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韓國貿易商務學會

「 」 18 (2002.8)

## 合作投資契約 法的 問題

*Legal Aspects of International Joint Ventures*

【 】

I.

II. 海外直接投資 根據 最近動向

III. 合作投資契約 問題點

IV. 中國 北韓 合作投資



IMF 가  
 가4)  
 가  
 中國  
 北韓

## II. 海外直接投資 根據 最近動向

### 1. 法的 根據

#### 가. 外國換去來法規

가 (KOTRA)  
 가  
 5)  
 4) 1998 11 「  
 , KOTRA (KISC)  
 management) 가  
 15,541 , 2000 15,697 가 1998 8,852 , 1999  
 24,647 가 1962 1997  
 5) 5 8 (FDI)  
 , 5 4가



가 ( 18 2 , 3 , 30 6 ).

가

9 4 .

< 1>

海外直接投資

	( ) , .
	1 , .
	가 , 가 가 .
	.

: , 「 』(2000.1), 86

2001 11 6

( )<sup>6)</sup> 가 .

‘ , , ( )

( ) .

6)

가

( ) 20 , 3 , ( ) 2 . “ ”, 2001.11.17.

가

< 1>

. OECD 資本移動自由化規約

1996 (Organization for Economic Cooperation and Development: OECD) 가 OECD 「 (Code of Liberalization of Capital Movements) I List A . 7)

< 2>

OECD I (List A)

A.	
1.	,
2.	
3.	5
B.	
1.	,
2.	
3.	5
< >	A B
i)	가
ii)	(exceptionally detrimental)

IMF 資本去來 1998 6 2 「 」

7) , “OECD ”, 「 」 5 , , 1996, 40 42 .

9 「 」 1999 4 1  
2001 1 2

8)

9)

場外

(multi-netting, )

## 2. 海外投資市場

10)

### 가. 海外直接投資

國際貿易

國際分業

世界生産

移動性(mobility)

가

가

生産據點

國際화가

多國籍企業(multinational corporation:

MNC)

8) , “ 2 ( )”, 2000.12.15 .

<[http://www.mofe.go.kr/mofe2/html/mainindex\\_search.php3](http://www.mofe.go.kr/mofe2/html/mainindex_search.php3)>

9)

219

가

159

30%

10)

節

「

」(2000.1) 83 94

(MNC)

所有權 利點

가

地域的 利點

(FDI)

가

(competition and concentration)

自立經濟

. 1990

가

(non-FDI flows)

(FDI flows)

.11)

. 世界 海外直接投資動向

1990 (FDI)

가 . 1994 , 1997

11) Pieter Bottelier, "The Role of Foreign Direct Investment and Multinational Corporations in China's Development - China's Response to the Asian Crisis", China Fair for International Investment and Trade, Xiamen, China, Sept. 8- 11, 1998.  
<http://www.worldbank.org/html/extdr/offrep/eap/pgsp090898.htm>



(cross-border mergers and acquisitions: M&A)  
 (United Nations Conference on Trade and Development:  
 UNCTAD) 1998 , , FDI  
 4,604 , 1,659 , 175 가 68.5%, 3.8%,  
 5.4% , 가 .12)

1950 1970  
 (“Greenfield FDI”)가 , 1980  
 M&A

M&A

動因

가

가 가 1990

(Multilateral Agreement on

Investment: MAI)

13)

가

12) UNCTAD, *World Investment Report 1999*.

13) 1991 (OECD) (CIME)  
 (CMIT)

1995 OECD 1995 9 MAI  
 , OECD EU , WTO ( ) 14  
 가 . 1996 12 OECD 가  
 (NGO) MAI 1998 4 .

### III. 合作投資契約 問題點

#### 1. 一般的

(international joint venture)  
(comparative advantage)가  
(synergy effect)  
가 對政府 , ,  
, , ,  
가  
가  
가  
(International Finance Corporation: IFC)가  
,  
.14)

85%가 6 , 20%  
18  
14) , , , 가 (IFC) 6 75  
가

. Robert Miller, Jack Glen, Fred Jaspersen and Yannis Karmokolias, "International Joint Ventures in Developing Countries: Happy Marriages?", *IFC Discussion Paper* No.29, World Bank, 1996. <<http://www.worldbank.org/fandd/english/0397/articles/050397.htm>>  
<<http://www.ifc.org/economics/pubs/dp29/dp29.pdf>>

가 (JV) (staffing  
(equity structure)가 80%, 78%, 45%,  
issue) 44%, 42% .  
가  
(intellectual property) , 가  
(valuation problem) 가  
(transparency) , 가  
가 (conflict resolution) .  
(management responsibility) 母會社  
(management independence) .  
(ownership structure)  
가 ,  
가 가  
(MNC) ‘一部’ ‘全部’  
, 가 ‘ ’  
‘巨人’ 가 가  
가 税金  
가 (transfer price)

가

## 2. 法律的

國籍

가 가

， 合作會社(JV)

.15)

가

가

， 理事會

가 가

가

가

(communication)

(deadlock)

3

定款(articles of

incorporation, by-laws)<sup>16)</sup>

15) 「

」, 1996, 162 163 .

16) (英 memorandum of association; 美 articles of incorporation, charter) (英 articles of association; 美 by-laws)

, 163 .

17)

人的會社 가 가

가  
가 3  
가  
18)

株式先買權(first refusal) 19)

가

### 二重課稅防止協定

20)

17)

가 目的外 (ultra vires doctrine)  
“ (the transaction of any or all lawful  
business)

18) 川上 弘, “合弁會社”, 土井輝生編「國際契約ハンドブック」, 同文館, 1981, 387 .

19) 商法 (335 1 )  
가  
(335 2 4 ).

20) M&A . IMF  
限界企業

會社整理・和議 가 가

(現 ) 3  
, 2001.10.9 「 M&A 」 3 .

### 3. 合作投資契約書

21)

經營戰略 : (business structure) ,  
가 , 가  
, 가 가 가  
가 .  
所有構造 : 가 가 ( ) ,  
가 .  
:  
가 , 가  
가 .  
經營環境 : 가 가  
가 .  
가 가  
(learning effect) :  
가

---

21) IFC Discussion Paper("International Joint Ventures in Developing Countries") ABA ("Negotiating and Drafting International Contract Joint Ventures", pp.304-308)

가

技術移轉 : (good will, understanding) 가

(cultural conflict) : 多國籍性(multinationality) (business practices) 가 (communication)

保險(insurance) : (non-exclusivity clause), 가 (contract termination) , (good will) 가

: (products liability: PL) 가 PL 가

紛爭解決(dispute resolution) : (self-executing agreement)

issue) (addressing hard

가

(exit mechanism)

仲裁(arbitration)

假處分(injunction)

가

彈力性 :

(commitment)

document)

(living

## IV. 中國 北韓 合作投資

### 1. 問題

(World Trade Organization: WTO) 가 2008

가



가 가

, 가 .

가

「 」, 「 」, 「 」

2000 6 · 15

가

## 2. 中國 合作投資<sup>22)</sup>

가. 中國

WTO 가

合資投

資, 合作投資, 獨自投資 合作開發

가

中

外合資經營企業, 中外合作經營企業, 獨自企業

가

‘三資企業’<sup>23)</sup>

22) (KOTRA), 「

가 」( ), 2001.7, 36 41 .

23) 法」 1994 7

1993 12 「會社

社 三資企業法 가

( 外資企業法 ) 有限會

社 , 國有獨自會社

가 . ,

가

‘共產黨組織’ 三資

. , “中國 有限會社 運營機構 ”,

· 合資投資

1979. 7 「中外合資經營企業法」(1990.4. ) 1988. 9  
 「中外合資經營企業法實施條例」  
 가 .24)  
 (Equity JV)  
 가  
 , , , , ,  
 , 董事會( ) 總  
 經理( )가 .

· 合作投資

1988 「中外合作經營企業法」 1995. 8  
 「中外合作經營企業法施行規則」 (Contractual JV)  
 가  
 가  
 契約<sup>25)</sup>

「 」 9 , 2001.2, 268 270, 284 .  
 24) 2000 36 56.7%가  
 . KOTRA, 37 .  
 25) 契約 “合同” .



가

가

가

· 合作開發 合作生產

가

「對外合作開發開採海洋石油資源條例」

「中外合作經營企業法」

· 合資契約

(合同) 定款

가

26)

26) '協議' '合意'

中國法

合資, 合作, 獨自

가

27)

가

가

가

가

가

가

가

가

30%

가

가

27)

市, 縣, 區

가

公證

2

1

가

가

가

3

가

가

가

. KOTRA, , 80 , 99 .

30% 50%

70% ,28)

가

( )

가

가

가

가

“

”

가

3

### 3. 北韓 合作投資<sup>29)</sup>

가.

社會主義 計劃經濟

28) 外貨收支  
가 , 90 .

29) “ (2001.9) , “ 가 ” ,



가가

( 2 , 2 ) .

( 14 ),  
有限責任

( 4 , 9 ).

“ ”

가

1992

“ ” ( 5 ), 1999 “ ”

立法

가

30)

가

認可主義

가

31)

( ), (

30) , 45 51 .  
31)



12 , 11 2 , 37 , 28  
. 가가 30%  
( 2 , 2 ).  
3 .  
( )( 12 , 10  
, 26 ). - ( )  
)- ( / ) 가 ( ) ,  
, 가 ) ,  
가 .

, ( )  
( ) .  
가 ( )  
37 , 126 , 101 ).  
( 37 )

申訴 , ,  
( 7 , 158 ,  
21 , 132 ). 3  
( . 42,43 , 47 , 21 ,  
31 ).

. 가 가  
. 가 가 .  
恣意的 가 .  
“ ”(  
3 2 ) “ 가

가 ”( 5 ), “ 가 ”

( 19 2 )

가 ,

가 가 原價 가 ,

가 「 가 가 ICSI

D<sup>32)</sup> 」 가 .

가 가 가 가

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32) (International Center for Settlement of Investment Disputes) . ICSID

- , "OECD", " ", " ", 5 ,  
, 1996.
- , " ", , 1995.
- , " ", " ",  
, 2001.9.
- , " 가 ", "  
", 2001.9.
- , "中國 有限會社 運營機構", " ", " ", 9 , 2001.2.
- , " ( 2 )", , 2001.
- (KOTRA), " 가 "( ), 2001.7.
- , " ", 1996.
- 川上 弘, "合弁會社", 土井輝生編「國際契約ハンドブック」, 同文館, 1981.
- , " ", 2000.1.
- , " ", 2001.
- , " 2 ", 2000.12.15.
- Pieter Bottelier, "The Role of Foreign Direct Investment and Multinational Corporations in China's Development - China's Response to the Asian Crisis", China Fair for International Investment and Trade, Xiamen, China, Sept. 8- 11, 1998.
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- Robert Miller, Jack Glen, Fred Jaspersen and Yannis Karmokolias, "International Joint Ventures in Developing Countries: Happy Marriages?", *IFC Discussion Paper No.29*, World Bank, 1996.
- Stephen Sayer, "Negotiating and Structuring International Joint Venture Agreements", 14th May 1999. <<http://www.dundee.ac.uk/cepmlp/journal/html/article5-1.html>>  
<<http://www.worldbank.org/fandd/english/0397/articles/>>  
<<http://www.ifc.org/economics/pubs/discuss.htm>>

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ABSTRACT

**Legal Aspects of International Joint Ventures**

Park, Whon Il

International joint ventures are usually formed and managed by domestic companies and foreign investors for the common objectives. They offer an opportunity for each partner to benefit significantly from the comparative advantages of the other. Local partners bring knowledge of the domestic market; familiarity with government bureaucracies and regulations; understanding of local labor markets; and existing manufacturing facilities. Foreign partners can offer advanced process and product technologies, management know-how, and access to export markets.

In Korea, joint ventures have been encouraged to usher in foreign investors with foreign currency capital badly needed during the IMF financial crisis. In the meantime, Korean laws and regulations with respect to joint ventures have been largely overhauled to promote foreign direct investment (FDI) both inbound and outbound. They include four types of FDI, i.e., acquisition of foreign stocks, provision of long-term loans, participation in joint operations like resources development, and establishment of foreign offices.

From the legal point of view, the formal joint venture agreement must be an offspring of a series of tough negotiations between domestic and foreign partners. They usually stress the long-term relationship with the good will and dedication to each other, and restrict the free transfer of stocks. Both partners are earnestly interested in the ownership and management of the joint venture. So they keep a close eye on the articles of incorporation, changes of business environment, conflict resolution methods, transparency of accounting and other financial matters. When a multinational corporation (MNC) is involved in the joint venture, conflicts over management strategies, marketing and other issues take place more often than not between the MNC and local partners.

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We have to pay attention to joint ventures, particularly, in China and North Korea. As witnessed in other transition economies, China is eagerly bringing in foreign direct investments for the development of nation's economy. China encourages foreign investors to establish ordinary joint ventures, contractual joint ventures, solely invested foreign capital companies and jointly operated development companies with local partners. In North Korea, however, joint ventures have a different meaning like contractual joint ventures in China, in which North Korean partners have an initiative in the management. Rather, jointly operated companies or simply processing-for-wage companies are recommended in view of the unpredictable legal infrastructure in North Korea.

Key Words : foreign direct investment, FDI, joint venture, multinational corporations, transition economies