한국경호경비학회 – 제27호(2011): 161–195

투고일 2011. 4. 29, 심사일 2011. 5. 11, 게재확정일 2011. 6. 13

The Legal Issues of Private Investigation Service in WTO/FTA System : Study of South Korea

Ko, Ji-Hoon · Park, Hyeon-Ho

The Legal Issues of Private Investigation Service in WTO/FTA System : Study of South Korea

Ko, Ji-Hoon* · Park, Hyeon-Ho**

〈Abstract〉

As crimes have increased to an extent that the police cannot cope with, there have been continuous discussions for the introduction of Private Investigation (hereafter PI) in Korea. However, attempts to legislate for the introduction of PI have failed every time PI bills for the introduction of PI were proposed. This was fundamentally because arguments both for and against the introduction of PI were sharply divided depending on the priorities.

However, regardless of those clash of views, an apparent need for the legislation of PI service has arisen. As Korea opens its service market to other countries through GATS and FTAs, currently existing domestic PI law has been found to be inconsistent with international agreements such as GATS and KOREA-US(KORUS) FTA. This paper found that the *Act on Usage and Protection of Credit Information* which regulates PI service is inconsistent with the Article 12.4(a)(i) and (iii) of KORUS FTA and the Article 7.11 and the Article 7.13 of KOREA-EU FTA. If Korea does not modify the existing laws and establish new laws in relation to PI, such inconsistencies could lead to international trade disputes which could amount to billions of dollars. In this regard, the passage of the PI bill is necessary.

Key words : GATS, FTA, Private Investigation, US-Gambling Case, Service Trade Agreement

* 제1저자(서울지방경찰청 경위, 서울대 국제대학원 석사)

** 교신저자(용인대학교 경찰행정학과 교수)

목 차

I. Introduction

As crimes have increased to an extent where the police cannot take full control, there have been continuous needs for Private Investigation service (PI service). This demand is not confined to business areas in which illegal investigation agencies such as Heung-shin-so are generally operated. Demand for PI service varies according to the type of investigations conducted by the service providers: (1) Legal investigator (2) Corporate investigator (3) Financial investigator (4) Insurance investigator (5) Store detective (6) Cyber detective (Lee, 2009, p.116).

However, in spite of increasing demands, there has not been even one definite regulation about PI in Korea. Since there is no regulation about PI service, management and surveillance on PI service also could not be properly administered. As a result, PI service has been operated underground by illegal PI agencies while needs for the illegal practices of these agencies became more prevalent.

Recognizing the needs of proper regulation, there have been several attempts to legislate PI law but it did not lead to the passage of the bill. Although many people agreed with the need of PI service and the need of proper administration system, potential side-effects from reckless operation of PI service overshadowed the benefits from legalizing PI services and as a result, passage of the bill was stopped. The stance at issue still has been acutely divided depending on the priorities.

However, regardless of these discussions, an apparent need for legislation of PI service has been aroused. As Korea opens its service markets to other countries through GATS and FTAs, currently existing domestic PI law has been found to be inconsistent with international agreements such as GATS and KOREA- US FTA (KORUS FTA). If Korea does not modify the existing laws and establish new laws in relation to PI such inconsistencies could lead to international trade disputes which could amount to hundred billion dollars. In this regard, the passage of the PI bill is necessary. It is not a matter of choice but a matter of need because of the possible expensive trade disputes.

The objective of this paper is thus to examine the inconsistency of the currently existing domestic regulations on PI with international agreements such as GATS and KORUS FTA and possible international trade disputes. This paper will hopefully become a driving force on the passage of the PI bill as well as marker highlighting the need for the introduction of PI system in Korea through legal analysis of domestic regulations and international trade agreements.

Ⅱ. Private Investigation service in Korea

With lack of relevant regulations and laws, illegal PI agencies such as Heung-Shin-So and Sim-bu-rum Center are being widely operated in Korea. Many foreign PI firms are also operated in Korea but its business field is very restricted due to lack of regulations and overlapping service with law firms. These foreign PI firms are normally operated legally under the name of consulting firm or risk management institute.

1. Korea Legal System

Since there is no established law which prohibits or permits PI ,PI has not been properly regulated. However, the *Act on Usage and Protection of Credit Information* (신용정보의 이용 및 보호에 관한 법률[1]) indirectly prohibits PI services by stating in Article 40:5 that "using names such as informant, detective or similar names like this" shall not be allowed. Also, the *Attorney Act* (변호사법) which guarantees exclusive rights of attorneys on investigation and litigation bans investigators from providing services because the main business activity of private investigators infringes the Article 109:1 of the *Attorney Act* (the penal regulation)(Kang, 2006, p.126). The Article 109:1[2] states specifically that "none shall be allowed to conduct investigation, adjustment,

1) Article 40 (The Prohibition on Credit Bureau and et cetera)
Credit bureau and et cetera shall be prohibited to do the following and no entity shall be allowed under the fourth clause or under the fifth clause except for Credit bureau and et cetera
1. Spreading false information to a client
2. Demanding the request for credit information
3. Forcing a recipient of an investigation to respond and submit investigation materials
4. Finding out the address and contact information of a specific person or investigating private life besides financial relationship such as financial transactions. With respect to credit bureau which is permitted to debt collection, when they discover the contact information of a specific person for performing a job or when finding out the contact information of a specific person according to other regulations, this regulation is not applied.
5. Using names such as informant, detective or similar names like this
6. Inflicting loss on financial derivatives, corporate body or investors or credit facilitator of indirect investment body by a grievous faultor intentionally when performing credit evaluation

2) 변호사법 제109조(벌칙) 다음 각 호의 어느 하나에 해당하는 자는 7년 이하의 징역 또는 5천만원 이하의 벌금에 처한다. 이 경우 벌금과 징역은 병과(倂科)할 수 있다.
1. 변호사가 아니면서 금품 · 향응 또는 그 밖의 이익을 받거나 받을 것을 약속하고 또는 제3 자에게 이를 공여하게 하거나 공여하게 할 것을 약속하고 다음 각 목의 사건에 관하여 감정 · 대리 · 중재 · 화해 · 청탁 · 법률상담 또는 법률 관계 문서 작성, 그 밖의 법률사무를 취급하거나 이러한 행위를 알선한 자
가. 소송 사건, 비송 사건, 가사 조정 또는 심판 사건
나. 행정심판 또는 심사의 청구나 이의신청, 그 밖에 행정기관에 대한 불복신청 사건
다. 수사기관에서 취급 중인 수사 사건
라. 법령에 따라 설치된 조사기관에서 취급 중인 조사 사건
마. 그 밖에 일반의 법률사건

identification and representation related to legal cases such as non-contentious case and family disputes except for attorneys. It implies that private investigators cannot practically provide PI services. For instance, if private investigator confirms blood relationship through DNA test in the hope of rewards, it is considered as identification which is only permitted to attorneys(Kim, 2007). Therefore, without the revision of the *Attorney Act*, private investigators practically cannot perform their jobs.

As a result, even though there is no specific law which directly prohibits PI, providing PI services is actually prohibited by other domestic laws.

2. The background of PI service in Korea

Among the OECD countries, Korea is the only country which has not legalized PI service. Such conservative approach to PI service is basically related to our legal system (inquisitorial system) and negative public recognition on private investigation agencies. (Lee, 2009)

Regarding legal system, as opposed to inquisitorial system, the adversarial system (or adversary system) is a system of law that relies on the contest between each advocate representing his or her party's positions and involves an impartial person or group of people, usually a jury or judge, trying to determine the truth of the case. (Wikipedia, 2010) This system is more focused on fact-finding, therefore, the demand for private investigators was larger for countries which introduced adversary system compared to those that adopted the inquisitorial system.

In terms of negative public recognition on PI agencies, this is related to the illegal practices of PI agencies. PI services initially started underground through Heung-shin-so and Sim-bu-rum center. These enterprises mainly collected debts and handled private matters such as adultery outside the official legal system. Their illegal practices including murder by contract had brought bad impression to the public. Even though there are a lot of positive functions of PI services, bad impression on the illegal practices of those

agencies still remains in the public.

On the contrary to Korea, many countries have introduced PI system though there have been differences to the extent of service area (Shearing & Stenning, 1981, p.198). Their historical background and judicial procedures, of course, are different from Korea, but, nevertheless, considering the fact that Korea legal system is preparing to move towards the adversary system and consequent increase in the importance of fact finding in judicial procedures suggests an introduction of PI system in Korea.

Ⅲ. Positive effects and adverse effects for the introduction of PI service

Discussions on the introduction of PI service have been widely made in many papers and media. Arguments both for and against the introduction of PI services seem to be reasonable. Depending on the prioritized values, the stance on the issue is divided.

Since many analyses on the benefits and damages incurring from the introduction of the PI service have been made by various precedent researches, this paper will just briefly explain the positive and adverse effects from the introduction of PI service. In this paper no conclusion like "benefits from the introduction of PI service will outweigh the damages"will be made. This chapter will just introduce contrasting arguments on this issue before the next chapter argues the necessity of the introduction of the PI service not based on the benefit analysis but based on legal analysis.

1. Adverse effects

First, intrusion of privacy will be at issue. Private investigators may interfere in personal affairs on the request of their clients. Without strict regulations which include penalty regulations, individual's privacy will be at risk as long as the services requested by the clients are related to private matters. (Jeong, Park, Seo, 2007, p.476)

Second, the scope of work for the private investigators can overlap with other professions, causing confusion in performing the job. Korea has developed a different judicial system and has different histories on investigation. Therefore, the definition and the scope of work that private investigators perform in Korea are very different with those from Western countries. In Western countries, private investigators cover a wide range of jobs but in Korea, the jobs that private investigator covers are segmented into several professions such as investigator of traffic accidents, attorney, and cyber security specialist. Accordingly, without clarifying the scope and definition of P.I, the introduction of PI service will only add up confusion rather than improving the quality of life. (Kong, 2007)

Third, if private investigation agencies increase largely from the legalization of the business, then illegal practices of PI will increase substantially due to nature of the business. These problems are well shown from the practices of Simburum-center and Heung shin-so but these problems could be solved to some extents through the introduction of proper regulation which includes license and qualification system. If PI services are regulated efficiently, overall illegal practices of PI agencies can decrease. (Kong, 2007, p.52)

Fourth, sense of safety is a critical element in life, not an extra element. However, the introduction of PI service will deepen the gap between the rich and the poor in such critical element. This is a common phenomenon that is prevalent in all sectors in the capitalistic society not just the matter of investigation sector. In order to prevent further deterioration of the problem, the role of police has to be changed and more resources must be allocated in protecting the poor people.

2. Positive effects

First, the adoption of PI service will protect the rights of victims and help the damage recovery of victims (Kang, 2006, p.67). As crimes have increased and become more complicated to an unprecedented extent, there have been increasing demands for PI services. The introduction of PI service will make up for shortfall of public

investigation service by providing customized service. Sufficient effort could be placed in each investigation case to satisfy the clients. This scrupulous investigation will help with the fact-finding and will protect the rights of clients. (Lee, 2008, p.259)

Second, introduction of PI service will alleviate excessive burden of public investigation agencies. As private investigation agencies take on substantial portions of cases, public investigation agencies could not only reduce the cost of investigation but also alleviate excessive burden of public investigation agencies. This will lead to the enhancement in the quality of investigation service.

Third, legalization of PI service will not only change the negative images on investigation service but also reduce the illegal practices of private investigation agencies as the PI system is placed under the control of the government. Legalizing operations of PI agencies will make its business transparent and healthy and this will not only reduce the illegal practices but also improve the negative images of PI. (Kang, 2006, p.68)

Fourth, the creation of new business will also help to reduce the unemployment rate. This PI business will require many people from various areas when the service is systematically managed. Considering the diverse operation area of foreign PI agencies which are in charge of overall aspects of the corporations, the demand on labor force needed by PI operation is not confined to general private investigator. The demand on the labor force could even include scientists and financial analyst.

Ⅳ. The legal issues of Private Investigation in WTO and FTA

The previous chapter was to introduce the effects of the introduction of PI service. As the benefits do not outweigh the costs obviously, it is hard to convince the counter party with the benefit-cost analysis. However, when the measure at issue is illegal, whether to change the measure is not a matter of choice. Instead, coming up with a

measure which strengthens the positive effects and lessens the adverse effects is the crux of the matter. This would be the case for the PI service. Regardless of pro and con arguments about the introduction of PI services, it is necessary for Korea to arrange measures to permit PI service since Korea has already opened its PI service market to other countries. In other words, unless Korea gets rid of prohibition measures or arranges measures to permit PI service, Korea will face expensive international trade disputes. As this paper explained above, Korean domestic law does not directly regulates PI services, but the *Act on Usage and Protection of Credit Information* and the *Attorney Act* practically prohibit almost every types of general PI services. Exact definition of "PI" has to be discussed at first to determine the types of services provided by private investigation agencies, but in Korea, regardless of the discussion on the exact definition of PI, PI service is almost completely banned. This is apparent from the fact that just using titles such as detectives, informants or similar names are prohibited in Korea. (Lee, 2009, p.260)

However, in international agreements such as GATS and FTAs, Korea has partially opened its PI service markets to other countries. Especially in the KOREA-US FTA, Korea did not place any restrictions regarding PI services on its reservation list, which implies that the U.S. has the right to provide PI services regardless of the mode of supply. Therefore, the U.S. can claim that PI service prohibition regulations of Korea constitute a violation of Article 12.4 of the KOREA-US FTA. The cost of such international disputes involved in inconsistency between domestic law and international agreement can amount to billions of dollars.

In this chapter, this paper will analyze the possibility of international trade disputes between Korea and the other countries involved in Korea's PI service regulations by looking into the service agreements of FTA and WTO and in the end, it will show a way to harmonize the interests of two

1. Korea-U.S. FTA

Before discussing the legal inconsistency matters between international agreements

and domestic regulation, there are basic concepts that have to be understood thoroughly.

Domestic measures including PI prohibition measures can be classified between *market access restriction* and *domestic regulation* under service trade agreements. This distinction between two concepts is not still clear academically but basically, when domestic measures are classified as *market access restrictions*, it implies that the presumed purpose of domestic measures is to protect markets restricting market access of foreign providers. *Market access restriction* has to be eliminated when that relevant service market has been liberalized by GATS or FTA. Therefore, when PI prohibition measures are classified as *market access restriction*, PI prohibition measures have to be removed, if PI market is liberalized by GATS or FTA, in order to be consistent with GATS or FTA. If all the domestic measures which have prohibitive effects are categorized as *market access restriction*, this can intrude the regulatory autonomy of the government by imposing maximum limitations on the domestic measures.

Whereas, when domestic measures are classified as *domestic regulation*, it implies that domestic measures fall under the regulatory autonomy regulating the quality of service.

Only minimum requirements[3]from international agreements are applied to those domestic measures. Domestic measures are considered to improve the quality of service including consumer protection, safety or public order (King & Kalupahana, 2007, p.1295) rather than restricting the market access. However, if all the domestic measures are considered *domestic regulation*, the liberalization of markets will be limited as *domestic regulation* functions as trade barriers such as quotas and tariffs.(Delimatisis, 2010, p.672) When classified as *domestic regulation,* quantitative effect which prohibits market access is considered the secondary effect to preserve the quality of service.

"Distinction between *market access restriction* and *domestic regulation* is very important because depending solely on how a government measure is categorized, the measure therefore be permitted or prohibited under WTO or FTA law (Pauwelyn, 2006, p.133)". PI service prohibition measures also will be prohibited or permitted depending on its classification. PI service prohibition measures will be subject to different provisions of

3) Refer to the Article VI of GATS.

international agreements between quantitative (*market access regulation*) and qualitative regulations (*domestic regulation*) according to the classification. Maximum limitations are imposed on *market access regulation* while minimum requirements are imposed on the *domestic regulation*.

In this chapter, this paper will seek to find out how PI service prohibition measures will be classified between two concepts and will conclude the inconsistency of domestic measures with international trade agreements.

1) Introduction

As Korea pushes ahead with many PTAs (Preferential Trade Agreements) in the recent decade, many business areas have been liberalized drastically. Among those liberalized areas, the liberalization of service sectors was quite substantial compared to scope of liberalization depicted in the GATS and during this liberalization process under these PTAs, investigation service sector was also partially liberalized.

In Korea- US FTA[4], both countries chose a negative list approach to negotiate their FTA. In this approach, all industries except for those specifically listed on the "reservation list (negative list)"are practically completely liberalized and investigation sector was not named in the reservation list of KORUS FTA. It means that investigation sector has become liberalized by the KORUS FTA and as a result Korea cannot take any restrictive measures to protect its PI market. However, unlike this KORUS FTA which liberalized the investigation sector, the provision of PI service in Korea is completely banned by the *Act on Usage and Protection of Credit Information* (신용정보의 이용 및 보호에 관한 법률). This inconsistency between domestic regulation and KORUS FTA does not necessarily constitute a violation of the FTA provisions if the act in question is considered a *domestic regulation* (qualitative measure) which falls in the area of national autonomy. If a domestic regulation is considered essential to achieve

4) Negotiations were announced on February 2, 2006 and were concluded on April 1, 2007. The completion of the agreement was announced on April 2, 2007 and the treaty was signed on June 30, 2007. The agreement does not take in effect as of 2010.10.25. The Korea announced that renegotiation will take place on the limited area including revisions to the agreement text.

national policy objectives and thus being classified as a qualitative measure then it is free from liberalization requirements from the FTA. (Lode Van Den Hende and Herbert Smith LLP, 2007, p.95) However, this domestic act which totally prohibits the operation of PI services has to be interpreted as a *market access restriction* (quantitative measure) such as quotas and tariffs rather than *domestic regulation* (qualitative measure). Since de facto impact of the act in question is the same as a zero quota prohibiting the operation of private investigators, this domestic act functions as a trade barrier against the committed area under the KORUS FTA. As a result, the *Act on Usage and Protection of Credit Information* is considered to be in violation of the Article 12. 4(a) (i) and (iii)[5]of KORUS FTA which states that no parties can impose limitation on (i) the number of service suppliers, whether in the form of numerical quotas, and (iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas, otherwise specified in the negative list. This conclusion has several implications. This shows that even though national autonomy indeed has to be respected, its domestic law also should be consistent with international agreements and furthermore in analyzing domestic law, distinction between *domestic regulation* (qualitative measure) and *market access restriction* (quantitative measure) should be based on the de facto impact of regulation.

The above paragraphs were a briefly overview on the analysis result of this paper; in the proceeding section of this paper, the discussion on the violations of Article 12.4

5) KORUS ARTICLE 12.4: MARKET ACCESS states that Neither Party may adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that: (a) impose limitations on: (i) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test; (ii) the total valueof service transactions or assets in the form of numerical quotas or the requirement of an economic needs test; (iii) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; or (iv) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supplyof a specific service in the form of numerical quotas or the requirement of an economic needs test; or (b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

of KORUS FTA will be further examined in detail. First the interpretation of the list of reservations will be analyzed to determine the scope of liberalization in investigation sector and then analysis on the *Act on Usage and Protection of Credit Information* (신용정보의 이용 및 보호에 관한 법률)" and the *Attorney Act* will be conducted to make clear distinction between *market access restriction* and *domestic regulation* (qualitative measure). Lastly, the definition of the service supplied in the exercise of governmental authority will be interpreted to define the scope of investigation service sector that is provided by the government. On the last discussion, if investigation service is interpreted as a service supplied in the exercise of governmental authority then investigation service sector are not bound by FTA implying that any restrictions could be legally taken to restrict PI services

2) Interpretation of the list of reservations (negative list)

Before discussing the inconsistency between domestic law and international agreements, first the scope and coverage of liberalization in PI service sector has to be confirmed.

In negative list approach, unless specified in the list of reservations (the Schedule to Annex I), any particular service sectors are assumed to be bound by the FTA. It means that all service sectors which are not named in the list should be practically liberalized. This concept is explained in detail in the Articles of 11.12 and 12.6 (Non-Conforming Measures). These articles state that any existing non-conforming measures which are not subject to the FTA provisions have to be set out by the involved Parties and be specified in the list of reservations (The Schedule to Annex I). In other words, the non-conforming measures which do not follow the FTA provisions have to be stipulated in the list of reservations.[6]

---

6) The schedule to Annex I (EXPLANATORY NOTES) of KORUS FTA clearly shows this concept ;1. The Schedule of a Party to this Annex(the list of reservation) sets out, pursuant to Articles 11.12 (Non-Conforming Measures) and 12.6 (Non-Conforming Measures), the Party' s existing measures that are not subject to some or all of the obligations imposed by: (a) Article 11.3 (National Treatment) or 12.2 (National Treatment); (b) Article 11.4 (Most-Favored-Nation Treatment) or 12.3 (Most-Favored-Nation Treatment); (c) Article 12.5 (Local Presence); (d) Article 11.8 (Performance Requirements);

〈Table 1〉 Investigation and Security Services in the List of Reservations

Sector: Investigation and Security Services Obligations Concerned: Market Access (Article 12.4) Local Presence (Article 12.5) Measures: Certified Private Security Act (Law No. 7671, August 4, 2005), Articles 3 and 4 ; Enforcement Decree of the Certified Private Security Act (Presidential Decree No. 18312,March 17, 2004), Articles 3 and 4 ; Enforcement Regulations of the Certified Private Security Act (Ordinance of the Ministry of Government Administration and Home Affairs, No. 345, September 7, 2006), Article 3 Description: Cross-Border Trade in Services Only a juridical person organized under Korean law may supply security services in Korea. For transparency purposes, only five types of security services are permitted in Korea: (a) shi-seol-gyung-bee (facility security); (b) ho-song-gyung-bee (escort security); (c) shin-byun-bo-ho (personal security); (d) gee-gye-gyung-bee (mechanized security); and (e) teuk-soo-gyung-bee (special security).

Source : KORUS FTA,– Annex I, Schedule of Korea

As the above table shows, any measures which do not conform to the FTA provisions have to be stipulated in this list of reservations.

No mention on the investigation service

On the list of reservations from <Table 1>, only restrictions on security service is referred and there are no restrictions on investigation services. It means that there are no restrictions on investigation services but according to some researches[7], the concept of "investigation" is included in the broad concept of "security". Based on this

(e) Article 11.9 (Senior Management and Boards of Directors); or (f) Article 12.4 (Market Access).

7) Clifford D. Shearing and Philip C. Stenning, "Modern Private Security: Its Growth and Implications", Crime and Justice, Vol. 3 (1981), pp. 193–245 : "One way to go about defining security would be to list the variety of services associated with the term. Such a list would include guard, patrol and investigation ser– vices, alarms, safes, armoured transportation services, document shredders, identification systems, courier services, electronic surveillance equipment, guard dogs, sensor devices, etc."

classification, it is thus not necessary to stipulate the restriction on investigation service separately, in addition to security service. Following this definition, discriminatory measures can be taken in investigation sector, relieving prohibitive PI measures from the FTA duties, in terms of "Market Access and Local Presence".

However, regarding service trades under the FTA and also under GATS, UN CPC is used to classify the types of services in different sectors. In this classification list, it clearly shows that investigation service is not included in the concept of "security service."

〈Table 2〉 UN CPC code 873

873 8730 Investigation and security services
87301 Investigation services
Services consisting in investigating cases submitted by the client, relating to crimes, theft, fraud, shoplifting, dishonesty, missing persons, domestic relations and other unlawful or lawful practices. Included are internal and undercover investigation and shoplifting protection services.
87302 Security consultation services
87303 Alarm monitoring services
87304 Armoured car services
87305 Guard Services
87309 Other security services

Source :Ministry of Foreign Affairs and Trade Republic of Korea (www.fta.go.kr)

Therefore, the fact that investigation service is not written on the list of reservations implies that no restriction exists on the PI services in "Cross-Border Trade in Services and Investment"(mode of supply). Practically, investigation service has been liberalized under the KORUS FTA.

3) Analysis of domestic law: "the Act on Usage and Protection of Credit Information"

On the previous discussion, this paper concluded that Korea made a full commitment on the PI service. This part of the paper will focus on whether the practice of PI is legal under the domestic laws separate from the discussion of whether it is liberalized or not.

The following two points will be examined in detail: (1) whether the PI is really prohibited by the *Act on Usage and Protection of Credit Information* and (2) if this act is considered to be a *market access restriction*, not a domestic regulation (qualitative measure).

(1) Prohibition of Private Investigation

In this paper, two different domestic regulations which prohibit the operation of private investigators are explained. However, the nature of these two regulations is different and therefore each law will be discussed separately in two different chapters. First, in this chapter, the *Act on Usage and Protection of Credit Information* will be analyzed.

As discussed above, there are not definite regulations restricting the practice of PI. PI is just prohibited indirectly by the law which regulates credit bureaus and attorneys, but nevertheless, it is for sure that PI is not feasible based on the precedent court rulings and provisions.

In the Article 40 of the *Act on Usage and Protection of Credit Information*, it clearly stipulates that "using names such as informant, detective or similar names like this" and "finding out the address and contact information of a specific person or investigating private life" are prohibited. This provision is clearly confirmed by a Supreme Court case.

According to the supreme court precedent [1994. 8.26.선고 94도780],the existence of PI service seems to be acknowledged since PI service could be registered to a tax office to get business license. However, in this same ruling, it confirms that the investigative activities of finding out the address and contact information of a specific person or investigating private life as a profession is prohibited even if the PI service is registered in the tax office as a sim-bu-rum center or a detective agency. Practically, although this ruling accepts the registration of PI in the tax office, it denies the most critical operation of private investigators and thus it could be interpreted as the denial of PI itself. In the cases of other countries, operations involving finding out the whereabouts of people and direct and indirect investigation on individual's private life compose a critical aspect in the operation of PI. If these basic functions are denied, then the operation of PI agencies is practically not possible.

In addition, although the ruling of the Supreme Court did not make a direct ruling

on the legality of PI's registration in the tax office, the provision which restricts the usage of the titles such as detectives, informants, or other similar names seems to prohibit even the tax registration of PI.

(2) Market access restriction or domestic regulation?

The *Act on Usage and Protection of Credit Information* could be regarded as a government intervention to restrict PI market and depending on how this government intervention is classified, this intervention can be interpreted as a '*market access restrictions*' (such as tariffs and quotas) or *'domestic regulation'* (such as security requirement, protection standard) (Pauwelyn, 2005, p.131).This distinction is very important because depending on the classification of the government intervention, the act of restricting PI will be subject to different FTA articles. *Market access restriction* is subject to stricter disciplines compared to *domestic regulation.*

① View on classification as Domestic regulation

There have been many discussions on how to distinguish between *market access restriction and domestic regulation* (qualitative measure). Academic researchers have taken contrasting views on this distinction. However, this paper will adopt the view represented in the decisions of the Panel and AB(Appellate Body) in US -gambling case which favors classification as *market access restriction.*[8)]

8) There is no rule of decisis in WTO dispute settlement but, if the reasoning developed in the previous report in support of the interpretation given to a WTO rule is persuasive from the perspective of the panel or the Appellate Body in the subsequent case, it is very likely that the panel or the Appellate Body will repeat and follow it. This is also in line with a key objective of the dispute settlement system which is to enhance the security and predictability of the multilateral trading system.(http://www.wto.org)
Considering the significance and impact of the U..S.-gambling case on the service, both the ruling and arguments from the case must be taken into consideration as the similar line of reasoning can be applied for the PI service. Through this case, contrasting views on the classification between domestic regulation and market access restriction have been settled to some extent. It is very likely that the analysis on the issues from this case will be repeated.
The decision under the multilateral arrangments (WTO) has to be respected in the bilateral arrangements(FTA) as the principles and regulations from FTA regarding

Pauwelyn(2005) states that "The mere fact that domestic regulation has the effect of restricting the number of imports does not make it a *market access restriction*." From this view point, the *Act on Usage and Protection of Credit Information* can be interpreted as a *domestic regulation* (qualitative measure) since the act in question was established to serve the national policy objective, protection of civilian's privacy. To protect civilian's privacy, the *Act on Usage and Protection of Credit Information* states that only the credit bureau that is permitted to engage in debt collection can search for the contact information of a specific person and investigate private life. The purpose of this act is to prevent reckless operation of private investigators, not to impose quantitative restriction on PI investigation. As a result, the effect of restricting the number of operations is a by-product of the regulation to protect civilian privacy.

This interpretation narrowly applies the definition of *market access restriction*. It implies that even if there is *market access restriction* caused by the prohibition of the PI services, if the purpose of the act was to serve other objectives rather than to hinder market access, then that act has to be considered as a *domestic regulation* (qualitative measure).

② View on classification as *Market access restriction*

Unlike the above interpretation, this paper argues that the *Act on Usage and Protection of Credit Information* has to be considered as *market access restriction*, not a *domestic regulation*. The distinction between *domestic regulation* and *market access restriction* has to be based on the de facto impact rather than textual analysis. (Lode Van Den Hende & Herbert Smith LLP , 2007, p.107) Even when the act does not seem to take the form of general *market access restriction* such as tariffs and quotas, if its actual effects are the same like *market access restriction,* then this act has to be interpreted as a *market access restriction*. Therefore, the prohibition of PI services based on the *Act on Usage and Protection of Credit Information* has to be considered as a *market access restriction* if its de facto impact is the same as imposition of *market access restriction*.

This interpretation is supported by the ruling of Antigua & Barbuda vs. US-Gambling

service follows those of GATS. For this reason, the rulings from WTO regarding service are discussed in this chapter.

Services(DS285); "In 2005, the World Trade Organization (WTO) Appellate Body presided over United States—Measures affecting the cross-border supply of gambling and betting services (U.S.-Gambling), in which Antigua argued that U.S. criminal laws banning the provision of cross-border online gambling services violate U.S. commitments under the General Agreement on Trade in Services (GATS)."(King & Kalupahana, 2007, p.1189) In this case, the measures at issue were three federal laws - the "Wire Act", the "Travel Act", and the "Illegal Gambling Business Act" and eight other state laws. Even though these measures looked like the *domestic regulation* (qualitative measure), the Panel reasoned that prohibition on gambling services by those acts resulted in a "zero quota" and, therefore, constituted a "limitation on the number of service suppliers in the form of numerical quotas within the meaning of Article XVI:2(a)" and "a limitation on the total number of service operations or on the total quantity of service output ... in the form of quotas within the meaning of Article XVI:2(c)". It means that prohibition on the supply of gambling service, which the United States should have liberalized under its commitments under the GATS, is equivalent to a zero quota despite the fact that the prohibition itself did not take the form of numerical quotas. Following this logic, the Panel ruled the U.S restriction on gambling to be in violation of GATS XVI(Market Access):2(a) and (C).

Likewise, complete ban of PI services in Korea according to the *Act on Usage and Protection of Credit Information* has to be interpreted as a *market access restriction* because its de facto impact is equivalent to a zero quota in the PI services in terms of the mode of supply 3 and 4 (mode of supply 1 and 2 seems to be irrelevant)[9)]

9) "The GATS distinguishes between four modes of supplying services: cross–border trade, consumption abroad, commercial presence, and presence of natural persons. Cross–border supply is defined to cover services flows from the territory of one Member into the territory of another Member (e.g. banking or architectural services transmitted via telecommunications or mail); Consumption abroad refers to situations where a service consumer (e.g. tourist or patient) moves into another Member's territory to obtain a service; Commercial presence implies that a service supplier of one Member establishes aterritorial presence, including through ownership or lease of premises, in another Member's territory to provide a service (e.g. domestic subsidiaries of foreign insurance companies or hotel chains); and Presence of natural persons consists of persons of one Member entering the territory of another Member to supply a service

Unless specified in the list of reservations, neither party can impose limitation on the number of service suppliers and the total number of service operations in the form of numerical quotas under the Article 12.4 in KORUS FTA. However, the restriction of PI services under the *Act on Usage and Protection of Credit Information* which is equivalent to a zero quota on the supply of investigation service, an area not listed in the list of reservations, is in *de facto* imposing a *market access restriction* of PI services. As a result, it constitutes the violation of Article 12.4(a)(i) and (iii)[10]in KORUS FTA.

In the US-gambling case, since the "prohibition"itself does not take numerical forms, the United States thus counteracted that their measure is not against Article 16 under GATS but the Panel did not accept it mentioning its de facto impact is equivalent to a zero quota. Also, the counter-argument of the United States stating that their ban on the gambling service was to protect public morals and to maintain public order under GATS XIV (a) was not accepted as it did not satisfy the requirements under the chapeau of GATS XIV. (The Panel ruled that it satisfied the XIV(a) though). This paper did not examine Korea's justification under the exception clauses like GATS XIV, because introducing PI measures had nothing to do with threats on public moral or

(e.g. accountants, doctors or teachers). The Annex on Movement of Natural Persons specifies, however, that Members remain free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis." (http:// www. wto.org)

10) Neither Party may adopt or maintain, either on the basis of a regional subdivision or on the basis of its entire territory, measures that:
(a) impose limitations on:
(ⅰ) the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers, or the requirement of an economic needs test;
(ⅱ) the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
(ⅲ) the total number of service operations or the total quantity of services output expressed in terms of designated numerical units in the form of quotas or the requirement of an economic needs test; or
(ⅳ) the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test; or
(b) restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service.

safety.(When there are threats on public moral or safety for liberalizing specific sectors, the exception clauses can be applied to that market restrictive regulation.)

4) Analysis of domestic law: "the Attorney Act"

The *Attorney Act* hinders the operation of Private Investigators in a similar manner like the *Act on Usage and Protection of Credit Information* . Under this act, many operations of PI can be exclusively performed by the attorneys. Without being an attorney, most of the operations conducted by Private Investigator are not practically possible. Nevertheless, this paper concluded that this act is not in violation of the Article 12.4 because this act is considered to be *domestic regulation* (qualitative measure), which implies that the purpose of restricting the number of investigation operations is secondary while regulating the quality of service is the main purpose of the act. In other words, granting the rights to participate in judicial procedures only to the attorney is to guarantee the quality of service by regulating how the investigation service is provided. The purpose of the act is not prohibiting the number of market operations by forbidding private investigators. In addition, there is no definite provision to prohibit PI service in the *Attorney Act*, different from the *Act on Usage and Protection of Credit Information*, which was a provision that explicitly prohibits the operation of private investigators. In overall, the above difference in the nature of the act between the *Act on Usage and Protection of Credit Information* and the *Attorney Act* is the reason why the *Attorney Act* has to be interpreted as a *domestic regulation* (qualitative measure) instead being interpreted as *market access restriction* (quantitative measure). As a result, the *Attorney Act* is not relevant to the Article 12.4 (market access).

(The *Attorney Act* is not against the Article 12.7(domestic regulation) as well. The details will be discussed in GATS part)

5) Preliminary Conclusion in FTA

In this chapter, two main points were discussed: (1) the interpretation of the list of reservation to figure out the liberalization of investigation sector and (2) analysis of the *Act on Usage and Protection of Credit Information* and the *Attorney Act* to make clear

distinction between *market access measure and domestic regulation*.

Through this examination, this paper concludes that (1) investigation service sector is totally liberalized by KORUS FTA regardless of the mode of supply; (2) PI service in Korea is almost totally prohibited by the *Act on Usage and Protection of Credit Information* and the *Attorney Act* (Only mode of supply 3 and 4 seem to be relevant) (3) The *Act on Usage and Protection of Credit Information* constitutes the violation of Article 12.4 (a)(i) and (iii) as it is in de facto a *market access restriction*.

6) The definition of a service supplied in the exercise of governmental authority

Before finalizing the analysis of KORUS FTA, there is one last provision that has to be examined. The sixth provision of Article 12.1 in KORUS FTA stipulates that "This Chapter does not apply to services supplied in the exercise of governmental authority in a Party's territory. A service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers." If PI service sector is totally included under the service supplied in the exercise of governmental authority, then the discussion of this paper becomes fruitless because this service sector is no longer subject to KORUS FTA. However, the conclusion is that PI service is not relevant to a service supplied in the exercise of governmental authority.

According to a reply[11],to an information request posted on the inquiry board in Ministry of Foreign Affairs and Trade Republic of Korea website (http://www.fta.go.kr) on November 2nd 2010, investigation service of the police is supplied in the exercise of governmental authority. From this reply it can be inferred that investigation services provided by government agencies is not applicable to KORUS FTA including

11) 안녕하십니까. 외교통상부 FTA정책기획과 홈페이지 관리자입니다. 우리 양허안은 원칙적으로, 상업적 주재를 통한 조사서비스 공급과 관련하여 시장접근 및 내국민대우 의무 등을 위반하는 조치나 제한은 없는 것으로 해석됩니다. 그러나 형사사건에 관한 공소제기 여부를 결정하기 위하여 공소를 제기하고 이를 유지 · 수행하기 위한 준비로서 범죄사실을 조사하고 범인 및 증거를 발견 · 수집 · 보전하는 일련의 활동인 경찰의 "수사"는 정부 권한의 행사로 수행되는 서비스로서 협정의 적용 범위에서 제외됩니다.
(2010–11–04 5:36:08 PM, http://www.fta.go.kr/user/desk/Qna_view.asp)

investigation of police.

However, the definition of investigation by governmental agencies is too broad such that this definition includes almost every activities of Private Investigator, but inclusion of PI activities in the definition of governmental investigation does not exclude most of the parts of PI service from KORUS FTA.

In the U.S., The definition of investigation by governmental agencies includes most of the activities conducted by Private Investigator[12]. That definitions of criminal investigation from the two U.S. journal articles recognize the fact that the nature of the work of PI service is no different from that of public investigation service. Nevertheless, PI service is always negotiated in the service trade in the United States. Also, many foreign PI firms have already entered the U.S. PI market as the United States has opened its PI market to some countries during its service trade negotiations. This explains, regardless of the overlapping in the nature of the work, PI is bound by FTA and GATS, not falling under a service supplied in the exercise of governmental authority. When it comes to the scope to determine investigation service supplied in the exercise of governmental authority, the provider of service seems to be more important than the nature of work. As a result, PI service is bound by KORUS-FTA. Therefore, the preliminary conclusion is maintained.

2. GATS

Unlike the KORUS-FTA(Negative List), GATS are negotiated in a positive list approach. "Under a positive list approach, countries undertake national treatment and market access commitments specifying the type of access or treatment offered to services or service suppliers in scheduled sectors." (Hoekman & Matoo, 2002,

12) "According to B.W Simms and E,R.(1991), Criminal investigation involves identifying the occurrence of offenses, compiling reports on the circumstances surrounding the occurrence, interviewing witnesses and suspects with the objective of identifying the offender, and gathering sufficient evidence to allow prosecution to proceed." Another article also states that "private security in the United States has historically provided a wide range of policing activities and that today these forces "perform functions which are virtually identical in many respects to those carried out by the public police."

p.336).Therefore, if countries make a commitment on a specific sector, it has to be stipulated in the Schedule of Specific Commitment. In Korea, investigation/security sector has not been stipulated in the Schedule of Specific Commitment. Therefore, the *Act on Usage and Protection of Credit Information* (*market access restriction*) is consistent with GATS. However, if an act is classified as a *domestic regulation* (qualitative measure), then regardless of it being specified in the Schedule of Specific Commitment, such act is subject to Part 2 of GATS "General Obligations and Disciplines." As a result, the *Attorney Act* which was classified in the previous section as a *domestic regulation* (qualitative measure) has to be examined irrespective of the Schedule of Specific Commitment. But paragraph 4 and 5 of Article 6.4 in Part 2 of GATS "General Obligations and Disciplines" related to the *Attorney Act* is also applied in sectors in which a Member has undertaken specific commitments according to the regulation. Consequently, both the *Attorney Act and* the *Act on Usage and Protection of Credit Information* are consistent with GATS.

Since Korea did not liberalize its investigation and security markets by not stipulating them in the Schedule of Specific Commitment, prohibitive measures are still consistent with GATS. However, considering the Schedule of Specific Commitments of other countries, Korea will be pressured to gradually open its investigation market. Many countries already made specific commitments on the investigation and security sector though the details of them were different from country to country. Generally, developed western countries such as USA, Australia, Canada, Norway and Finland, made specific commitments; on the other hand, Asian countries such as Japan, China and Singapore, on the whole were conservative to open its PI market regardless of its national economic level. Considering these circumstances, Korea has to be prepared to liberalize security/investigation market as well. <Table 3> shows specific commitments of some western countries which have liberalized its PI market.

〈Table 3〉 The Schedule of Specific Commitments

– Australia

Investigation and Security(873)	Limitations on Market Access	Limitations on National Treatment
	1) None	1) None
	2) None	2) None
	3) None	3) None
	4) Unbound except as indicated in the horizontal service	4) Unbound except as indicated in the horizontal section

– USA

Investigation and Security(873)	Limitations on Market Access	Limitations on National Treatment
	1) None	1) None
	2) None	2) None
	3) Permanent resident alien status or US citizenship is required to own contract security companies in Maine	3) None
	4) Unbound, except as indicated in the horizontal section. In addition, permanent resident alien status or US citizenship is required for private investigators and security guards in: Maine and New York.	4) Unbound except as indicated in the horizontal section

Source : World Trade Organization (http://www.wto.org)

3. Chapter conclusion

In this chapter, the *Act on Usage and Protection of Credit Information* is concluded to be inconsistent with the Article 12.4(a)(i) and (iii) of KORUS FTA. However, such inconsistency is not just confined to KORUS FTA, it could arise in other FTAs following the same logic. For instance, when the same analysis is applied to KOREA-EU FTA regarding the *Act on Usage and Protection of Credit Information*, similar violation also occurs in the Article 7.11 and the Article 7.13 of KOREA-EU FTA.

Although specific violations of these two articles are assumed to be confined to the mode of supply 3, unlike the case of KORUS FTA, but the overall contents of the violation is almost the same with KORUS-FTA. Nothing is stipulated about investigation service in the mode of supply 3 under KOREA-EU FTA. It implies there is no restriction on the mode of supply 3 in terms of investigation service. <Table 4> shows the details on the Schedule of Specific Commitments related to investigation and security sector in the Korea-EU FTA.

〈Table 4〉 The Schedule of Specific Commitments

Sector or Sub–sector	Limitation on Market Access	Limitations on National Treatment	Additional Commit ments
1. Investigation and security services (CPC 873)	1) Unbound 2) None 3) Only a jurdicial person organized under Korean law may supply security services in Korea. For transparency purposes, only five types of security services are permitted in Korea: (a) shi-seol gyung-bee(facility security); (b) ho-song-gyung-bee(escort security); (c) shin-byun-bo-ho(personal security) ; (d) geegye-gyung bee (mechanized security); and (e) teuk-soo-gyung-bee(special security) 4) Unbound except as indicated in the Horizontal Commitments section	1) Unbound 2) None 3) None 4) Unbound except as indicated in the Horizontal Commitments section	

Source : KOREA–EU FTA (Annex 7–A–4)

Although investigation/security sector is a very small part of the service trade agreements, there are enough possibilities for the U.S and other countries to take legal actions against Korea for economic and political reasons. Some of the foreign PI firms already have complained a lot about extensive service coverage of Korean law firms including PI service area because the business field of PI firms has been encroached by those law firms. (Lee, 2008) In conclusion, there has to be an overall legal adjustment

related to the investigation and security sector to prevent unnecessary conflicts in the future.

V. Conclusion

While Korea proceeds with many bilateral agreements, the service market has been drastically liberalized recently. Although the negotiations on those international agreements for the liberalization of markets including service sector were carried out with prudence and caution, such agreements including vast areas left a loophole in its interpretation of agreements. The violation of Article 12.4 in KORUS-FTA by the *Act on Usage and Protection of Credit Information* is just an exemplary case of those loopholes. Considering the progress on liberalization of wide areas, inconsistency between domestic regulation and international agreement as well as ambiguity of terms and conditions in service agreement will further widen the loopholes in the future causing unexpected violations of international trade agreements.

The regulatory autonomy of sovereign countries will continuously conflict with progressive market liberalization. However, proliferation of international trade agreements and their ambiguous interpretations on terms and conditions will tilt the power in favor of market liberalization rather than the regulatory autonomy of sovereign countries. Sovereign countries may be pressured to liberalize their markets even to the extent that they did not make any commitments during their international trade negotiations. That is what had happened to the PI service sector in this paper. The Korean government might have thought that it had not liberalized its PI service as it did not directly mention its commitments on the list during the negotiation of service trade agreements but the loopholes in the interpretation of the international trade agreements have required the liberalization of Korea's PI market, making selective market liberalization impossible.

Unless liberalization trend is reversed or massive efforts are made to regulate every detail of international agreements, this phenomenon in favor of liberalization will not

likely to change. Apparently, considering the growing number of FTAs between countries this trend in favor of liberalization will be likely to continue in the near future.

Amid this liberalization trend, what has to be done is to proactively take advantageous position in multilateral and bilateral trade agreements. In order to achieve such advantageous position, a country should proactively engage in international trade agreements to hold first-mover advantage and also every domestic market including the service market should be prepared for liberalization. From this point of view, the investigation market has to be opened not only for avoiding international trade disputes but also for securing international competitiveness.

In conclusion, what this paper suggests is to arrange the domestic regulations to permit PI rather than to adjust the list of reservations in KORUS-FTA, preventing liberalization of PI market. Either way, both measures will prevent trade disputes but in the long-run, the introduction of PI service is an unavoidable trend as seen in examples of PI service of other countries. Establishing domestic regulation allowing PI sooner will be better not only for taking over the advantageous position in the international trade negotiations but also for securing the competitiveness of industries. In this respect, this paper supports the currently pending bill in the National Congress of Korea that permits PI in Korea.

References

1. 국외문헌

Button, Mark. (2007). Assessing the Regulation of Private Security across Europe, *European Journal of Criminology, Vol.4(1),* 109-128.

Choi, Won-Mog. (2009). Aggressive Regionalism In Korea - U.S.FTA: The Present and Future of Korea's FTA Policy, *Journal of International Economic Law, 12(3)*, 595-615.

Cattaneo, Olivier. (2010). *International Trade in Services: new trends and opportunities for developing countries, Washington.* D.C.: World Bank.

Delimatsis, Panagiotis. (2006). Due Process And 'Good' regulation Embedded In The Gats – Disciplining Regulatory Behavious In Services Through Article Vi Of The Gats, *Journal of International Economic, Vol.1,* 13-59.

Delematsis, Panagiotis. (2007). *International Trade in Services and Domestic Regulations-Necessity, Transparency, and Regulatory Diversity*. Oxford University Press.

Delimatisis, Panagiotis. (2010). Concluding the WTO services negotiations on domestic regulation-hopes and fears, *World Trade Review, 9:4,* 643-673.

Egger, Peter and Lanz, Rainer. (2008). *The Determinants of GATS Commitment Coverage*. The World Economy, University of Munich.

Fixler Jr, Philip E. and Robert W. Poole, Jr. (1988). Can police Services Be Privatized?, *Annals of the American Academy of Political and Social Science, Vol.498,* 108-118.

Hoekman, Bernard M. & Mattoo, Aaditya. (2002). *Development, trade, and the WTO: a handbook 1*. World Bank Publications.

King, Nancy J & Kalupahana, Kishani. (2007). Choosing Between Liberalization and Regulatory Autonomy under GATS: Implications of U,S,- Gambling for Trade in Cross Border E-Services, *Vanderbilt Journal of Transnational Law, Volume.40.*

Lode Van Den Hende and Herbert Smith LLP. (2007). GATS Article XVI and national regulatory sovereignty: what lessons to draw from US—Gambling?, *Brussels Cambridge Review of International Affairs, Volume.20,* Number 1.

Pauwelyn, Joost. (2005). RIEN NE VA PLUS? Distinguishing Domestic Regulation from Market

Access in GATT and GATS, *Duke Law School Faculty Scholarship Series*.

Prenzler, T and Hayes, H. (1999). An Evaluation of the Queensland Security Providers Act: Implications for National Regulation of the Protective Security Industry, *Australian and New Zealand Journal of Criminology*.

Prenzler, Tim (2001). Private Investigators in Australia: Work, Law, Ethics and Regulation, *Criminology Research Council Research Project* 15/99-2000(July).

Reinsdorf, Marshall B & Slaughter, Matthew J. (2009). *International trade in services and intangibles in the era of globalization*. Chicago ; London : The University of Chicago Press.

Sáez, Sebastián. (2010). *Trade in services negotiations : a guide for developing countries,* Washington, D.C. : World Bank.

Shearing, Clifford D & Stenning, Philip C. (1981). Modern Private Security: Its Growth and Implications. *Crime and Justice, Vol. 3*.

Simms, B. W. and E. R. (1991). *An Information Processing Model of a Police Organization Petersen." Management Science*, *Vol. 37, No. 2*.

Stenning, Philip C. (2000). Powers and Accountability of Private Police, *European Journal on Criminal Policy and Research, Vol.8,* 325-352.

WTO Secretariat. (2004). *UNITED STATES – MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES*. Report of the Panel.

WTO Secretaria. (2005). *UNITED STATES -MEASURES AFFECTING THE CROSS-BORDER SUPPLY OF GAMBLING AND BETTING SERVICES*. Report of the Appellate Body.

WTO Secretariat. (2009). *CHINA-MEASURES AFFECTING TRADING RIGHTS AND DISTRIBUTION SERVICES FOR CERTAIN PUBLICATIONS AND AUDIOVISUAL ENTERTAINMENT PRODUCTS*. Report of the Appellate Body.

2. 국내문헌

강인수외 9명 공저. (2009). **국제통상론**. 서울: 박영사.

강영숙. (2006). 일본탐정업계의 실태와 탐정업법에 관한 연구. **한국 민간경비학회보, 제8호**, 327-357.

강영숙, (2006). 한국의 공인탐정 제도도입에 관한연구. **용인대학교 경호학과 대학원 박사학위논문**.

고준성. (2008). **FTA의 서비스 무역규정 조문별 유형분석: 한국의 협상 가이드라인의 모색**. KIET 산업연구원.

공도환, (2007). 한국에서의 탐정제도의 필요성과 탐정의 역할 및 업무범위에 관한 연구. **연세대학 법무대학원 석사학위논문.**

국회도서관. (2009). **한-EU FTA 한눈에 보기.** 서울 : 국회도서관.

김명호,김환규. (2007). WTO/GATS하에서 자유무역협정(FTA)을 위한 서비스산업 경쟁력 강화방안. **조선대 경영경제연구,** 137-151.

김승호. (2007). **WTO 통상분쟁 판례해설(2).** 서울: 법영사.

김지연. (2005). 한국법률서비스시장 개방의 전망과 과제에 대한 연구. **연세대학교 경제대학원 석사학위논문.**

나영민. (2005). 탐정제의 도입방안에 관한 연구. **연세대학교 행정대학원 경찰행정 석사학위논문.**

왕상한. (2007). **WTO 유통업개방의 반성과 대안.** 파주: 법문사.

외교통상부 대외경제정책 연구원. (2005). **한, 칠레 FTA의 주요내용.**

나영민. (2006). 민간조사제도의 정착 및 수사기관과의 관계에 관한 연구. **제16회 한국경호경비학회 세미나자료집(한국경호경비학회).**

이상원. (2008). 민간조사(탐정)제도의 도입방향- 경비업법 개정을 중심으로. **한국경호경비학회지, 17호,** 235-253.

이상훈. (2009). 공인탐정제도의 올바른 모델설정에 관한 연구. **한국경호경비학회지, 제 20호,** 249-270.

이승철. (2008). 민간조사업법의 도입방향에 관한 연구. **한국경호경비학회지, 제17호,** 255-275.

이은섭, 박은진. (2009). GATS 의무에 대한 일반적 예외의 해석과 적용 - 미국 온라인 도박서비스의 공급에 영향을 미치는 조치에 관한 사건을 중심으로-. **통상학회지, 제34권 제 1호,** 127-151.

이재경. (2009). 공인탐정제도의 도입 필요성에 관한 연구. **한국민간경비학회보, 제 13호,** 116-143.

이한영, 송영관. (2009). GATS 국내규제와 투명성 규범에 관한 연구. **국제통상연구, 제 14권. 제4호.** 53-77

정인교. (2010). **FTA 통상론=Free trade agreement and international.** 서울: 율곡.

정일성, 박준석, 서상열. (2007). 민간조사제도 도입 반대의견에 관한고찰. **한국 경호 경비학회지, 제14호,** 465-484.

3. 인터넷 자료

United States Department of Labor. 2010.(Access Date: 2010. 11.03).

외교통상상부 자유무역협정. 2010.http://www.fta.go.kr/user(Access Date 2010.11.05).

The Department of Agriculture and Consumer Services, Division of Licensing. 2010. (Access Date: 2010.11.03).

World Trade Law. 2010. (Access Date: 2010. 11.05).

Wikipedia (Access Date: 2010. 11. 07).

【요 약】

WTO/ FTA 체제에서 민간조사업의 법적문제

고 지 훈 · 박 현 호

경찰이 대처할 수 없는 수준까지 범죄가 증가함에 따라, 민간조사업 도입에 대한 논의는 계속해서 있어왔다. 그러나 민간 조사업 도입을 입법화 하려는 시도는 매번 법안이 발의될 때마다 실패했다. 이러한 이유는 기본적으로 민간조사업 도입에 대한 찬반의견이 어떤 가치를 우선시 하느냐에 따라 첨예하게 엇갈렸기 때문이었다.

그러나 이러한 의견충돌과 상관없이 민간조사업 도입의 필요성은 분명하게 되었다. 한국이 GATS 와 FTA 같은 서비스협정을 통해 자국의 서비스 시장을 개방함에 따라, 민간조사와 관련된 현행법 들이 GATS 와 한미 FTA와 같은 국제 조약을 위반하는 것으로 밝혀졌기 때문이다. 이 논문은 구체적 양허안을 중심으로 한 법적 분석을 통해 민간조사서비스를 규제하는 신용정보의 이용 및 보호에 관한 법률이 한미 FTA의 12.4(a)(i) 와 12.4(iii) 그리고 한-EU FTA 의 7.13 조항을 위반한다는 것을 밝혀냈다.

만약 한국이 현재 법안을 수정하지 않고, PI 에 관한 새로운 법안을 입안하지 않는 다면 이러한 불합치는 수천만 달러에 이르는 통상 분쟁으로 이어질 수 있다. 이러한 접에서 새로운 민간조사법안의 통과는 필수적이라고 할 수 있다.

주제어 : GATS, FTA , 민간조사업, US-Gambling 케이스, 서비스 무역협정, 탐정업, 자유무역협정