright and other rights protected by the copyright law.[82]

Article 25 also allows a student or one who receives education in the enumerated institutions to reproduce or interactively transmit works to the extent necessary for class teaching. Unlike the schools referred to in the first and second paragraphs of the law, the student is not required to pay compensation or to implement reproduction prevention measures.

2.5. Use for current news report(Article 26 of the KCA)[83]

The KCA permits the reproduction, distribution, public performance, or public communication of a work for purposes of reporting current events by means of broadcast, newspapers or by other means.

2.6. Reproduction of articles or comments on current events (Article 27 of the KCA)[84]

Article 27 of the KCA permits the reproduction, distribution or broadcast of news articles and editorials about politics, economy, society, culture and

82) Article 24 (10) of the KCA.

83) Article 26 (Use for Current News Report) In the case of reporting current events by means of broadcasts, newspapers or by other means, it shall be permissible to reproduce, distribute, perform publicly, or communicate to the public a work seen or heard in the course of the event, to the extent justified by the information purpose.

84) Article 27 (Reproduction, etc of Current News Articles and Editorials) Current new articles and editorials about politics, economy, society, culture and religions published in the newspapers and Internet newspapers pursuant to Article 2 of Act on Promotion of Newspapers, etc. or in the news agency under the provisions of Article 2 of News Telecommunication Promotion Act may be reproduced, distributed, or broadcasted by other media organizations, unless any indications of prohibition of exploitation exist.

religion published in the newspapers and Internet newspapers. Those acts may not be exercised if the prohibition is indicated in the materials sought to be used.

2.7. Quotations from works made public (Article 28 of the KCA)[85]

Another limitation on copyright is found on Article 28 of the KCA, which allows the making of quotations from a work already made public. The act must be within a reasonable limit for news reporting, criticism, education and research, and it must be compatible with fair practice.

In Thumbnail Images case,[86] the defendant used the infringed's photographic works as the latter's images for image search without the latter's permission in a search engine. The defendant displayed the images 3 cm in width and 2.5 cm in length of the infringed's photographic works without the latter's permission. The defendant was accused of the violation of the infringed's copyright. The issue here is how to determine whether quotations from a work already made public are within a reasonable limit for news reporting, criticism, education and research, etc. and compatible with fair practice in accordance with Article 25 (currently Article 28) of the KCA. The Thumbnail Images Court held that Article 25 (currently Article 28) of the KCA prescribes that a work already made public can be quoted within a reasonable limit for news reporting, criticism, education and research, etc. and compatible with fair practice. Whether a work already

85) Article 28 (Quotations from Works Made Public) It shall be permissible to make quotations from a work already being made public; provided that they are within a reasonable limit for news reporting, criticism, education and research, etc. and compatible with fair practice.

86) See Thumbnail Images case (Judgment rendered by the Korean Supreme Court on February 9, 2006, Case No. 2005Do7793).

made public was quoted within a reasonable limit for news reporting, criticism, education, and research, etc. and compatible with fair practice should be determined by the court while the court takes into account the purpose of quotation, the characteristics of the copyrighted material, the contents and portion quoted, the method and form by which the copyrighted material was quoted, the general perception of readers, and the probability of substitution for the demand on the original work. The defendant used the infringed's photographic works as the latter's images for image search without the latter's permission in a search engine. The former's use falls under the scope of Article 25 (currently Article 28) of the KCA. The Thumbnail Images Court's analysis follows the holding of Kelly v. Arriba Soft Corporation, 280 F.3d 934 (2002). Arriba Soft Corporation court held that: (1) operator's use of owner's images as thumbnails in its search engine was a fair use; (2) as matter of first impression, operator's importation of owner's full-sized images into frame on operator's web site infringed owner's right to publicly display his works; and (3) use of full-sized images through inline linking and framing was not a fair use.

In Dambi Sohn-Related UGC case,[87] the plaintiff was Chung-Hyun Woo (hereinafter A) whereas the defendant was the Korea Music Copyright Association (KOMCA) & NHN Inc. The facts of this case were as follows:

A took a video on which his 5 year-old daughter appeared. On that video, she sang and danced to the song entitled as Crazy. Afterword, A posted the 53 second-long motion picture on his blog operated NHN Inc. KOMCA asked NHN Inc. for the take-down of the UGC file. So, A sought a declaratory judgment that he did not violate copyright collectively managed by KOMCA.

87) See Dambi Sohn-Related UGC case (Judgment rendered by Seoul High Court on Feb. 18, 2010, Case No. 2010Na35260).

The court in Dambi Sohn-Related UGC case opined that A did not violate copyright collectively managed by KOMCA, relying on Article 28 of the KCA. The court in Dambi Sohn-Related UGC case held that Article 28 of the Korean Copyright Act prescribes that a work already made public can be quoted within a reasonable limit for news reporting, criticism, education and research, etc. and compatible with fair practice. Whether a work already made public was quoted within a reasonable limit for news reporting, criticism, education, and research, etc. and compatible with fair practice should be determined by the court while the court takes into account the purpose of quotation, the characteristics of the copyrighted material, the contents and portion quoted, the method and form by which the copyrighted material was quoted, the general perception of readers, and the probability of substitution for the demand on the original work.

Article 35 ter of the KCA will be cumulatively applied to Dambi Sohn-Related UGC case following 2011 revision of Copyright Act in Korea, which adopted comprehensive fair use doctrine.

2.8. Public performance and broadcasting for non-profit purposes(Article 29 of the KCA)[88]

88) Article 29 (Public Performance and Broadcasting for Non-Profit Purposes) (1) It shall be permissible to perform publicly or broadcast a work already made public for non-profit purposes and without receiving any benefit in return from audience, spectators or third persons: Provided, That the same shall not apply to cases where the stage performers are paid any normal remunerations.
(2) It shall be permissible to reproduce and play for the general public any commercial music records or cinematographic works, if no benefit in return for the relevant public performance is received from audience or spectators: Provided that the same shall not apply to the cases as prescribed by Presidential Decree.

Under the KCA, another limitation on the copyright of a work already made public is its public performance or broadcast for non-profit purposes. These acts are allowed if no fees are charged on the audience, spectators or third persons and no remunerations are paid to the performers. In like manner, commercial phonograms and cinematographic works may be reproduced and played for the public if no admission fee is charged to the audience or spectators.

In KOMCA et al. v. Starbucks,[89] the plaintiffs were KOMCA, which referred to the Korea Music Copyright Association, and it represents right holders of musical composition, the Korean Association of Phonogram Producers (KAPP), and KMCIA, which used to be the Music Industry Association of Korea but was practically succeeded and replaced by the Korea Music Content Industry Association. On the other hand, the defendant was Starbucks in this case. In this case, Starbucks have not been paying for the music it have been playing at its stores. Starbucks played music at its stores using CDs it purchased and did not pay for the public performance of the music. In this case, Starbucks argued that the purchased CDs were "CDs for sale" under Article 29(2) of the KCA and thus it was not necessary for her to obtain permission from the right holder in Korea. On the other hand, the plaintiff argued that Starbucks had exploited the songs as important factors of business strategy. The court of the first instance in KOMCA et al. v. Starbucks[90] ruled for Starbucks, holding that "playing the purchased CDs at the Starbucks coffee shops is not public

89) Judgment rendered by the Korean Supreme Court on May 10, 2012, Case No. 2010Da87474.

90) Judgment rendered by Seoul Central District Court on April 29, 2009, Case No. 2008Gahap44196.

performance presented at the places of business, whose part of the main contents of business is having the people appreciate music or cinematographic works by equipping with the equipments fit for appreciating music or cinematographic works in accordance with Article 11 (1) (c) of the Enforcement Decree of the KCA."[91] On appeal, the Seoul High Court[92] disagreed with the holding of the Seoul Central District Court. In other words, the Seoul High Court reversed the lower court's decision, opining that "Starbucks' playing of CDs at its stores [without permission] infringes upon the public performance right of the right holder. ... Starbucks should not use the musical work of rights at its stores [without permission]." The appellate court acknowledged copyright infringement because the CDs at case are not "CDs for sale under Article 29(2) of the KCA and the public performance rights for musical work of arts cannot be recognized." Finally, the Korean Supreme Court affirmed the Seoul High Court's holdings and judgment.[93]

---

91) Article 11 (Exception to Public Performance with respect to Commercial Music Records, etc.) of the Enforcement Decree of the KCA (Presidential Decree) prescribes as follows:
"The term cases prescribed by Presidential Decree in the proviso to Article 29 (2) of the Act means public performances falling under any of the following subparagraphs:
1. A public performance in the following items presented at a place of business pursuant to subparagraph 8 of Article 21 of the Enforcement Decree of the Food Sanitation Act.
(a) A public performance presented at an entertainment pub restaurant pursuant to subparagraph 8 (c) of Article 21 of the Enforcement Decree of the Food Sanitation.
(b) Omitted
(c) A public performance presented at the places of business that do not fall under item (a), whose part of the main contents of business is having the people appreciate music or cinematographic works by equipping with the equipments fit for appreciating music or cinematographic works;
2-8. Omitted."

92) Judgment rendered by Seoul High Court on September 9, 2010, Case No. 2009Na 53224.

93) Judgment rendered by the Supreme Court on May 10, 2012, Case No. 2010Da87474.

2.9. Reproduction for private use(Article 30 of the KCA)[94]

Under Article 30 of the KCA, a person may by himself reproduce a work already made public for his personal or family use or a similar use by a limited circle. Underscoring the requirement that the reproduction be conducted by that person, the law also requires that it must not be done in a photocopying machine set up for the public use.

2.10. Reproduction in libraries, etc.(Article 31 of the KCA)[95]

---

94) Article 30 (Reproduction for Private Use) It shall be permissible for a user to reproduce by himself a work already being made public for the purpose of his personal, family or other similar uses within a limited circle; provided that this shall not apply to the reproduction by a photocopying machine that is set up for the public use.

95) Article 31(Reproduction, etc. in Libraries, etc.) (1) Libraries under the Library Act and the facilities (including the heads of the relevant facilities; hereinafter referred to as libraries, etc.) as prescribed by Presidential Decree among those facilities which provide books, documents, records and other materials (hereinafter referred to as books, etc.) for public use may reproduce the works by utilizing books, etc. held by the libraries, etc. (in the case of Subparagraph 1, including the books, etc. reproduced by or interactively transmitted to the libraries, etc. in accordance with the provision of Paragraph 3 hereof) in any of the following cases: provided that in the case of Subparagraphs 1 and 3, the works may not be reproduced in digital format.

1. Where, at the request of a user and for the purpose of research and study, a single copy of a part of books, etc. already made public is provided to him;

2. Where it is necessary for libraries, etc. to reproduce books, etc. for the purpose of preserving such books, etc.; and 3. Where libraries, etc. provide other libraries etc. with a reproduction of books, etc. that is out of print or scarcely available for similar reasons at the request of other libraries etc. for their collection purpose.

(2) Libraries, etc. may reproduce or interactively transmit their books, etc. to allow users to peruse them in such libraries, etc. by using devices capable of information processing such as computers, etc. In such case, the number of users who may peruse them at the same time shall not exceed the number of copies of such books, etc. held by the libraries, etc. or authorized to be used by the persons with copyrights or other rights protected

Article 31 of the KCA allows libraries and other similar facilities to reproduce books or interactively transmit them in specific situations. First, they may reproduce them at the request of a user for research and study; in such case, they may reproduce a single copy of a part of a book already made public.[96] Second, they may also reproduce a book for the purpose of preserving them.[97] Third, at the request of other libraries for their collection purposes, a certain library may reproduce books that are out of print or scarcely available.[98] Fourth, a library may reproduce or interactively

---

according to this Act.

(3) Libraries, etc. may reproduce or interactively transmit their books, etc. to allow users in other libraries, etc. to peruse them by using computers, etc.; provided that, in those cases where all or a part of the books, etc. have been published for sale, such books, etc. shall not be reproduced or interactively transmitted unless a period of five years has elapsed since the publication date of such books, etc.

(4) In reproducing books, etc. pursuant to Subparagraph 2 of Paragraph (1), Paragraph (2) or Paragraph (3), libraries, etc. shall not reproduce such books, etc. in digital format if they are being sold in digital format.

(5) In reproducing books, etc. in digital format pursuant to Subparagraph 1 of Paragraph (1), or reproducing or interactively transmitting books, etc. for the purpose of allowing perusal inside other libraries, etc. pursuant to Paragraph (3), libraries, etc. shall pay the owners of authors' property rights compensation in accordance with the standards determined and published by the Minister of Culture, Sports, and Tourism; provided that said provision shall not apply to books, etc. (excluding those books, etc. which are, in part or in whole, published for a sales purpose) regarding which the state, local governments or schools as provided in Article 2 of the Higher Education Act hold authors' property rights.

(6) The regulation regarding compensation in Paragraph 5 to Paragraph 9 of Article 25, shall apply mutatis mutandis to foregoing Paragraph 5 with regard to distribution of compensation, etc.

(7) If books, etc. are reproduced or interactively transmitted in digital format pursuant to the foregoing Paragraphs (1) through (3), libraries, etc. shall take necessary measures as provided by Presidential Decree such as reproduction prevention measures in order to prevent infringement of copyrights and other rights protected under this Act.

(8) If National Library of Korea collect books, etc. to preserve online materials in accordance with Article 20 bis of Library Act, they can be reproduced.

96) Article 31 (1) (1) of the KCA.

97) Article 31 (1) (2) of the KCA.

98) Article 31 (1) (3) of the KCA.

transmit books to allow users to peruse them inside its own building using computers or similar devices. In such case, the number of users who may peruse them at any given time cannot exceed the number of copies of such books held by that library.[99] Fifth, a library may also reproduce or interactively transmit its books to allow users in other libraries to peruse them through computers or similar devices. In such case, where the books have been published for sale, they can be reproduced or interactively transmitted only after five years from the publication date.

There are conditions for the exercise of those acts that limit copyright. If the books are being sold in digital format, they cannot be reproduced in digital format. This prohibition applies to the reproduction of works in order to preserve them, or in order to enable users in the same library or in other libraries to peruse them.

In other instances, compensation must be paid to the owner of the copyright. This requirement pertains to reproduction in digital format at the request of a user or to enable users in other libraries to peruse them.

In each of the five instances enumerated above that involve the reproduction or interactive transmission of a work in digital format, libraries must also institute means like reproduction prevention measures in order to prevent infringement of copyright and other protected rights.

2.11. Reproductions for examination questions (Article 32 of the KCA)[100]

99) Article 31 (2) of the KCA.

100) Article 32(Reproduction for Examination Questions) It shall be permissible to reproduce and distribute a work already being made public in questions of entrance examinations or other examinations of knowledge and skills, to the extent deemed necessary for that purpose; provided that it is for non-profit purposes.

Article 32 of the KCA permits the reproduction of a work already made public in questions of entrance examinations or other examinations of knowledge and skills. But it requires that the reproduction is made only to the extent deemed necessary to accomplish the purpose, and that it is done not for profit. The prevailing view is that posting exams at a school homepage to educate students who did not take classes is not covered by Article 32. Also, the prevailing view is that online exam is not covered by Article 32 because it only covers reproduction and distribution of a work in exam questions at school. However, I think those examples can be covered by Article 35 bis of the KCA.

2.12. Reproductions in braille(Article 33 of the KCA)[101]

Article 33 of the KCA provides that published works may be reproduced and distributed in Braille for visually impaired persons. In the same vein, facilities that promote the welfare of those persons may record a published oral or written work, or reproduce, distribute or interactively transmit it in a recording form for their exclusive use. In such event, the use of those works must not be for profit-making purposes. The law does not prescribe the payment of any compensation for the use of copyrighted materials under this provision. Likewise, it makes no distinction between tangible and

101) Article 33 (Reproduction, etc. for Visually Impaired Persons, etc.) (1) Published works may be reproduced and distributed in Braille for visually impaired persons, etc.
(2) The facilities (including the heads of relevant facilities) as prescribed by Presidential Decree among facilities for the purpose of promoting the welfare of visually impaired persons, etc. may record a published literary work, or reproduce, distribute or interactively transmit such work in a recording form for the exclusive use of visually impaired persons, etc. in order to provide such for the use of visually impaired persons, etc. without using it, in any way, for profit-making purposes.
The scope of visually impaired persons, etc. as provided in the foregoing Paragraphs (1) and (2) shall be determined by Presidential Decree.

digital copies. Clearly, the law seeks to provide the visually impaired the same access to protected works that other persons enjoy.

2.13. Reproduction, etc. for acoustically impaired persons, etc.(Article 33bis of the KCA) (revised on July 16, 2013 and effective since Oct. 17, 2013)[102]

Anyone may transform disclosed works into sign language, and reproduce, distribute, perform or make public transmission, for acoustically impaired persons.[103] This provision was adopted in 2013 to extend the free use exceptions to acoustically impaired persons.[104]

2.14. Ephemeral sound or visual recordings by broadcasting organizations(Article 34 of the KCA)[105]

---

102) Article 33bis (Reproduction, etc. for Acoustically Impaired Persons, etc.) (Revised on July 16, 2013, Effective since Oct. 17, 2013)
(1) Anyone may transform disclosed works etc. into sign language, and reproduce, distribute, perform or make public transmission, for acoustically impaired persons, etc.
(2) The facilities (including the heads of relevant facilities) as prescribed by Presidential Decree among facilities for the purpose of promoting the welfare of acoustically impaired persons, etc., may transform voices and sounds included in disclosed copyrighted works etc. into the way in which they can recognize such as subtitles, or reproduce, distribute, perform, or make public transmission such subtitles etc. for their use to the extent to which it can provide such for the use of acoustically impaired persons, etc. without using it, in any way, for profit-making purposes.
(3) The scope of acoustically impaired persons, etc. as provided in the foregoing Paragraphs (1) and (2) shall be determined by Presidential Decree.

103) Article 33 bis (1) of the KCA.

104) The KCA revised on July 16, 2013 and effective since October 17, 2013 (Act No. 11903).

105) Article 34(Ephemeral Sound or Visual Recordings by Broadcasting Organizations)
(1) Broadcasting organizations with the authority to broadcast a work may make ephemeral sound or visual recordings of the work for the purpose of their own broadcasting and by the means of their own facilities.
(2) Sound or visual recordings made pursuant to Paragraph (1) may not be kept for a

Article 34 of the KCA allows broadcasting organizations to make ephemeral sound or visual recordings of a work for the purpose of their own broadcast.

2.15. Exhibition or reproduction of artistic works, etc (Article 35 of the KCA)[106]

The exhibition or public display of an original or a reproduction of a work of art is one of the economic rights of the creator under the KCA.[107] Article 35 of the law enumerates limitations to this right. This provision allows the owner of that original to exhibit the work in an original form. But this does not allow the owner to exhibit it permanently in a street or park, outside the wall of a building, or other places open to the public.

---

period exceeding one year from the date of sound or visual recording, unless they are kept as materials for public records at places as prescribed by the Presidential Decree.

106) Article 35(Exhibition or Reproduction of Works of Art, etc.) (1) The owner of the original of a work of art, etc. or a person who has obtained the owner's authorization, may exhibit the works in its original form; provided that this provision shall not apply to the case of that the work of art is to be permanently exhibited in a street or park, outside the wall of a building, or other places open to the public.
(2) Works of art, etc. exhibited at all times at an open place as referred to in the proviso of Paragraph (1) may be reproduced and used by any means, except those falling under any of the following cases:
1. Where a building is reproduced in another building;
2. Where a sculpture or a painting is reproduced in another sculpture or a painting;
3. Where the reproduction is made in order to exhibit permanently at an open place, as prescribed under Paragraph (1); and
4. Where the reproduction is made for the purpose of selling its copies.
(3) A person who exhibits works of art, etc. under Paragraph (1), or who intends to sell originals of works of art, etc. may reproduce and distribute them in a pamphlet for the purpose of explaining and introducing them.
(4) A portrait or a similar photographic work produced by consignment shall not be exploited without the consent of the consignor.

107) Article 19 of the KCA.

Article 35 restricts the copyright owner's right not only to the public display of the work, but also to its reproduction. A work of art exhibited at all times in an open space may be reproduced, but subject to certain exceptions. Thus, a building cannot be reproduced in another building, a painting cannot be reproduced in another painting, and a sculpture cannot be reproduced in another sculpture. Furthermore, the reproduction cannot be made for purposes of exhibiting it permanently at an open space or for selling it.

On the other hand, works of art may be reproduced and distributed in a pamphlet for the purpose of explaining and introducing them. This right is vested on the person who may lawfully exhibit works of art or who intends to sell originals of works of Article

2.16. Temporary copying (Article 35 bis of the KCA)[108)]

Under Article 35 bis of the KCA, the term temporary copying falls under the umbrella of reproduction. Hence, as a countermeasure against inclusion of temporary copying into reproduction, a comprehensive fair use doctrine was adopted.

108) Article 35 bis (Temporary Copying in the Course of the Exploitation of a Copyrighted Work) A person who exploits a copyrighted work on a computer can copy the copyrighted work temporarily on the computer to the extent to which it is deemed necessary for its smooth and efficient information processing. Provided that it does not apply when the exploitation of the copyrighted work infringes its copyright.
Under Article 35 bis of the Korean Copyright Act, the term temporary copying falls under the umbrella of reproduction. Hence, as a countermeasure against inclusion of temporary copying into reproduction, a comprehensive fair use doctrine was adopted.

2.17. Comprehensive fair use doctrine (Article 35ter of the KCA)[109]

In Lyprinol Case,[110] the Korean Supreme Court addressed the scope of free use exceptions as compared to fair use doctrine for the first time even though the Lyprinol case dealt with one brought before the KCA adopted fair use doctrine. The Court held that the scope of Article 28 of the KCA should be strictly construed.

In terms of KeSPA v. Blizzard, fair use doctrine needs to be addressed. The Korean e-Sports Player Association (KeSPA), a quasi-official body organized and maintained with governmental approval, foster and promote e-sports in Korea.[111] KeSPA has played a key role in organizing tournaments, offering career guidance for professional game players, dealing with aspects of marketing and public relations, and negotiating broadcast agreements with cable and television companies.[112] The dispute between KeSPA and

---

109) Article 35 ter (Fair Use of a Copyrighted Work) (1) Any person can exploit a copyrighted work for report, criticism, education, research etc. unless its exploitation conflicts with the way of its ordinary exploitation and unreasonably prejudices the just interests of its copyright holder except that it falls under Arts 23 to 35 bis, or 101 ter to 101 uinquies.

(2) When a court determines whether the exploitation of a copyrighted work falls under section 1 of Art. 35 ter, it should take into account the followings:

1. The purpose and nature of the exploitation, such as its commercial or non-commercial nature.
2. The type and usage of the copyrighted work
3. The amount and importance of the exploited portion in the whole copyrighted work
4. The effect of the exploitation of the copyrighted work on current or potential market or value of the copyrighted work. As far as relationship between fair use exception and free use exceptions is concerned, overlapping application between them is recognized. Hence, Arts. 23 to 35 bis are illustrative lists of fair use.

110) Judgment Rendered by Korean Supreme Court on Feb. 15, 2013, Case No. 2011Do5835.

111) T.L. Taylor, Raising the Stakes: E-sports and the Professionalization of Computer Gaming 161 (2012).

112) Id.

Blizzard in terms of copyright resulted from KeSPA's negotiation of broadcast agreements for StarCraft without Blizzard's authorization. KeSPA publicly took the position that the negotiation of broadcast agreements with cable and TV outlets really concerned player performances on a platform that had become an industry standard, and not the platform itself.[113] The dispute between KeSPA and Blizzard raises a fundamental issue in e-sports. That is, who, the game developer or the game players, has proprietary rights as to game output, for broadcast or other purposes? In this regard, the answer will depend on the types of copyrighted work generated during e-sports play, and how to allocate copyright to creators of game output including game developers and game players. Hence, we need to delve into the issues such as functional and material constraints, the rules of the game and games as systems, and issues as to whether game output is authorship of a derivative work or joint authorship as well.

In Korea, some might argue that cable or TV broadcast of StatCraft game on cable or TV outlets constitute fair use, taking into account 4 factors prescribed under Article 35 ter (2) of the KCA.[114] In other words, the courts in Korea should consider the purpose and nature of the exploitation, such as its commercial or non-commercial nature, the type and usage of the copyrighted work, the amount and importance of the exploited portion in the whole copyrighted work, and the effect of the exploitation of the copyrighted work on current or potential market or value of the copyrighted work As to the first factor, the purpose and nature of broadcast of StarCraft game are commercial. As to the second factor, e-sports such as StarCraft game can contribute to public interests which promote accumulation of a

113) Dan L. Burk, Owning E-Sports: Proprietary Rights in Professional Computer Gaming, 161 U.Pa.L.Rev.1535, 1543 (2013).

114) Seung Jung Oh, Copyright Law, Pakyoung Publishing Co., 758 (3rd ed. 2013)

variety of cultural heritages. The third factor can serve to play in favor of Blizzard. The fourth factor can play against Blizzard because the broadcast of StarCraft game establishes independent markets apart from StarCraft game itself.[115]

2.18. Use by means of translations, etc. (Article 36 of the KCA)[116]

Article 36 of the KCA limits the right of the copyright holder to make derivative works like translation, arrangement, or adaptation. In cases where the work is used for school education under Article 25, or publicly performed or broadcasted under Article 29, or reproduced for private use under Article 30, the user is allowed to make a translation, arrangement or adaptation of that work.

The work may also be translated if it is used in judicial proceedings under Article 23, for current news report under Article 26, for examination questions under Article 32, or for visually impaired persons under Article 33. In cases where political speeches or statements made in court, national assembly or municipal assemblies are exploited under Article 24, a current news article or editorial is reproduced under Article 27, or a quotation is made from a published work under Article 28, the user can also make a translation of the work.

---

115) Id.

116) Article 36 (Use by Means of Translation, etc.) (1) If a work is used in accordance with Articles 25, 29, 30, or 35 ter, the work may be used by means of translation, arrangement, or adaptation.
(2) If a work is used in accordance with Articles 23, 24, 26, 27, 28, 32, or 33, the work may be used by means of translation.

2.19. Indication of sources[117)]

A person who uses a work subject to free use or fair use exceptions shall indicate its sources, except the cases as prescribed under Articles 26, 29 to 32, 34, or 35 bis of the KCA. The indication of the sources shall be made clearly in the manner and to the extent deemed reasonable by the situation in which the work is used. If the real name or pseudonym of the author of a work is indicated, such real name or pseudonym shall be indicated.

2.20. Exception to application[118)]

Articles 23, 25, 30 and 32 shall not be applied to a computer program work.

2.21. Relationship with author's moral rights.[119)]

As far as free use and fair use exceptions are concerned, no provisions may be interpreted as affecting the protection of author's moral rights.

---

117) Article 37 (Indication of Sources) (1) A person who uses a work pursuant to this subchapter shall indicate its sources, except the cases as prescribed under Articles 26, 29 to 32, 34, or 35 bis.
(2) The indication of the sources shall be made clearly in the manner and to the extent deemed reasonable by the situation in which the work is used. If the real name or pseudonym of the author of a work is indicated, such real name or pseudonym shall be indicated.

118) Article 37bis (Exception to Application) Articles 23, 25, 30 and 32 shall not be applied to a computer program work.

119) Article 38 (Relationship with Author's Moral Rights) No provisions of this subchapter may be interpreted as affecting the protection of author's moral rights.

3. Duration

Copyright subsists for a variety of lengths in different countries. The duration of copyright protection can be dependent upon several factors, including the type of work (e.g. musical composition, novel, database, computer program), whether the work has been published or not, and who, an individual or a corporation, has created. In most nations, the default length of copyright protection is the life of the author plus either 50 or 70 years. Under most countries' laws, copyrights expire at the end of the calendar year in question. In principle, an author's economic right to a copyrighted work is effective during his or her lifetime and for 70 years after his or her death. However, a different protection term may apply as to certain types of work, such as cinematographic works, databases, computer programs, or joint works. Because the FTA between Korea and EU was ratified by both South Korea and EU, implemented by the South Korean National Assembly, and became effective since July 1st, 2011, the copyright period for royalty payments, in general, will be extended to 70 years from the current 50 years after the original copyright holders dies. However, the new duration of copyright protection will be effective within 2 years after the entry into the force of the FTA between Korea and EU. That is, it has been effective since July 1st, 2013.

4. Licensing Copyright

Article 46, paragraph 1 of the Korean Copyright Act (hereinafter KCA) prescribes that the holder of the author's economic right may grant another person authorization to exploit the work. Article 46, paragraph 2 of the KCA states that the person who obtained such authorization pursuant to paragraph 1 shall be entitled to exploit the work in such a manner and within the limit of such conditions so authorized. In addition, Article 46, paragraph 3 of the KCA stipulates that the right of exploitation as authorized under paragraph 1 may not be transferred by assignment to a third party without the consent of the holder of the author's economic right. Based on Article 46 of the KCA, the licensee has a contractual right to exploit the copyrighted work of the licensor.[120)]

In addition to these provision, there are special provisions on the right of exclusive publication (Articles 57 to 62 of the KCA) and the publishing right (Articles 63 to 63 bis of the KCA). A contract to establish a right of exclusive publication is a special type of exclusive license recognized in America. The right of exclusive publication was adopted to implement the Free Trade Agreement between Korea and USA (hereinafter KORUS FTA), which was finalized on April 2, 2007 and became effective as of March 15, 2012. Article 18.10, paragraph 4 of the KORUS FTA states that each Party shall make available to right holders27 civil judicial procedures concerning the enforcement of any intellectual property right. Pursuant to footnote 27 of Article 18.10, paragraph 4 of the KORUS FTA, it makes clear that this includes a federation or an association having legal

120) Seung-Jong Oh, supra note 68, at 523; Hae Wan Lee, Copyright Law, Pakyoung Publishing Co., 371-72 (2nd ed. 2012).

standing and authority to assert such rights, and also includes a person that exclusively has any one or more of the intellectual property rights encompassed in a given intellectual property. However, the scope within which exclusive publication is allowed in Korea is narrower than that of exclusive licensing in America. According to Article 57 of the KCA, the owner of the economic right can establish a right of exclusive publication to publish[121] or reproduce and forward[122] his/her copyrighted work. In other words, the right of exclusive publication covers only either the right of reproduction and distribution or the right of reproduction and forwarding, so that it is prohibited to encompass the right of public performance, display, or rental or to make derivative work.

As far as the publishing right is concerned, a person who holds the right to reproduce and distribute a copyrighted work may establish the right to publish such work for a person who intends to publish such work in documents or pictures by printing them or by another method similar thereto.[123] The holder of the publishing right may hold the right to publish the original copy of the work that is the object of the publishing right as prescribed by a publishing contract.[124] Since the right of exclusive publication

121) See Article 2, subparagraph 24 of the KCA, stating that "the term "publication" means a reproduction and distribution of the works or music records for the demand of the public."

122) See Article 2, subparagraph 10 of the KCA, prescribing that "the term "forwarding" means to provide works, etc. for use so that the members of the public may have access at the time and place of their own choice among the public transmission, including transmission to be done accordingly." See cf. Article 2, subparagraph 7, stating that "the term "public transmission" means transmitting works, stage performances, music records, broadcasting or database (hereinafter referred to as "works, etc.") by means of radio communication or wire communication so that the public may receive them or have access to them."

123) Article 63, paragraph 1 of the KCA.

124) Article 63, paragraph 2 of the KCA.

was introduced into the KCA, provisions on the publishing right seem to be redundant. However, taking into account domestic publishers' strong objections to the deletion of provisions on the publishing right, the provisions on the publishing right survived. Suppose that a copyright infringer pirates two pages of a 1000 page-long book of a copyright holder. The holder of the publishing right on the l000 page-long book will not win the case brought against the infringer because the holder of the publishing right does not hold the right to publish some portion of the original copy of the work, but has the right to publish the original copy of the work. Nonetheless, the holder of exclusive publication can successfully bring an action against the copyright infringer.

In this regard, it should be discussed whether the general principles of contract law in the Korean Civil Code are applied to a copyright licensing contract. The Korean case law tends to rely on the general principle of contract is a copyright assignment contract or a copyright licensing contract.[125] According to Jeong Sung Shin et al. vs. Jiku Corp.,[126] the Court held that "the interpretation of a legal act generally makes clear the objective meaning which parties bestow on its representative act. When its objective meaning is not clear from its plain meaning only, the court must interpret it reasonably in accordance with logic, doctrine of experience, common sense of society in general and the general perceptions of business practice, social justice and the ideology of equity, comprehensively taking into account the contractual terms, the motive for and the circumstances of the legal act, the purpose for and genuine intent with which the parties want to accomplish

125) Judgment Rendered by the Korean Supreme Court on July 30, 1996, Case No. 95 Da 29130; Seung-Jong Oh, supra note, at 545.

126) Judgment rendered by the Korean Supreme Court on July 30, 1996, Case No. 95 Da 29130.

by the legal act, and trade practices, etc..” and thus went on to state that “when it is unclear whether a copyright-related contract is an assignment contract or a license contract, the court should presumably interpret it in favor of its author by reserving the copyright to the author if the contractual term does not apparently state whether it is based on assignment or license. If the contractual term is ambiguous, the court must interpret it by comprehensively taking into account trade practices, the knowledge of both parties and the parties' behaviors, etc.”

Chapter 5.

Unification of National Health Insurance Service (NHIS)

Hong Songmin
(Research Fellow, KLRI)

▢ **Overview**

Korea's national health insurance took only 10 years to achieved the universal coverage. The unification of individual medical insurance funds was pushed ahead as the previous units configuration system was limited in disease risk pooling, income redistribution and strengthening social solidarity while there arose systematic problems such as inequity of contribution burden amongst medical insurance funds, gaps in medical benefits, and wastes of administration costs. The most important outcome is improved responsibility and transparency of administration. Strengthen health security and enhanced equity in contribution burden are also considered to be important achievements.

1. Introduction

The National Health Insurance Act[127] aims to improve citizens' health and promote social security by providing citizens with insurance benefits for the prevention, medical examination, medical treatment of and rehabilitation from diseases and injury, for childbirth and death, and for improvement of health, as the health insurance system in Korea is regulated by the law (Article 1). Korea is regarded to have accomplished universal coverage[128] as the national health insurance covers Korean nationals who reside within Korea as the insured and the dependents(Article 5). Foreigners residing in the country are also covered as the Special Cases, according to the Article 109. That the National Health Insurance Corporation(hereinafter NHIC)

127) Gukmingeongangboheombeob [National Health Insurance Act], Act. No. 12615, May. 20, 2014 (S. Kor.).

128) For expatriates, Article 109 of the same act states as a special case.

functions as the single insurer(Article 13) since the unification of the multiple insurance funds, separated by occupational status, is the most significant characteristics of the NHI system of Korea. Another significance is the government's effect on the health insurance system as the Minister of Health and Welfare shall administer the national health insurance program prescribed by the law(Article 2). Article 14 prescribes medical care benefits provided to the insured and the dependents in case of diseases, injuries, childbirths, etc. Sickness allowances is regulated as the additional benefits but has not been come into effect. The financial resources are mainly based on the NHI contributions(Article 69) and the government as well subsidizes an amount equivalent to 14% of the anticipated contributions revenues. In order to review the costs of medical care benefits and evaluate the reasonableness of medical care benefits, the Health Insurance and Assessment Service has been established and in action(Article 62).

2. History

2.1. Implementation of the National Medical Insurance

The Medical Insurance Act[129] was legislated in 1963 but had not been enforced until the medical care insurance covered workplaces employing more than 500 employees in 1976[130], under the Medical Insurance Act[131]. The coverage for the public healthcare was expanded stepwise as the Medical Insurance for Public Officers and Private School Employees Act[132] in 1977. Rural areas and the self-employed in cities were also

129) Uiryoboheombeob [Medical Insurance Act], No. 1623, Dec. 16, 1963 (S. Kor.).
130) Uiryoboheombeob [Medical Insurance Act], No. 2942, Dec. 22, 1976 (S. Kor.).
131) Constitutional Court [Const. Ct.], 2000 99 Hun-Ma 289 (consol.), Jun. 29, 2000, (2000 DKCC, 11) (S. Kor.).

given the eligibility[133] in 1988 and 1989, respectively. As seen above, Korea's public health insurance system took only 10 years to achieve the universal coverage. The segmentation of the coverage was due to the lack of the government's financial ability and the characteristics of the Bismarckian social insurance; mandatory coverage and contribution collection, and equal benefits. As the government could not afford to manage the universal health care, population groups with ability to pay contributions such as income workers, civil officers, and private school employees were first to be covered, and the coverage expanded to citizens in rural areas and the self-employed in cities[134], step-by-step.

2.2. Unification of medical insurance funds

Based on the Medical Insurance Act[135], legislated on Dec. 31, 1997 and enforced since Oct. 1, 1988, the Public Officers and Private School Employees Medical Health Insurance Corporation and 277 regional medical insurance funds were unified. As a result, the National Health Insurance Corporation became the single insurer and covered approximately 60% of the whole nation's population, including 28 millions of public officers, private school employees and the insured of the regional medical insurance funds[136] (the first unification). However, this reform, regarded as the stepping

132) Gongmuwonmitsariphakgyogyojikwonuiryoboheombeob [Medical Insurance for Public Officers and Private School Employees Act], No. 3081, Dec. 31, 1977 (S. Kor.).

133) Constitutional Court [Const. Ct.], 2006 99 Hun-Ma 289 (consol.), Jun. 29, 2006, (2006 DKCC, 11) (S. Kor.).

134) Ibid.

135) Gongmuwonmitsariphakgyogyojikwonuiryoboheombeob [Medical Insurance for Public Officers and Private School Employees Act], No. 5488, Dec. 31, 1997 (S. Kor.).

136) Constitutional Court [Const. Ct.], 2006 99 Hun-Ma 289 (consol.), Jun. 29, 2006, (2006 DKCC, 11) (S. Kor.).

stone for the next one, came into effect only on the administrative aspect as the financial separation of each fund was still regulated. According to the National Health Insurance Act[137], legislated on Feb. 8, 1999 and enforced from Jan. 1, 2000, the universal health insurance system with the NHIC as the single insurer has been finally accomplished[138](the second unification). Until then, the Medical Insurance Act that covered the insured of the employer-provided funds and the National Medical Insurance Act that covered public officers and private school employees were abolished.

2.3. Discussion on establishment of the National Health Insurance Law

Sung-kyun Hwang and 20 other members of the National Assembly submitted the "National Medical Insurance Amendment Act" to the National Assembly, on the purpose of the inclusion of medial assistance scheme into the National Medical Insurance and the National Medical Insurance Corporation(hereinafter NMIC) to include the employer-provided funds. On the other hand, the union of the National Employer-provided Medical Insurance Funds filed a petition against the amendment on the same day. The following day, the Ministry of Health and Welfare laid a new 'National Health Insurance Act' to the assembly, based on the report by the Unification of the Medical Insurance Funds Planning Committee(의료보험통합추진기획단). The purpose of the law was to have a single insurer in the public health insurance market to improve efficiency in management and fairness in

137) Gukmingeongangboheombeob [National Health Insurance Act], Act No. 5854, Feb. 8, 1999 (S. Kor.).

138) Constitutional Court [Const. Ct.], 2006 99 Hun-Ma 289 (consol.), Jun. 29, 2006, (2006 DKCC, 11) (S. Kor.).

contribution payment, and to provide universal healthcare including medical treatment, prevention, not to mention the health promotion, etc. The Subcommittee of the Bill Review of the Health and Welfare Committee in the National Assembly decided to singularize the two bills submitted by the NA and the ministry. The core content of the law was to replace the NMIC to the NHIC while absorbing the employer-provided funds. After much meandering, the amended "National Health Insurance Act"(no. 5854) was finally enacted and proclaimed on Feb. 8, 1999. The unification of the public insurance funds, in both name and reality, has been finally achieved under this law since Jan. 1, 2001.

3. Issue

3.1. Unconstitutionality suit

On the other hand, this passage of the bill caused a controversy over violation of the constitution. Young-kwon Sung and 76 persons(2 attorneys including Young-hwa Lim), most of which were the insured of the employer-provided funds, filed a petition to the Constitutional Court on May 20, 1999. They claimed that several parts of the new NHI law were against the constitutional law; the Article 33 (2) "The Corporation shall administer the financial affairs of employer-provided policyholders and locally provided policyholders in an integrated manner"; the Article 62 (3) and (4) that implicitly differentiated the standard to impose contributions from the insured of the employer-provided insurance and ones of the local-provided insurance; the Article 63 and 64 that regulated the income assessment differently for the insured of the employer-provided insurance and ones of the local-provided insurance; the Article 67 in which the government imposes contributions

only from the insured of the local-provided insurance and the Article 6 of the supplementary provision that forced to dissolve the previous employer-provided medical insurance funds; and finally, the Article 7 of the supplementary provision that stated to transfer the financial accumulation to the NHIS by force, etc[139]. The Constitutional Court dismissed the appeal. The court especially stated on the financial integration of the funds, the key issue of the case, that "Article 33 (2) does not violate the Constitutional Law as the legal delay period to assess the income of the local-provided insurant was prepared, and at the same time, a legal set to secure contribution equality between the two insurant groups."

3.2. Meanings of integration

Through the unification of the NHI system, and furthermore, financial integration, the government apprehended the weaknesses of units configuration's function as social health insurance and systematic problems such as limits in disease risk pooling, income redistribution, and strengthening social solidarity, etc; lack of equity in contribution of different groups of insurants; medical care benefit gap, inefficiency in administrative costs, etc. In order to overcome these issues, the government pushed forward to the unification of the previous medical health insurance system.

3.2.1. Reasons of pros

People who agreed on the integration claimed that units configuration would cause too heavy a contribution burden to the contributors when

139) Constitutional Court [Const. Ct.], 2006 99 Hun-Ma 289 (consol.), Jun. 29, 2006, (2006 DKCC, 11) (S. Kor.).

there existed gaps in contributing ability. The amount of contributions could be different even though the insured had same level of income and assets, as regional medical insurance funds were operated individually. For the employer-provided medical insurance funds, the application of contribution rates were highly unequal when workers in large-sized workplace contributed less than the ones in small-sized workplace. Both cases, caused by the units configuration, resulted in a problem in inequity of contribution.

The units configuration also gave rise to a segmentation in terms of so-called “life-cycle” stages. When people are young and employed, they would be under the employer-provided medical insurance. When they become old to have more disease risks and earn less, they would be switched to the region medical insurance funds. Furthermore, inter-generation and inter-age group separation would be unavoidable while income gap between those who work and those who don’t under the units configuration. It was expected that the unification of insurance funds prevent the social-economic gap and improve the effece of income redistribution.[140)]

3.2.2. Reasons of cons

In contrast, people who agreed on units configuration supported then-existing system claimed that the unification of various medical insurance funds in which income forms and assessment standard differed greatly prevented fair and equal imposition when the success and failure of social insurance scheme depended upon equity in contribution system. Furthermore, under the unified system, the government’s efficient control over health expenditure also would be more difficult than under units configurations as administrative organization became obese, bureaucratized and ossified, thus it would naturally

140) Ibid.

result in increase of the public health expenditure. They also claimed that there had been no cases of health insurance unification in order to reduce administration costs, as integration of medical health insurance funds and cost-reducing were not interrelated.

4. Conclusion

4.1. Improvement in administration and management system

The most important outcome of the insurance unification is that transparency and responsibility in administration and management has neem improved.[141] Under the units configuration, there were hundreds of union representatives and multiple numbers of executives that were responsible for managing the insurance funds. Corruptions became a social problem; monitoring each fund to prevent irregularities was such a challenge. Especially, accumulated funds of the employer-provided medical insurance was misused by the workplace as if it was private bank of the owner of the company. Unification of medical insurance funds enabled to reduce the number of executives and achieve human resource innovation. In addition, the government as the director of the scheme and citizens as beneficiaries could effectively monitor and control over the national health insurance management.

141) Jong Hyun Hong, Gukmingeongangboheomjedoui jisokganeunghan gwanliwa unyoungeul wiham beopjegaeseonbangan [A Study on the National Health Insurance Service Legal Institution for its sustainable management and development], Korea Legislation Research Institute, 57 (2013)

4.2. Health security strengthened

Institutional basis to strengthen and expand the security of health insurance was also prepared.[142] There had been limitations in strengthening and expanding health security under the units configuration, in which hundreds of individual insurance funds were operative. There were gaps in financial sustainability amongst funds which might have led to standardization downward of benefits to the level of poor fund. While insurance funds with better financing conditions could accumulate enormous amount of fund but could not provide sufficient benefits whereas funds in a poor state could not afford to guarantee the minimum level of benefits. There was, of course, a systematic measures to pool risks but with only limited effects. The unification of health insurance funds was to dissolve the financial gaps amongst each funds immediately, leading to continuous policy-making for better health security.

4.3. Equity in contribution burden

It is considered that fairness and equity of the imposition system was also improved through the unification.[143] Previously under the units configuration, contribution rates of regional funds in rural areas were higher than that

142) Jong Hyun Hong, Gukmingeongangboheomjedoui jisokganeunghan gwanliwa unyoungeul wiham beopjegaeseonbangan [A Study on the National Health Insurance Service Legal Institution for its sustainable management and development], Korea Legislation Research Institute, 57-58 (2013)

143) Jong Hyun Hong, Gukmingeongangboheomjedoui jisokganeunghan gwanliwa unyoungeul wiham beopjegaeseonbangan [A Study on the National Health Insurance Service Legal Institution for its sustainable management and development], Korea Legislation Research Institute, 58 (2013)

of the employer-provided funds and regional funds in the wealthy cities. This gap was due to that each fund was self-financing in management and operation. The unification enabled the NHIS to impose contributions in standardized tariff regardless of where the insured live and work. However, the fact that the insured of the local-provided and the employer-provided health insurance are still separated is one of the problems of Korea's health insurance system.[144] This is not only limited in the NHIS, but related to the tax system in which the blind spots still exist and the financing system lacks.

4.4. Expanded Solidarity

Finally, one of the most important achievement of the integration to the National Health Insurance is that people's solidarity has been strengthened and expanded.[145] It is undeniable that many claims and complaints are being submitted. However, under the integrated NHI system, all the citizens except for the beneficiaries of the medical assistance are covered by the single social health care. The current National Health Insurance Act expanded social solidarity to the whole population whereas the range of solidarity was limited within a certain region or workplace under the previous units configuration. This change as the institutional touchstone enables the government to perform the obligation to protect its people's health right.

144) Young Hun Jeong, Gukmingeongangboheomsang boheomryo budamui pyeongdeunge daehan heonbeopjeok geomto [A Constitutional Review on Equity of NHIS Contribution Burden], Constitutional Research Institute (2014)

145) Jong Hyun Hong, Gukmingeongangboheomjedoui jisokganeunghan gwanliwa unyoungeul wiham beopjegaeseonbangan [A Study on the National Health Insurance Service Legal Institution for its sustainable management and development], Korea Legislation Research Institute, 58-59 (2013)

[References]

NHIC, Gukmingeongangboheomhaeseol [Explanation of the National Health Insurance Act], (2011)

NHIS Commission of innocavation, Silcheonjeok geongangbokjipeullaen : jeilpyeon geongangbokjipeullaenui gaeyo [Practical health welfare plan: Book 1 Outline of health welfare plan] (2012)

NHIS Commission of innocavation, Silcheonjeok geongangbokjipeullaen : jeipyeon jeiljang jisokganeunghan bojandeong ganghwa bangan [Practical Health Welfare Plan: Book 2 Chapter 1 Policies to enhance sustainability of health security] (2012)

NHIS Commission of innocavation, Silcheonjeok geongangbokjipeullaen : jeipyeon jeijang sodeukjungsimui boheomryo bugwachegye danilhwa bangan [Practical Health Welfare Plan: Book 2 Chapter 2 Strategies to unify income-related contribution imposition systems] (2012)

NHIS Commission of innocavation, Silcheonjeok geongangbokjipeullaen : jeipyeon jesamjang pyengsaeng matchumhyung tonghap geongangseobiseu jegong bangan [Practical Health Welfare Plan: Book 2 Chapter 3 Provision of universal life-cycle health care service] (2012)

NHIS Commission of innocavation, Silcheonjeok geongangbokjipeullaen : jeipyeon jesajang geupyeogyeoljeonggujo mit jinryobi cheonggusimsajigeupchegye haprihwa bangan [Practical Health Welfare Plan: Book 2 Chapter 4 Strategies for benefits provision and review of medical expenses system] (2012)

NHIS Commission of innocavation, Silcheonjeok geongangbokjipeullaen : jeipyeon jeojang noinjanggiyoyangboheom bowangaeseonbangan [Practical Health Welfare Plan: Book 2 Chapter 5 Strategies to improve long-term care insurance] (2012)

NHIS Commission of innocavation, Silcheonjeok geongangbokjipeullaen : jeipyeon jeyukjang bogeonuiryo gonggeupchegye gaeseonbangan [Practical Health Welfare Plan: Book 2 Chapter 6 Strategies to improve healthcare supply system] (2012)

Heung Jae Lee, Gwang Seok Jeon, Ji Sun Park, Sahoibojangbeop [Social Security Laws] (2011)

Hong Gi Jeong, Jeong Chan Jo, Gukmingeongangboheombeop [National Health Insuranc Law], Korea Legislation Research Institute (2005)

Young Hun Jeong, Gukmingeongangboheomsang boheomryo budamui pyeongdeunge daehan heonbeopjeok geomto [A Constitutional Review on Equity of NHIS Contribution Burden], Constitutional Research Institute (2014)

Jong Hyun Hong, Gukmingeongangboheomjedoui jisokganeunghan gwanliwa unyoungeul wiham beopjegaeseonbangan [A Study on the National Health Insurance Service Legal Institution for its sustainable management and development], Korea Legislation Research Institute (2013)

[Precedents]

Constitutional Court [Const. Ct.], 2000 99 Hun-Ma 289 (consol.), Jun. 29, 2000, **(2000 DKCC, 11)** (S. Kor.). (http://www.law.go.kr/detcInfoP.do?mode=1&detcSeq=137528, National Legal Information Center)

Constitutional Court [Const. Ct.], 2009 Hun-Ma 299 (consol.), May. 31, 2012, **(2012 DKCC, 11)** (S. Kor.).