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INVESTOR-STATE ARBITRATION IN SOUTH KOREAN INTERNATIONAL TRADE POLICIES: AN UNCERTAIN FUTURE, TRAPPED BY THE PAST

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Younsik Kim



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ABOUT THE INVESTOR-STATE ARBITRATION PROJECT

Launched in November 2014, this project is addressing a central policy issue of contemporary international investment protection law: is investor-state arbitration (ISA) suitable between developed liberal democratic countries?

The project will seek to establish how many agreements exist or are planned between economically developed liberal democracies. It will review legal and policy reactions to investor-state arbitrations taking place within these countries and summarize the substantive grounds upon which claims are being made and their impact on public policy making by governments.

The project will review, critically assess and critique arguments made in favour and against the growing use of ISA between developed democracies — paying particular attention to Canada, the European Union, Japan, Korea, the United States and Australia, where civil society groups and academic critics have come out against ISA. The project will examine the arguments that investor-state disputes are best left to the national courts in the subject jurisdiction. It will also examine whether domestic law in the countries examined gives the foreign investor rights of action before the domestic courts against the government, equivalent to those provided by contemporary investment protection agreements.

CIGI Senior Fellow Armand de Mestral is the lead researcher on the ISA project. Contributors to the project are Marc Bungenberg, Charles-Emmanuel Côté, David Gantz, Shotaro Hamamoto, Younsik Kim, Céline Lévesque, Csongor István Nagy, Luke Nottage, Ucheora Onwuamaegbu, Carmen Otero, Hugo Perezcano, August Reinisch and David Schneiderman. A conference was held in Ottawa on September 25, 2015. The papers presented at that conference are in the process of being issued as CIGI Papers and will ultimately appear as a collective book.

ABOUT THE AUTHOR



Younsik Kim is a CIGI senior fellow and an assistant professor of constitutional law at Sungshin Women's University in Korea. Previously, he was a senior researcher at the Korean Constitutional Research Institute at the Constitutional Court of Korea. He has written several publications on international and constitutional law, with articles published in *Law and Society* and *Public Law Study Review*, among others.

Younsik holds a Ph.D. in law from the University of Edinburgh, where his thesis focused on the relationship between investor-state arbitration and national constitutional law. He has an LL.M. from the University of Chicago, an LL.M. from Korea University and an LL.B. from Korea University.

ACRONYMS AND ABBREVIATIONS

BIT	bilateral investment treaty
BRIC	Brazil, Russia, India and China
FTA	free trade agreement
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ISA	investor-state arbitration
ISDS	investor-state dispute settlement
Korea-EFTA FTA	Korea-European Free Trade Association Free Trade Agreement
KORUS-FTA	Korea-US Free Trade Agreement
KOTRA	Korea Trade Investment Promotion Agency
MFN	most-favoured nation
MTBE	methyl tert-butyl ether
NAFTA	North American Free Trade Agreement
OECD	Organisation for Economic Co-operation and Development
TPP	Trans-Pacific Partnership
TTIP	Transatlantic Trade and Investment Partnership
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
US Trade Act of 2002	US Bipartisan Trade Promotion Authority Act of 2002
WTO	World Trade Organization

EXECUTIVE SUMMARY

South Korea is a developed country, known for the most active bilateral investment treaty (BIT) policy in the world. When it was still a developing country, South Korea complied with the requests of developed countries in negotiating BITs. The early model of South Korean BIT tended to promise investor-friendly terms in order to attract much-needed foreign investment. Therefore, South Korean policy makers were generally amicable to the investor-state arbitration (ISA) system because they believed that ISA could function to increase more inbound capital flows.

As its economy grows, South Korea seems to be in a dual position in which it has become both an investment-importing and an investment-exporting state. In the heyday of neo-liberalism, during the late 1990s, South Korea launched an ambitious free trade agreement (FTA) road map to increase access to foreign markets and to attract more investment. At the same time, the South Korean government attempted to level up investment protection of new and existing BITs, including investment chapters in FTAs. Support for ISA in drafting BITs has thus become more apparent, as South Korea seeks to protect its overseas investors to the same extent to which it hopes to attract more foreign capital. To take an example, South Korean policy makers decided to drop an “exhaustion of local remedies” clause in BITs. This new policy presented more commitment to investment protection by enhancing direct access to investment arbitration. However, this liberalist update later turned out to be a source of risk.

Recently, South Korea’s original support for the ISA system was challenged in the aftermath of strong public sentiment against the Korea-US Free Trade Agreement (KORUS-FTA). It is especially noteworthy that South Korean judges, despite their traditional apolitical attitude to controversial social issues, raised critical voices about judicial sovereignty. Although one might point out that intense criticism of this treaty appeared to be politically and ideologically distorted in South Korea, it is clear that the experience of the KORUS-FTA had considerable impact on a new model BIT, which was drafted so as to strike a balance between the legitimate regulatory power of the host state and investment protection. It remains to be seen whether the ISA system will be beneficial or risky under the post-KORUS FTA BITs. Nonetheless, it is at least said that ISA could contribute in some degree to protecting South Korean overseas investment. South Korean investors are increasingly using ISA to protect their own overseas properties in developing countries.

However, new concerns about ISA and BITs have arisen in an unexpected way. Three investment claims against the South Korean government were raised based on old, liberalist BITs that were established before the KORUS-FTA. Global investors in those cases took advantage of loopholes in old BITs that favoured investors. Eliminating the exhaustion clause, in particular, encouraged global investors to consider global remedies without the involvement of host states. Although public criticism of ISA has died down, the results of investment arbitrations against the South Korean government will be a litmus test for the public to reassess the costs and benefits of ISA. The South Korean government’s ISA policy will encounter public opposition if the government fails to defend its actions in the pending arbitration cases.

INTRODUCTION

This paper traces a trend in South Korean ISA practices and policies, as demonstrated by its BITs and investment chapters of FTAs.¹ This research was part of the Investor-State Arbitration project of the Centre for International Governance Innovation, which centres on one research question: “Is ISA suitable between developed liberal democratic countries?”²

Setting the parameters of the research touches on the difficulties in defining “a developed liberal democratic country.” As noted by Hugo Perezcano, “a developed liberal democratic country” does not seem to delineate a boundary of the research because it is a politically arguable and value-oriented concept.³ Therefore, this research attempts to propose a relatively clearer concept than is suggested by the term “a developed liberal democratic country.”

¹ Unless noted otherwise, this paper refers to a stand-alone BIT or the investment chapter of an FTA as a BIT.

² See Investor-State Arbitration project, online: <www.cigionline.org/activity/investor-state-arbitration>.

³ See H Perezcano, “Risks of a Selective Approach to Investor-State Arbitration” CIGI, Investor-State Arbitration Series Paper No 3, 13 April 2016 at 2, online: <www.cigionline.org/publications/risks-of-selective-approach-investor-state-arbitration>.

Before delving into the new concept, a preliminary question arises as to why the ISA project, despite the ambiguity identified above, insists on the term “a developed liberal democratic country.” The answer can be found in the context of the project as seen in the following. It has been argued that the international investment legal system has been designed to protect foreign investments from legal risks of unstable host states, most of which fail to ensure either democracy or the rule of law. The international investment legal system is thought to substitute for the unpredictable legal systems of host states. However, this argument is not generally applicable to countries that protect foreign investments under highly developed legal systems. Nevertheless, most BITs or FTAs between countries having highly advanced legal systems tend to include ISA. In this context, the target of the CIGI project is an ISA policy of an economically developed country with a highly developed legal system.

With the targets and contexts of the ISA project in mind, this research proposes to replace the term “a developed liberal democratic country” with “a developed country”; that is, an economically developed country that is able to guarantee the stability and predictability of governmental measures under its domestic legal system. In fact, “a developed liberal democratic country” is not a useful term for circumscribing the research boundary because the international community does not recognize a consensus about its meaning. The concept of a developed country suffers from a lack of clarity because the division between a developed country and a developing country can vary, being made in various international contexts for different purposes, as seen in the World Trade Organization (WTO) system.⁴ Although it is undeniable that the developed/developing distinction also provides insufficient criteria, its application could help to define the research target more precisely than sticking to the concept of a developed liberal democratic country. For instance, the nature of the political system, whether a liberal democracy, a dictatorship or something else, may be controversial; in comparison to this, development can be measured by objective economic data. In addition, a developed country can be recognized in accordance with a conventional understanding of its meaning, formed through repeated practices in the field of international economic law. The concept of a “developed country” fits well with the research goal, which takes into consideration the investment practices of countries that have achieved economic development by drawing on legal stability.

In addition to the conceptual questions, this paper needs to tackle a methodological issue. As part of the ISA project, the paper describes the responses of South Korea to the ISA system in making FTAs and BITs with other developed countries. This analysis requires a historical approach to South Korea’s ISA policy. This policy was formed when BITs were concluded with developed countries while South Korea was still a developing country. Now, the policy is being tested by South Korea’s position as both a capital-importing and capital-exporting country in the field of international investment. Therefore, some historical analysis is required in order to understand the current South Korean position on the ISA system and to anticipate possible changes in South Korean ISA policy.

This paper commences by investigating the changes in South Korea’s position in negotiating and concluding investment treaties with developed countries. It articulates policy changes in light of South Korea’s dual position as both an investment-importing and an investment-exporting country. Further, the paper analyzes how public responses to ISA and a changed strategic position influenced the investment treaty-making practices by mapping the social controversies triggered by the KORUS-FTA. Finally, this paper anticipates the future of South Korean ISA policies by exploring a changing discursive landscape regarding ISA in the wake of a series of South Korea-involved investment cases.

SOUTH KOREA’S ISA POLICY AND DUAL POSITION IN MAKING INTERNATIONAL INVESTMENT TREATIES

ISA Policy in South Korea as a Developing Country (1960s–mid-1990s)

South Korea established many BITs with major developed countries — mainly European — during the 1960s and 1970s. With the Korean peninsula destroyed during the Korean War, successive South Korean administrations since the war have placed the reconstruction of the national economy and the elimination of poverty at the centre of the national policy agenda. While South Korea had an

4 See e.g. M Matsushita, TJ Schoenbaum & PC Mavroidis, *The World Trade Organization* (Oxford: Oxford University Press, 2006) at 763–765.

abundance of human resources, it lacked investment and natural resources. The South Korean government hoped to attract more foreign investment by establishing investment treaties. South Korea signed investment treaties with developed countries after its first BIT with Germany in 1964 and after joining the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) in 1965. Concurrent with South Korean trade policy, the South Korean BITs concluded with developed countries were part of comprehensive BIT policies pursued by western countries. The first surge in BITs occurred in the 1960s and 1970s, when global investors encountered difficulties in finding a suitable place for investments after having decolonized. Most of these countries eventually launched comprehensive and ambitious BITs with their former colonies.⁵

Liberalist views were embodied in the BITs that South Korea concluded with developed countries from the 1960s to the 1980s in the drafting of substantive norms for investment protection. Most BITs at that time incorporated key legal doctrines for such protection, such as national treatment, most favoured nation (MFN) treatment, a minimum standard of treatment, direct or indirect expropriation and rights to transfer capital and returns.⁶ Developed countries recognized and adopted this general trend.

Most of the BITs at that time were vaguely worded in two- or three-page documents promising investment protections. The provisions of the indirect expropriation doctrine in early South Korean BITs, which later caused intense debate in the KORUS-FTA, show this style of treaty drafting. For example, article 5.1 of the Korea-UK BIT prevented unjustified expropriations:

Article 5 Expropriation

1. Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to *measures having effect equivalent to nationalisation or expropriation* (hereinafter referred to as “expropriation”) in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party and against prompt, adequate and effective compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation of impending expropriation became public knowledge, shall include interest until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph. (emphasis added)

The more abstract language of the treaty text implies higher risks of dispute because the meanings of terms are unclear to both parties. In regard to the indirect expropriation doctrine, the interpretation of “measures having effect equivalent to nationalisation or expropriation” has been controversial in the areas of international investment law under the name of “indirect expropriation.”⁷ Foreign

⁵ See AP Newcombe & L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2009) at 41–42.

⁶ *Ibid* at 43.

⁷ Many international investment treaties and arbitration decisions incorporate the idea of indirect expropriation through the use of various kinds of terminology such as “de facto expropriation,” “creeping expropriation” or measures “tantamount to” or “equivalent to” expropriation. See *Tecmed v Mexico*, Award, 29 May 2003, ICSID No ARB(AF)/00/2 at para 114.

investors, as seen in a series of notorious North American Free Trade Agreement (NAFTA) cases,⁸ want to expand the concept of indirect expropriation as much as possible in order to challenge more government actions. At the same time, the host state wants to narrow the conceptual scope of indirect expropriation. Accordingly, this abstractness of treaty language implies more obligation for the host state, and eventually a greater degree of risk that the government's actions will be interrupted by global investors. Such a risk is referred to as a "sovereignty cost," which a nation state is required to take by establishing a BIT representing a commitment to investment protection. This risk contains "the political costs of assembling a coalition in support of foreign investors' rights, as well as the costs associated with giving up a broad range of policy instruments relevant to domestic social or developmental purposes (taxation, regulation, performance requirements, property seizure, and currency and capital restrictions)."⁹

In substantive matters, South Korean trade policies seemed more amenable to ISA than did those of other developing countries such as China, Brazil and India. Those countries had shown more reluctance than South Korea in adopting the international investment legal system because they relied on a different development model until the 1980s.¹⁰ The advent of resource nationalism in developing countries increased the diplomatic strength of newly independent investment-importing countries by giving more weight to sovereign dignity. Those capital-importing states took ambitious steps, such as nationalization, under the banner of the "New International Economic Order."¹¹ This trend is also explained in light of "post-colonial syndrome," which was prevalent among newly independent countries after 1960.¹² Those countries established ambitious economic development plans based on the protection of the domestic market, considering foreign investment as another type of colonialism. As a result, the experience of colonialism made those countries reluctant to delegate their power to global institutions such as the International Centre for Settlement of Investment Disputes (ICSID) by overestimating the sovereignty costs. For example, while Brazil refused to sign any treaty with an investor-state dispute settlement (ISDS) mechanism, the Chinese government was reluctant to accept the typical type of ISA system found in most developed-country BITs until the 1990s, as seen in the China-South Africa BIT (1997) or the China-Barbados BIT (1998). In contrast, South Korea has taken the ISA system seriously since the 1960s.

8 Article 1110.1 of the *North American Free Trade Agreement* prescribes that "[n]o Party may directly or indirectly nationalise or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalisation or expropriation of such an investment." *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2 (entered into force 1 January 1994) [NAFTA]. However, the NAFTA text does not clarify the meaning of a "measure tantamount to expropriation or nationalization." This wording allows international investment tribunals to recognize various government measures as indirect expropriation. Of course, this kind of treaty wording gives the benefit of flexibility to an investor who is forced to face hostile and devious government measures. However, taking a too investor-oriented approach to the meaning of indirect expropriation runs the risk of generating other counterproductive consequences; the broad concept of indirect expropriation can be applied to attack ordinary government policies that pursue the public interest. To take an example of the *Metalclad* case, the host state refused to grant a construction permit, and it designated the area as a national protection area for cactuses. The tribunal in this case held that this series of measures amounted to indirect expropriation "which [had] the effect of depriving the owner of the reasonably-to-be-expected economic benefit of property." See *Metalclad Corp v Mexico*, Award, 30 August 2000, ICSID Case No ARB(AF)/97/1, 40 ILM 36 at para 103. Additionally, the Canadian company, Methanex, submitted a Chapter 11 NAFTA claim on the grounds that California's ban on methyl tert-butyl ether (MTBE) gasoline additive amounted to an expropriation under article 1110 of NAFTA. Although the claim was unsuccessful, this case drew critical attention from civil society because it illustrated that foreign investors can challenge the sovereign power that protects the public interest. See *Methanex Corp v United States*, Final Award, 3 August 2005, NAFTA (UNCITRAL), 44 ILM 2005 at 1345.

9 See Z Elkins, AT Guzman & BA Simmons, "Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000" (2006) 60:04 Intl Org 811 at 825 (proposing a typical concept of sovereignty cost). See also S Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Oxford: Hart Publishing, 2009) at 89; LE Sachs & KP Sauvant, "BITs, DTTs, and FDI Flows: An Overview" in KP Sauvant & LE Sachs, eds, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford: Oxford University Press, 2009) at xli (applying this concept to dynamics of the international investment field at various contexts).

10 See A Berger, "The Politics of China's Investment Treaty-Making Program" in T Broude et al, eds, *The Politics of International Economic Law* (Cambridge: Cambridge University Press, 2011); G Smith, "Chinese Bilateral Investment Treaties: Restrictions on International Arbitration" (2010) 76 Arb 58 at 58–59; K Hadely, "Do China's BITs Matter? Assessing the Effect of China's Investment Agreements on Foreign Direct Investment Flows, Investors' Rights, and the Rule of Law" (2013) 45 Geo J Intl L 255 at 305–06; SW Schill, "Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China" (2007) 15 Cardozo J Intl & Comp L 73 at 86–94. See also Newcombe & Paradell, *supra* note 5 at 43–44 (explaining a reluctance with respect to the BIT programmes in China and some developing countries).

11 See RCA White, "A New International Economic Order" (1975) 24 ICLQ 542; GW Haight, "The New International Economic Order and the Charter of Economic Rights and Duties of States" (1975) 9:4 Intl Lawyer 591.

12 Those countries showed hostile feelings against former colonial states or foreigners. See M Kahler, "Legalization as Strategy: The Asia-Pacific Case" (2000) 54:3 Intl Org 549 at 561; T Allee & C Peinhardt, "Delegating Differences: Bilateral Investment Treaties and Bargaining over Dispute Resolution Provisions" (2010) 54:1 Intl Stud Q 1 at 12.

However, the ISA provisions in those Korean BITs seemed to show a wide spectrum of variation due to the policies of negotiation partners (see Table 1). Some South Korean BITs concluded with developed countries between the 1960s and the 1980s did not incorporate the ISA system; others included an exhaustion clause in which the investor is required to seek a national remedy before submitting the case to investment arbitration. For example, while neither the Korea-Germany BIT nor the Korea-Switzerland BIT (1971) adopted ISA clauses, the Korea-UK BIT prescribes an exhaustion clause:

Article 8.1 (Reference to International Centre for Settlement of Investment Disputes)

Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as “the Centre”) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States opened for signature at Washington on 18 March 1965 any legal dispute arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former. A company which is incorporated or constituted under the law in force in the territory of one Contracting Party and in which before such a dispute arises the majority of shares are owned by nationals or companies of the other Contracting Party shall in accordance with Article 25 (2) (b) of the Convention be treated for the purposes of the Convention as a company of the other Contracting Party. *If any such dispute should arise and agreement cannot be reached within three months between the parties to this dispute through pursuit of local remedies or otherwise, then, if the national or company affected also consents in writing to submit the dispute to the Centre for settlement by conciliation or arbitration under the Convention, either party may institute proceedings by addressing a request to that effect to the Secretary-General of the Centre as provided in Articles 28 and 36 of the Convention.* In the event of disagreement as to whether conciliation or arbitration is the more appropriate procedure the national or company affected shall have the right to choose. The Contracting Party which is a party to the dispute shall not raise as an objection at any stage of the proceedings or enforcement of an award the fact that the national or company which is the other party to the dispute has received in pursuance of an insurance contract an indemnity in respect of some or all of his or its losses. (emphasis added)

See also article 6 of the Korea-Netherlands BIT (1974):

The Contracting Party in the territory of which a national of the other Contracting Party makes or intends to make an investment, shall assent to any demand on the part of such national to submit, for arbitration or conciliation, *after the exhaustion of all internal administrative and juridical remedies*, to the Centre established by the Convention of Washington of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, any dispute that may arise in connection with that investment. (emphasis added)

On the other hand, article 8 of the Korea-Belgium BIT (1974) allowed an investor to directly challenge the host state without exhausting local remedies:

Each Contracting Party hereby irrevocably and anticipatory gives its consent to submit to conciliation and arbitration any dispute relating to a measure contrary to this Agreement, pursuant to the “Convention on the Settlement of Investment Disputes between States and Nationals of other States” of 18 March 1965, at the initiative of a national or legal person of the other Contracting Party, who considers himself to have been affected by such a measure. This consent implies renunciation of the requirement that the internal administrative or judicial resorts should be exhausted.

The Korea-Italy BIT (1989) allows an investor to take into account a national remedy or ICSID arbitration, but it does not pronounce on whether the investor is required to waive the right to submit to the other tribunal once he or she chooses one of the two tribunals. Article 10, section 2, of the Korea-Italy BIT reads:

If such disputes or differences cannot be settled according to the provisions of paragraph 1 of this Article within six months from the date of request for settlement, the investor concerned may submit the dispute to:

- (a) the competent court of the Contracting Party for decision; or
- (b) the International Centre for Settlement of Investment Disputes under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, of March 18, 1965 done in Washington D.C. for conciliation or arbitration.

Table 1: Types of ISDS in South Korean BITs Concluded with Major Developed Countries (1960s to mid-1990s)

BIT (Year of Signature)	Type of ISDS
Germany (1964)	N/A
Switzerland (1971)	N/A
Netherlands (1974)	ICSID arbitration with an exhaustion clause
Belgium-Luxembourg Economic Union (1974)	ICSID arbitration without an exhaustion clause
United Kingdom (1976)	ICSID arbitration with an exhaustion clause
France (1977)	ICSID arbitration without an exhaustion clause
Denmark (1988)	ICSID arbitration without an exhaustion clause
Italy (1989)	National court ICSID arbitration without an exhaustion clause No fork-in-the-road clause
Austria (1991)	ICSID arbitration without an exhaustion clause

Source: Author.

Such variation reflects an inconsistency in the ISA policies of developed countries. Developed countries with ambitious BIT plans in the early stages of international investment treaties seemed to take various approaches to dispute-settlement mechanisms. While there were many similarities in substantive norms, many different models of dispute settlement were emulating each other. A generalized model of ISA was not recognized until an increasing number of investment arbitrations took place after another surge of BITs in the mid-1990s. South Korea, as a rule-taker rather than a rule-maker, did not have any choice but to accept the various approaches proposed by its negotiation partners, and liberalist approaches of developed countries were reflected in the negotiation process.

South Korea's status as rule-taker can be attributed to many circumstantial factors. Unlike other Third World countries, South Korea did not experience post-colonial syndrome. Negative views of foreign investments were marginalized or suppressed by strongly pro-American authoritarian regimes. In addition, many high-ranking policy makers might have been conversant with western-centred systems, as they were educated in developed countries and fascinated by liberalist ideas. South Korea as a developing country also suffered from lack of bargaining power to reflect its policy intentions in treaty drafting. The South Korean economy was in a more disadvantageous position than other developing countries because it lacked adequate natural resources or large potential markets to attract foreign investors. Last but not least, it seemed that sovereignty costs were underestimated or ignored: South Korean policy makers did not have the opportunity to assess the potential harms of ISA because they did not observe any investment cases until 1987,¹³ nearly 20 years after the first ISA clause was prescribed in a treaty and the ICSID convention was established.¹⁴ Various problems with ISA surfaced after NAFTA arbitration started to produce controversial decisions and investment lawyers considered ISA a useful tool to protect investors from host states. All things considered,

13 See United Nations Conference on Trade and Development (UNCTAD), "UNCTAD IIL Issues Note: Latest Developments in Investor-State Dispute Settlement" (March 2011) at 2, online: <www.unctad.org/Templates/Page.asp?intItemID=6205&lang=1>.

14 See *Asian Agricultural Products Ltd v Sri Lanka*, Award and Dissenting Opinion, June 27, 1990, ICSID No ARB/87/3, (1991) 6 ICSID Rev — Foreign Investment LJ 526. See also A Redfern & M Hunter, *Law and Practice of International Commercial Arbitration* (London, England: Sweet & Maxwell, 2004) at 5654.

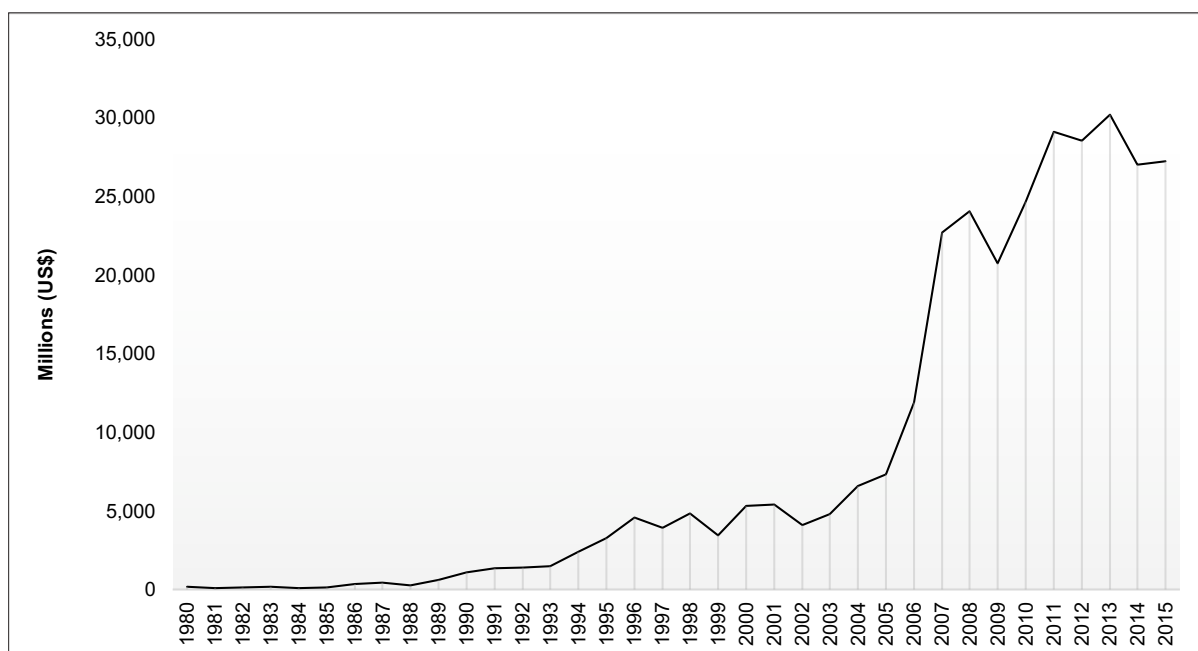
it appears unlikely that South Korean policy makers joined the ISA system with a consistent ISA policy that was established on the basis of expected costs and benefits.

Liberalist Update of ISA Policy in South Korea as a Developed Country (mid-1990s–2011)

South Korea is now considered a developed country, with a stable political and legal system. South Korea joined the Organisation for Economic Co-operation and Development (OECD) in 1996. It was the seventh largest trader in the world for merchandise and the thirteenth largest exporter and importer in 2014.¹⁵ The rule of law has been successfully established on the basis of stable political development. South Korea's rule of law fell within the world's highest 30 percent in 2013, according to the World Bank's Worldwide Governance Indicators.¹⁶

After South Korea became a developed economy, the country strengthened its commitment to a liberal ISA policy due to South Korea's dual position, in which South Korea is not only an investment-importing but also an investment-exporting country. South Korea is still desperate to attract more foreign investment to shore up its economy. Therefore, the government is required to create friendlier policies for foreign investors, as South Korean business environments have changed greatly since the 1980s. South Korean industry has lost its competitiveness, while emerging countries, such as those in BRIC (Brazil, Russia, India and China), have become more attractive to global investors and importers. In addition, South Korean industries have been challenged by regional economic blocs, such as the European Union and the NAFTA zone, which restrict their access to foreign markets.

Figure 1: Amount of South Korean Overseas Investment Per Year¹⁷



Source: Export-Import Bank of Korea.

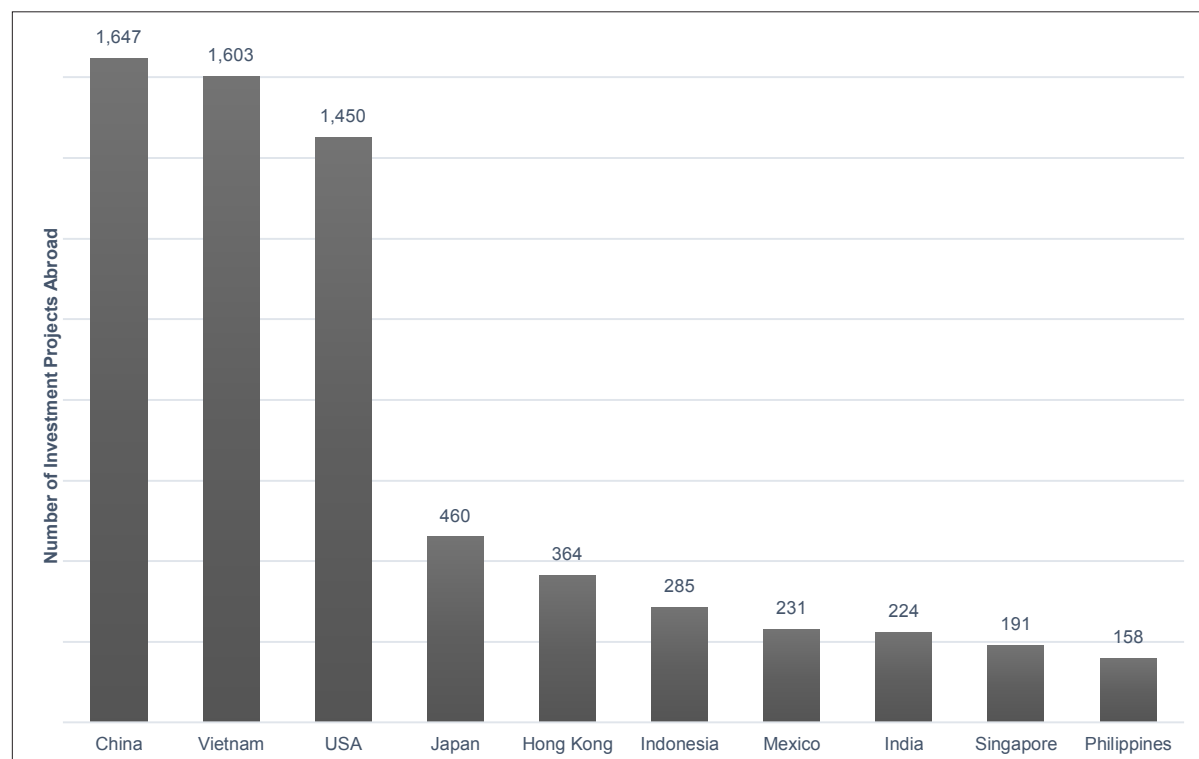
At the same time, the South Korean government has encouraged more South Korean investors to invest overseas by increasing access to foreign markets. As a consequence, South Korea's overseas investment rose from around US\$14 million in 1980 to more than US\$30 billion in 2013. The total amount of overseas investment soared after 2005 (Figure 1). South Korean investors invest heavily in developing countries such as China and Vietnam. In 2015, only four developed countries were among the 10 countries receiving the most South Korean investments. It is worth pointing out that China has become one of the

15 See World Trade Organization, *International Trade Statistics 2014* (2014) at 26, online: WTO <www.wto.org/english/res_e/statistics_e/its2014_e/its2014_e.pdf>.

16 See World Bank, *Worldwide Governance Indicators* (2015), online: <info.worldbank.org/governance/wgi/#home>.

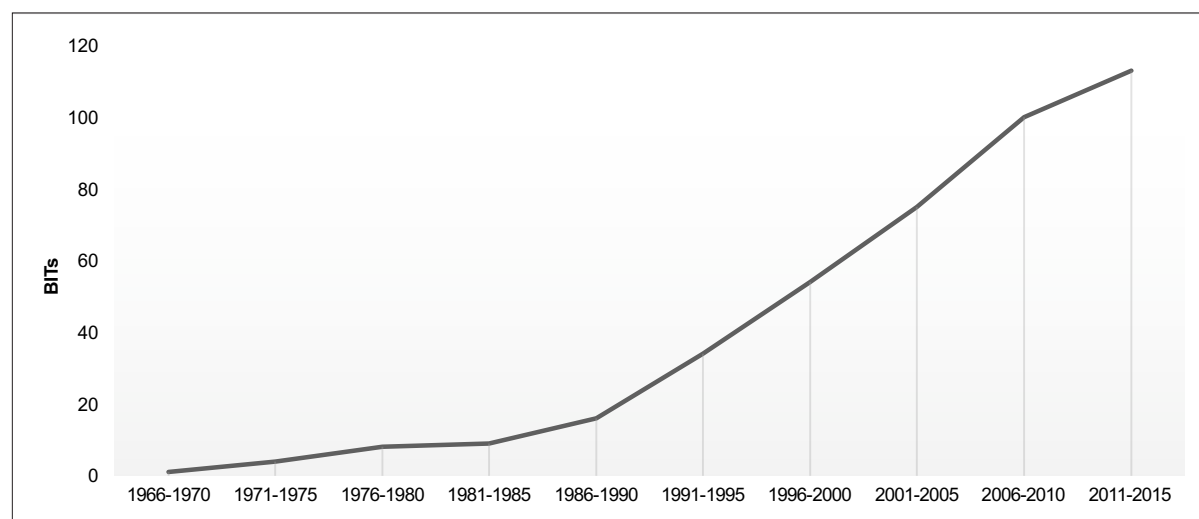
17 See Export-Import Bank of Korea, "Database of the Korea Export-Import Bank of Korea" (2015), online: <211.171.208.92/odisas.html>.

Figure 2: Number of South Korean Overseas Investments Projects in the Top 10 Destination Countries, 2015¹⁸



Source: Export-Import Bank of Korea.

Figure 3: Number of South Korean BITs



Source: Author.

18 *Ibid.*

most important business partners of South Korean investors. According to 2015 statistics,¹⁹ the United States is still South Korea's most important trading partner in terms of investment volume: the amount of Korean investment in the United States (US\$5,656 million) was double that of its investment in China (US\$2,855 million). However, South Korean investment projects in China outnumbered those in the United States (Figure 2), and more Korean corporations were newly established in China than in the United States. Given these trends, it is reasonable to expect that future major destination countries for Korean investments will be developing countries such as China, rather than developed countries.

Under the conditions outlined above, South Korea started to conclude more BITs and FTAs (Figure 3) with developing countries. The number of BITs and FTAs in South Korea has grown with South Korean economic development. Especially with the conclusion of the Korea-Chile FTA in 2003, the South Korean government embarked on a more ambitious and systematic FTA road map.²⁰ While staying within the WTO regime, South Korea signed a series of "exploratory" FTAs with Chile and Singapore that were not expected to harm South Korea's main industries or legal system.²¹ In comparison to the KORUS-FTA, those FTAs garnered less public attention at the time because trade with those countries did not comprise a significant portion of South Korea's foreign trade. Despite some negative effects on agriculture, there was no significant discussion of FTA concerns because the South Korean economic structure was already dominated by the manufacturing and service sectors. Moreover, the South Korean people expected losses in the agricultural industry to be offset by gains in the manufacturing industry. As South Korean policy makers found exploratory FTAs to have been mutually beneficial,²² the South Korean government sought FTAs with major developed countries such as Japan and the United States to promote economic prosperity and stabilize national security.²³

Along with the comprehensive FTA program, the South Korean government in 2001 set up a model BIT to handle the increased inbound and outbound flow of capital.²⁴ This Korean Model BIT was not reviewed and approved by the National Assembly; it was originally intended for circulation inside the government to guide diplomats and trade officials.²⁵

As seen in the Korean Model BIT, liberalist language became more dominant in most BITs or FTAs at that time, in the sense that the South Korean policy showed a clear preference for ISA provisions in investment treaties. Most South Korean BITs since the mid-1990s enhanced investors' direct access to dispute arbitration without an exhaustion clause by following the mainstream practices of international investment treaties. The Korean Model BIT, and those that followed, reflect the liberalist premise that a local court in the legal system of the host state cannot be an impartial forum.²⁶ Therefore, article 8 of the 2001 Korean Model BIT provides:

Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party:

1. Any dispute between a Contracting Party and an investor of the other Contracting Party including expropriation or nationalization of investments shall, as far as possible, be settled by the parties to the dispute in an amicable way.

¹⁹ *Ibid.*

²⁰ See generally Y Kim, "The Policy and Institutional Framework for FTA Negotiations in the Republic of Korea" in J Harrison, ed, *The European Union and South Korea: The Legal Framework for Strengthening Trade, Economic and Political Relations* (Edinburgh: Edinburgh University Press, 2013).

²¹ See generally W Lim, "KORUS FTA: A Mysterious Beginning and an Uncertain Future" (2006) 30:4 Asian Perspective 175 at 175–77; N Choi & H Lee, *A Sectorial Assessment of a Korea-US FTA and Policy Implications for the Korean Economy (Hanmi FTA Hyeobsang-ui Bun-yabyeol Pyeongga-wa Jeongchaeggwaje)* (Seoul: Korea Institute for International Economic Policy, 2007) at 41–78 (explaining the general scheme of South Korean foreign trade policy).

²² In the case of the Korea-Chile FTA, the Korea Trade Investment Promotion Agency (KOTRA) reported that the bilateral trade volume increased by 454 percent (from US\$1.6 billion to US\$7.2 billion) within five years of the conclusion of the FTA. See KOTRA, *Achievement and Issues of Korea-Chile FTA (Han-chille FTA Seonggwawa Sisajeom)* (Seoul: KOTRA, 2009).

²³ See Lim, *supra* note 21 at 78–79.

²⁴ See H-T Shin, "Investment Treaty Practice of China, Japan and Korea" (2015) *Collected Courses of the International Academy for Arbitration Law*, vol 1 at 17.

²⁵ See H-T Shin, "Republic of Korea" in C Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013).

²⁶ *Ibid* at 413.

2. The local remedies under the laws and regulations of one Contracting Party in the territory of which the investment has been made shall be available for investors of the other Contracting Party on the basis of treatment no less favourable than that which would be accorded to investments of its own investors or investors of any third State, whichever is more favourable to investors.
3. If the dispute cannot be settled within six (6) months from the date on which the dispute has been raised by either party, and if the investor waives the rights to initiate any proceedings under paragraph (2) of this Article with respect to the same dispute, the dispute shall be submitted upon request of the investor of the Contracting Party, to the International Center for Settlement of Investment Disputes (ICSID) established by the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of other States.
4. The investor, notwithstanding that it may have submitted the dispute to the ICSID under paragraph (3) may seek interim injunctive relief, not involving the payment of damages, before the judicial or administrative tribunals of the Contracting Party that is a party to the dispute for the preservation of its rights and interests.
5. Each Contracting Party hereby consents to the submission of a dispute to arbitration in accordance with the procedures set out in this Agreement.
6. The award made by ICSID shall be final and binding on the parties to the dispute. Each Contracting Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.

It is important to bear in mind that South Korea updated the BITs concluded with developed countries in a liberalist way. For example, the South Korean government signed a new BIT with the Netherlands in 2003 and with the Belgium-Luxembourg Economic Union in 2006. In addition, the Korea-Switzerland BIT was replaced by the Korea-European Free Trade Association Free Trade Agreement (Korea-EFTA FTA) in 2005. The liberalist nature of those treaties is apparent in the procedural perspectives. Those treaties include a typical ISA system that allows an investor of one party state to initiate international arbitration without having exhausted the national remedy. The Korea-EFTA FTA accepts the ISA provisions. Moreover, while the Korea-Belgium BIT incorporates most elements of the 2001 Korean Model BIT, the Korea-Netherlands BIT (2003) dropped the exhaustion clause:

Korea-Netherlands BIT (2003) Article 8 Settlement of Investment Disputes between a Contracting Party and an Investor of the other Contracting Party

1. Any dispute between a Contracting Party and an investor of the other Contracting Party including expropriation or nationalization of investments shall, as far as possible, be settled by the parties to the dispute in an amicable way.
2. The local remedies under the laws and regulations of the Contracting Party in the territory of which the investment has been made are available for investors of the other Contracting Party on the basis of treatment no less favourable than that accorded by the former Contracting Party to investments of its own investors or investors of any third State, whichever is more favourable to the investor concerned.
3. If the dispute cannot be settled within six (6) months from the date on which either party to the dispute requested amicable settlement, each Contracting Party hereby consents to submission of the dispute to the International Centre for Settlement of Investment Disputes (ICSID) for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature at Washington on 18 March 1965. If the parties to such a dispute have different opinions as to whether conciliation or arbitration is the more appropriate method of settlement, the investor shall

have the right to choose. In case a legal dispute concerning an investment in the territory of the Republic of Korea has been submitted to a competent domestic court, this dispute shall not be submitted to ICSID, when a judgement rendered by any domestic court has become final. If a dispute concerns an investment in the territory of the Kingdom of the Netherlands, an investor may choose to submit a dispute to ICSID at any time.

South Korea's liberal approach is understood partially in relation to the second surge of BITs in the wake of globalization and at the zenith of neo-liberalism.²⁷ The BITs and FTAs concluded by South Korea since the mid-1990s followed the mainstream of international investment legal systems, which showed clear preference to the ISA system without any state involvement such as domestic resolution or state-to-state arbitration. Such prevalence of the ISA system revealed a liberal stance, in which the state stands back and private actors assume a more decisive role in a transnational sphere beyond the state nexus. In addition to the changing global context, South Korea's dual position provides a strong rationale for South Korean liberalist policy. On the one hand, as a traditional capital-importing country, South Korea seems to use ISA to send a positive signal to potential foreign investors. On the other hand, South Korea's position as an emerging investment-exporting state seems to confirm the principles of its original policies in order to protect its investors against the arbitrary regulatory power of foreign host states.

CHANGES IN ISA POLICY AFTER THE KORUS-FTA

Unproductive Social Discussions in Politics of the KORUS-FTA?

South Korean policy makers considered the FTA deal with the United States as an ultimate goal of the Korean FTA road map. The South Korean government estimated that the advantages of the KORUS-FTA would be incomparable to those of previous FTAs because trade between South Korea and the United States makes up a significant proportion of South Korea's total foreign trade. The South Korean and US governments concluded the KORUS-FTA in 2007, after 14 months of negotiations.

The KORUS-FTA guides the future BIT policy of South Korea in the sense that the experience of the KORUS-FTA sets a generational line between old and new BITs. Despite a consistent preference for ISA, it is worth pointing out that the risk of ISA had never been seriously discussed in South Korean society before the conclusion of the KORUS-FTA. There could be several reasons for such a long silence on ISA in South Korea. As mentioned earlier, the risks of the ISA system had looked unrealistic to the public until the late 1990s saw a boom in international investment claims.²⁸ In addition, the hospitality of the South Korean government toward foreign business might have discouraged foreign investors from seeking global legal remedies outside of the national legal system. Thus, the South Korean government before the *Lone Star* case²⁹ had not been challenged in international investment arbitration under its BITs.³⁰ In addition, lack of expertise in international investment law had precluded activists from problematizing this issue in the public sphere. From the perspective of policy making, treaty making had been done without enough consultation of civil society. Many important international trade policies were often decided by a small number of technocrats or insiders who were connected to and ideologically aligned with major business actors.³¹

Against this backdrop, establishment of the KORUS-FTA interrupted South Korea's preference for ISA by stirring up a public debate. The KORUS-FTA was ratified in 2007, but the political and social discussions over this treaty delayed the final process in the legislature for nearly four years. Finally,

27 See G Van Harten, *Investment Treaty Arbitration and Public Law* (Oxford, England: Oxford University Press, 2007) at 24–44; Newcombe & Paradell, *supra* note 5 at 47–49.

28 See Van Harten, *supra* note 27 at 24–34.

29 *LSF-KEB Holdings SCA v Korea*, Pending, ICSID Case No ARB/12/37, online: <icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/12/37>.

30 In 1984, Colt Industries Operating Corporation submitted a legal claim to the ICSID arbitration panel against the South Korean government. However, this claim was based not on a BIT or an FTA but on a dispute over technical and licensing agreements for the production of weapons. The parties agreed to settle and to discontinue the proceedings. See *Colt Industries Operating Corp v Korea*, 3 August 1990, ICSID No ARB/84/2.

31 See S-Y Eum, “Democratic Control over the Globalization of the Law (*Beob-ui Segyehwa-e Daehan Minjuju-uijeog Tongje*)” (2005) 28 *Democratic LS (Minjubeophak)* 136; S-Y Eum, “The Globalization of Law: The Legal Character of the Treaty-Making Power and of the Consent of the Legislature to Treaty-Making (*Beob-ui Segyehwa*)” (2006) 32 *Democratic LS (Minjubeophak)* 183; S-Y Eum, “The Globalization of Law and KORUS FTA: The Necessary Condition in Validity of Treaties and the Validity of KORUS FTA (*Beob-ui Segyehwa-wa Hanmi FTA*)” (2007) 15:1 *LS (Beophagyongu)* 163.

the South Korean governing party steamrolled the approval of the KORUS-FTA through the National Assembly, despite warnings that it would restrict regulatory powers exercised in the public interest.³²

These opponents of the KORUS-FTA have emphasized the potential harm of “poisonous clauses” that could force the South Korean government to accede to American social and economic interests. Although many South Korean scholars and civic groups have taken slightly different positions on what these poisonous clauses are, most of them agree that the ISA and indirect expropriation clauses would be serious obstacles to future South Korean public policy planning.³³ Those critics point out notorious cases arising from NAFTA (a treaty that had been drafted by the United States, another negotiating partner of the KORUS-FTA). As discussed earlier, NAFTA’s abstract language around indirect expropriation allowed global investors to challenge certain public policies that presumably belonged in the realm of a state’s sovereign power.³⁴ In addition, considerable attention has been devoted to a constitutional question of whether an ISA system can review domestic laws that are passed by national constitutional organs, such as the National Assembly or the executive.

Although the KORUS-FTA initiated a nationwide debate over ISA for the first time in South Korean society, the intense criticism of this treaty appeared to be ideologically politicized. In fact, the political actors attempted to use the KORUS-FTA debate for their own interests in the public sphere. In particular, the major opposition party’s stances about the ISA system are too vulnerable to changing political environments (Table 2). Initially, the KORUS-FTA was proposed by the current opposition party, which had formerly been the governing party. In 2007, then president Roh Moo-Hyun signed the KORUS-FTA with the tacit support of his party (the Yeollin Uri Party, the predecessor of the current opposition party) and a conservative opposition party (Grand National Party, the predecessor of the current governing party). However, the final legislative consent languished in the National Assembly due to resistance from civil society after the presidential signature. The KORUS-FTA suddenly emerged as a rallying point in the 2012 general election after the governing party became the Grand National Party in the 2008 presidential election. The governing party, which had maintained a consistent pro-FTA stance, attempted to add the final and formal establishment of the KORUS-FTA to its list of political achievements before the 2012 general election. In contrast, the opposition party betrayed its original position about the KORUS-FTA after it had lost its status as a ruling party. The opposition party intended to damage the ruling party’s image by expressing public concerns about ISA and indirect expropriation. In addition, it was said that the opposition party was reluctant to give its final consent to the KORUS-FTA because, as the largest opposition party with a liberal ideology, it was eager to form a strategic coalition with critical civil society and other small opposition parties with a left-wing manifesto in the upcoming general election.

Table 2: Parties’ Positions in the KORUS-FTA Controversy

	2007 (Signature of the FTA)			2011 (Legislative Consent of the FTA)		
Party	Grand National	Yeollin Uri	Democratic Labour	Grand National	Democratic Unification (mostly former Yeollin Uri)	Unified Progressive (successor of Democratic Labour)
Political Ideology	Conservative	Liberal	Leftist	Conservative	Liberal	Leftist
Status	Opposition	Governing	Opposition	Governing	Opposition	Opposition
Stance toward KORUS-FTA	Positive	Positive	Negative	Positive	Negative	Negative

Source: Author.

32 See generally G-B Hong, *Invest-State Claim (Tujaja-gugga Jigjeob Sosongje)* (Seoul: Nogsaeakpyeongnonsa, 2006) (regarding the critical points of view on the KORUS-FTA).

33 *Ibid* at 63–86; H-Y Lee, “Carefully Selected 11 Poisonous Clauses of the KORUS-FTA (*Eomseonhan Han-mi FTA Dogsojohang 11gaji*)” (2011), online: <h21.hani.co.kr/arti/economy/economy_general/30589.html>. In fact, these clauses were the most controversial issues in the negotiation of the KORUS-FTA. See Choi & Lee, *supra* note 21 at 216.

34 See e.g. Public Citizen, “NAFTA Chapter 11 Investor-to-State Cases: Bankrupting Democracy” (2001), online: <www.citizen.org/documents/ACF186.PDF> (explaining notorious NAFTA cases).

In addition, the radical resistance against the KORUS-FTA seemed to be ideologically distorted by the leftist parties and some activists insisting on the renegotiation or termination of the KORUS-FTA. Such criticism might be understood in the context of a critique of “American imperialism” that was similar to post-colonial syndrome. The public debate on the KORUS-FTA, when compared against other investment treaties, provides meaningful references in assessing the discursive landscape around the KORUS-FTA. Compared to the opposition to the KORUS-FTA, South Koreans have not expressed strong opposition to the Korea-India Comprehensive Economic Partnership Agreement, even though it includes the very provisions that the KORUS-FTA opponents criticized: indirect expropriation³⁵ and ISA.³⁶ Furthermore, it is difficult to find a persuasive reason for South Korean activists’ denunciations of the FTA with the United States, after their long silence over other treaties. With this in mind, it might look circumstantially convincing to claim that vague fear, rooted in anti-American sentiment, engendered negative opinions of the KORUS-FTA.³⁷ Indeed, progressive parties and activists attempted to connect public concerns over the KORUS-FTA to anti-American sentiment. In addition, fear and antipathy toward the expansive powers of global capitalism after the 2008 global economic crisis might have fuelled this negative attitude toward the KORUS-FTA.³⁸

In reality, a productive discussion about the KORUS-FTA, and ISA in particular, seemed to be crippled as politicians, government officials and civic groups each understood the KORUS-FTA in such a way as to advance their own interests. The president and the ruling party attempted to hide the risks of the ISA system and overestimate its benefits because they simply regarded any criticism as damaging to their political leadership. On the other hand, opposition parties and progressive groups exaggerated the risks of the KORUS-FTA by ignoring the differences between NAFTA and the KORUS-FTA. As illuminated in the later part of this paper, the KORUS-FTA contains reasonable legal safeguards to secure the ability of governmental authorities to pursue constitutionally authorized public policies.³⁹ Nevertheless, the opponents of the KORUS-FTA intentionally or unintentionally overlooked such efforts. In addition, anonymous Internet users posted conspiracy theories accusing the government of hiding something in favour of US interests. These rumours spread quickly through social networks, piggybacking on public disappointment over the South Korean president. In response to such political turmoil, the government dismissed those concerns as a “ghost story.” The Supreme Prosecutors’ Office was criticized for its attempt to interrogate the people who had spread the anti-FTA rumours on the Web.⁴⁰

Legal Discussion of ISA and the KORUS-FTA

Several abortive constitutional cases followed the establishment of the KORUS-FTA.⁴¹ The Constitutional Court of Korea dismissed most of the cases on the grounds that the constitutional claims involved did not meet legal prerequisites for plaintiffs to initiate and maintain proceedings in the court.

In one of the constitutional cases, a group of lawmakers criticized the lack of democratic participation. The KORUS-FTA negotiation took nearly four years from the time South Korea declared the KORUS-FTA as a medium- and long-term goal of the FTA road map in 2013. Nevertheless, careful analysis of the KORUS-FTA had not been on the table in South Korean civil society because of a “paper curtain,” whereby government was reluctant to release information to the public in the name of a negotiation strategy. While government officials of the executive branch are initiating and negotiating FTAs, the legislative branch and other social groups have few chances to engage in treaty making. In spite of the constitutional function of the legislative branch in representing public opinion, the National Assembly plays a very limited role in the process of treaty making. In fact, legislative controls are often impeded

35 Comprehensive Economic Partnership Agreement (Korea-India CEPA) 7 August 2009 (entered into force 1 January 2010) at art 10.2.1, online: <commerce.nic.in/trade/INDIA%20KOREA%20CEPA%202009.pdf>.

36 *Ibid*, art 10.21.

37 This fear comes from South Korea’s conventionally ambivalent attitude toward the United States. Indeed, South Korean people have expected various benefits from the Korean-US relationship, and have, at the same time, felt victimized by the United States because South Korea has experienced the unilateralism of the United States as a superpower.

38 See for more details CW Kim, “Attitudes and Electoral Politics May Trip Up the KORUS FTA”, *Council on Foreign Relations Press* (30 November 2015), online: <www.cfr.org/south-korea/shift-south-korean-attitudes-electoral-politics-may-trip-up-korus-fta/p26446>.

39 See GH Song, *Handbook of the KORUS-FTA: A Commentary of the KORUS-FTA for Government Officials (Hanmi FTA Haendeubug: Gongmuwon-eul Wihan Hanmi FTA Hyeobjeongmun Haeseol)* (Seoul: Noksaeongpyeongnonsa, 2007); Hong, *supra* note 32.

40 See SS Park, “SNS Crackdown on FTA Rumors Sparks Backlash”, *The Korea Times* (9 November 2011), online: <www.koreatimes.co.kr/www/news/nation/2011/11/116_98439.html>.

41 See 25-2 KCCR 559, 2012 Hun-Ma1 66, 28 November 2013; Decision (No 4), 2012 Hun-Ma 533, 24 July 2012; Decision (No 4), 2012 Hun-Ma 233, 24 April 2012; Decision (No 4), 2012 Hun-Ma 284, 3 April 2012; 19-2 KCCR 436, 2006 Hun-Ra 5, 25 October 2007.

by lack of information and expertise. As a result, the detailed contents are revealed to the public and lawmakers only at the eleventh hour when the National Assembly is about to take a last step.

This has led to constitutional claims; some critics argue that the executive branch infringed upon the powers of the legislature in concluding the KORUS-FTA because it forged ahead unilaterally with negotiations, showing reluctance to furnish the South Korean public with relevant information. It is said that “the administration has monopolized FTA-related information and carried out negotiations in a hasty, unfaithful and unilateral manner.”⁴² Thus, 23 Korean lawmakers raised a constitutional claim against the KORUS-FTA on the grounds that the executive did not disclose any negotiation information. Notably, they criticized the executive branch for monopolizing FTA-related information and deliberately blocking legislative intervention. However, the Constitutional Court of Korea attempted to avoid the political burden of a substantive judicial review on this point; the court dismissed the case based on the standing issue. The court held that the constitutional power of the National Assembly is granted not to individual members of the National Assembly but only to the National Assembly as an institution. Therefore, the court ruled that individual lawmakers as members of the National Assembly have no standing to raise a constitutional claim of infringement upon the constitutional power of the National Assembly.⁴³

In another case, a member of the National Assembly had asserted that the KORUS-FTA infringed on the right of the plaintiff as a lawmaker to carry out his constitutional duty, that is, legislating. In other words, the plaintiff argued that the KORUS-FTA could prevent him from introducing or passing a bill that conflicts with the KORUS-FTA but conforms to Korean constitutional law. This argument implies that the enforcement of the KORUS-FTA could be constitutional in practice.

However, the court refused to hear the case; the court argued that the plaintiff did not have the standing to bring a constitutional complaint. The Constitutional Court of Korea attempted to specify the meaning of “any person” who is qualified to raise a constitutional complaint prescribed in the Constitution of the Republic of Korea, article 111(1), paragraph 5. In interpreting article 68, section 1, of the Korean Constitutional Court Act,⁴⁴ the court held that “any person whose fundamental rights is guaranteed by the Constitution” in the provision of the Korean Constitutional Court Act should be considered an individual citizen. The court added that the allegedly infringed right to legislate is not a constitutional right of any individual, but exists only in the law maker’s capacity as a member of a constitutional institution.⁴⁵

A plaintiff in the other case argued that the establishment of the KORUS-FTA is practically equivalent to a constitutional amendment because the KORUS-FTA restricts legislative and judicial power, including regulatory power in the economic area with regard to articles 119 and 123 of the Constitution of the Republic of Korea.⁴⁶ The relevant clause of the Constitution of the Republic of Korea allowed

42 See Yonhap News, “Lawmakers Launch Lawsuit against South Korea-U.S. FTA Talks”, *The Hankyoreh* (7 September 2006), online: <www.hani.co.kr/arti/english_edition/e_national/155156.html>.

43 See 19-2 KCCR 436, 2006 Hun-Ra 5, 25 October 2007.

44 Article 68, section 1 of the Korean *Constitutional Court Act, 1988*, Act No 4017, prescribes “[a]ny person whose fundamental rights guaranteed by the Constitution is infringed due to exercise or non-exercise of the public authority, excluding judgment of the court, may request adjudication on constitutional complaint to the Constitutional Court.”

45 See Decision (No 4), 2012 Hun-Ma 533, 24 July 2012.

46 **Korean Constitutional Law Article 119**

(1) The economic order of the Republic of Korea shall be based on a respect for the freedom and creative initiative of enterprises and individuals in economic affairs.

(2) The State may regulate and coordinate economic affairs in order to maintain the balanced growth and stability of the national economy, to ensure proper distribution of income, to prevent the domination of the market and the abuse of economic power and to democratize the economy through harmony among the economic agents.

Korean Constitutional Law Article 123

(1) The State shall establish and implement a plan to comprehensively develop and support the farm and fishing communities in order to protect and foster agriculture and fisheries.

(2) The State shall have the duty to foster regional economies to ensure the balanced development of all regions.

(3) The State shall protect and foster small and medium enterprises.

(4) In order to protect the interests of farmers and fishermen, the State shall endeavor to stabilize the prices of agricultural and fishery products by maintaining an equilibrium between the demand and supply of such products and improving their marketing and distribution systems.

(5) The State shall foster organizations founded on the spirit of self-help among farmers, fishermen and businessmen engaged in small and medium industry and shall guarantee their independent activities and development.

the legislature to establish strong control of the private economic area. The plaintiff argued that such governmental measures could be reviewed or screened under the ISA mechanism, especially by KORUS-FTA's pro-business stance. Further, the claimant insisted that although the establishment of the KORUS-FTA could have an effect on the South Korean legal system similar to a constitutional amendment, it omitted the referendum.⁴⁷ Lastly, the petitioner contended that the ISA system of the KORUS-FTA infringed on the right to property and the right to equality on the ground that it works in favour of foreign investors.

In response, the court stated that the establishment of the KORUS-FTA cannot be considered as the revision of a written constitution, although it is expected to dismantle a current constitutional order. In other words, the constitutional court clearly rejected the claim that the making of the KORUS-FTA is a "de facto" constitutional revision. The treaty cannot change the rules of constitutional law but shall conform to the constitutional law itself. If the treaty prevented the constitutional organ from working in a constitutionally allowed way, this would be simply unconstitutional and subject to constitutional review. Then, the court examined whether the KORUS-FTA infringed on any constitutional rights of the plaintiffs. In addition, the court rejected the plaintiff's standing to bring suit because he failed to specify the actual grievance of the claimant; reference to abstract and vague risk that the plaintiff's rights would be infringed is not enough to let the court recognize a real harm of the governmental measure.⁴⁸

Compared to this passive attitude of the highest court, it is noteworthy that Korean judges were critical of the ISA provisions when the KORUS-FTA was under discussion. A senior judge, on the court intranet, mentioned a risk of infringing on "national judicial sovereignty." Soon after, more than 100 judges expressed agreement by posting responses to the senior judge's comment. Judges' opinions about the KORUS-FTA raised doubts about judicial independence from politics, as a growing number of judges expressed criticism on private social network services or the court intranet.⁴⁹ South Korean judges were extremely concerned that domestic judicial decisions would be subject to investment arbitration, as seen in the *Loewen* case of NAFTA.⁵⁰ Finally, the Supreme Court accepted the request of 166 judges to form a special task force to research and investigate crucial issues pertaining to the KORUS-FTA.⁵¹ Such a collective action by judges was extraordinary in South Korea because the judiciary has traditionally refrained from making comments on politically controversial issues.

Meanwhile, the press and a lawmaker revealed that the Supreme Court of Korea submitted a consultation paper to the executive titled "Examination Opinion on the Investor-State Dispute Resolution Procedure for the South Korea-United States Free Trade Agreement." The paper was drafted by the Supreme Court at the Ministry of Justice's request during the KORUS-FTA negotiations in June 2006. When the KORUS-FTA negotiation proceeded, the Supreme Court submitted that consultation paper as a preliminary analysis for setting up a negotiation strategy. Therefore, the Supreme Court might have thought that this opinion would be circulated privately inside the government. Contrary to the original drafter's belief, this document gained political relevance as it was accidentally leaked at a politically sensitive time.

The paper stated that ISA could cause "extreme legal chaos."⁵² First, the Supreme Court was concerned about sovereignty infringement as a result of interrupting legitimate government policies or regulations;

47 **Korean Constitutional Law Article 130**

[...]

(2) The proposed amendments to the Constitution shall be submitted to a national referendum not later than thirty days after passage by the National Assembly, and shall be determined by more than one half of all votes cast by more than one half of voters eligible to vote in elections for members of the National Assembly.

48 See 25-2 KCCR 559, 2012 Hun-Ma 166, 28 November 2013.

49 See R Kim, "Judges' Revolt Against FTA Gaining Momentum", *The Korea Times* (2 December 2011), online: <www.koreatimes.co.kr/www/news/nation/2011/12/117_100040.html>.

50 In the *Loewen* case, the claimant argued that unfair and inappropriate administration of justice in US courts violated the investment protection clauses enumerated in Chapter 11 NAFTA, including the expropriation provisions. In this case, the NAFTA Tribunal rejected the respondent state's contention that judicial acts are not covered by the jurisdiction of NAFTA arbitration. *The Loewen Group, Inc v United States*, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, 5 January 2001, ICSID No ARB(AF)/98/3, (2005) 7 ICSID Reports 421 at paras 30–32.

51 See Yonhap, "166 Judges Submit Anti-FTA Proposal", *Yonhap News Agency* (9 December 2011), online: <english.yonhapnews.co.kr/business/2011/12/09/44/0502000000AEN20111209008800315F.HTML>.

52 Occupy FTA, "Korean Supreme Court Opposing ISDS in KorUS FTA", (2 August 2016), online: <occupyfta.blogspot.kr/2016/08/korean-supreme-court-opposing-isds-in.html>.

in addition, ISA could restrict judicial sovereignty, namely the constitutional capacity of the judiciary to resolve legal disputes, in the sense that judicial rulings can be subject to the jurisdiction of investment arbitration. Moreover, the court said the investment arbitration system would favour US investors over national investors, since foreign investors enjoy broader protection and greater options for dispute resolution; the court also cited issues with the lack of transparency and fairness in arbitration procedures.⁵³ In conclusion, the Supreme Court argued that more public input is required to decide whether or not the KORUS-FTA would adopt the ISA system; otherwise, judicial decisions should be immune from arbitration.

Thus far, the Supreme Court of Korea has not expressed a formal opinion on the ISA controversy. Instead, the ISA special task force team of the Supreme Court of Korea has recently published an edited volume on ISA. This book contains the research conducted by the judges of task force teams on general issues of FTAs and BITs. It is hard to pinpoint, from this book alone, the Korean Supreme Court's official responses to the KORUS-FTA discussion. Instead, it could be inferred that the South Korean judges toned down their criticism after the establishment of the KORUS-FTA. South Korean judges appeared to reach a consensus that the ISA system would not restrict national sovereignty on the premise that legitimate public policies would not breach the KORUS-FTA. In addition, the judges accept that a judicial ruling may be sent to investment arbitration. However, they do not expect a South Korean judicial ruling to be involved in an investment claim as long as judges issue correct rulings.⁵⁴

Careful Language in a New Generation of South Korean BITs

After the KORUS-FTA controversy, South Korean negotiators learned to choose treaty language more prudently in order to protect constitutionally legitimate regulatory powers against global investors' abuse of treaty-based rights. Initially, the first step was taken in the KORUS-FTA negotiation under the 2004 US Model BIT. Most South Korean BITs or FTA investment chapters without a formal model BIT follow the principles and wordings of the KORUS-FTA.⁵⁵ This approach was formed not only by the global context but also by critical voices at home. Both state parties had to deal with criticism of NAFTA, whose pro-business trend angered many environmentalists and labour activists. For instance, the US Bipartisan Trade Promotion Authority Act of 2002 (US Trade Act of 2002) prescribed that the indirect expropriation provision of FTAs must be "consistent with United States legal principle and practice."⁵⁶ This effort to respect legitimate regulatory power is reflected in the 2004 US Model BIT,⁵⁷ which was eventually incorporated into the wording of the KORUS-FTA.

The recent post-KORUS-FTA BITs show significant developments in concretizing the treaty language, compared to any previous BITs or FTAs. While the early model of BIT, including the unofficial 2001 Korean Model BIT, was concise and abstract, the recent BITs and the investment chapter of the FTA are expanded with very sophisticated and detailed terms. For instance, the Korea-UK BIT consists of only 13 articles; the KORUS-FTA investment chapter has 28 articles with seven annexes. The current South Korean BITs and FTAs are designed to strike a balance between investment protection and respect for the regulatory power of the host states. As South Korea becomes a developed country, its makers of trade policy are paying attention not only to attracting investments, but also to alleviating the sovereignty costs.

In this context, the indirect expropriation clauses of the KORUS-FTA that stirred up South Korean society provide an illustrative example. The United States and South Korea attempted to circumscribe the understanding of indirect expropriation by clarifying the language of the treaty. Originally, this

53 See EJ Jung, "Supreme Court Recommends Renegotiation of ISD Clause", *The Hankyoreh* (26 April 2012), online: <english.hani.co.kr/arti/english_edition/e_international/530076.html>.

54 See e.g. HM Lee, "International Investment Arbitration System and Finality Principle (*Guk-je-tu-ja-jung-jae-je-do-wa Choe-jong-seong-ui Won-chik*)" in International Trade Law Research Team, ed, *Study on Investor-State Dispute Settlement (Tujaja-gukga Bunjaeng Haegyuljeolchae Gwanhan Yeongu)* (Seoul: Judicial Development Foundation, 2014).

55 See HT Shin & L Chung, "Korea's Experience with International Investment Agreements and Investor-State Dispute Settlement" (2015) 16:5/6 *J World Investment & Trade* 952 at 957.

56 See 19 USC §3802(b)(3)(D). See also MB Baker, "No Country Left Behind: The Exporting of US Legal Norms under the Guise of Economic Integration" (2005) 19:3 *Emory Intl L Rev* 1321 at 1337-39; J Williams, "Regulating Multinational Polluters in a Post-NAFTA Trade Regime: The Lessons of *Metalclad v. Mexico* and the Case for a Takings Standard" (2003) 8:2 *UCLA J Intl L & Foreign Aff* 473 at 476-77 (explaining the relevant factual backgrounds).

57 See MG Parisi, "Moving toward Transparency: An Examination of Regulatory Takings in International Law" (2005) 19:1 *Emory Intl L Rev* 383 at 413-23 (explaining the general trend of the United States, following the NAFTA agreement).

effort to respect legitimate regulatory power was adopted in the 2004 US Model BIT, and incorporated into the wording of article 11.6 and annex 11-B of the KORUS-FTA:

Article 11.6: Expropriation and Compensation

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (expropriation), except:
 - (a) for a public purpose;
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation; and
 - (d) in accordance with due process of law and Article 11.5.1 through 11.5.3.

Further, the KORUS-FTA requires the investment tribunal to take into account annex 11-B when it reviews whether a certain government action constitutes indirect expropriation.

Annex 11-B Expropriation

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.
2. Article 11.6.1 addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 11.6.1 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:
 - (i) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;⁵⁸ and
 - (iii) the character of the government action, including its objectives and context. Relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.
 - (b) Except in rare circumstances, such as, for example, when an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect, non-discriminatory regulatory actions by a Party that are designed

58 For greater certainty, whether an investor's investment-backed expectations are reasonable depends in part on the nature and extent of governmental regulation in the relevant sector. For example, an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector.

and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilization (through, for example, measures to improve the housing conditions for low-income households), do not constitute indirect expropriations.⁵⁹

The KORUS-FTA proposes a proportionality test in which the indirect expropriation is recognized only in an exceptional situation where “an action or a series of actions is extremely severe or disproportionate in light of its purpose or effect.”⁶⁰ In other words, the investment tribunal under the KORUS-FTA is required to assess the proportionality between the adverse effect of a regulation and the public interest pursued by that regulation. An increasing number of recent international investment tribunals have followed this approach inspired by the *Tecmed* and *Azurix* cases.⁶¹ For example, the *El Paso Energy International Company* case held that a regulation should not cause unreasonable interference with the property; one example of unreasonable regulation situations is when the regulation is disproportionate to the purposes of the host state.⁶² Finally, the *LG&E Energy Corp.*⁶³ tribunal clearly held:

With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State’s action is *obviously disproportionate* to the need being addressed.⁶⁴

In recognizing “the public interests” or “the social or general welfare purposes” of the government action, the tribunal is required to weigh the character of a government action, which could be determined by its objectives and context. This issue is associated with the “legitimate public welfare objectives” that the government seeks to achieve through regulatory action.⁶⁵ KORUS-FTA’s “legitimate public welfare objectives” include “public health, safety, the environment, and real estate stabilisation.”⁶⁶ This provision allows the government to take measures “to improve the housing conditions for low-income households.”⁶⁷ In addition, article 11.10 of the KORUS-FTA guarantees the state the regulatory power to protect the environment, in contrast to its power to protect investment. The conceptual scope of the “legitimate public welfare objective” seems compatible with a significant portion of the constitutionally justifiable measures the South Korean government may take, such as environmental protection⁶⁸ or public policies relating to housing supply.⁶⁹ Lastly, the tribunal and the respondent state could suggest other legitimate public welfare objectives because the enumeration of such objectives in the treaty text is not exhaustive.⁷⁰ This conceptual flexibility could help a government to protect a minimum scope for maintaining justifiable regulatory power.

In the post-KORUS-FTA era, South Korea is not a just rule-taker, but also a rule-maker in a limited sense; South Korea has insisted that its requests should be reflected in the treaty, as long as they are not seriously incompatible with international investment law. In reality, the KORUS-FTA, at the request of South Korean negotiators, contains several elements of South Korean legal doctrines that did not exist in the 2004 US Model BIT.

59 For greater certainty, the list of “legitimate public welfare objectives” in subparagraph (b) is not exhaustive.

60 *KORUS-FTA*, annex-B.3(b), online: <ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

61 *Técnicas Medioambientales Tecmed, SA v Mexico*, Award, 29 May 2003, ICSID No ARB(AF)/00/2, (2004) 43 ILM 133 [*Tecmed*]; *Azurix Corp v Argentina*, Award, 14 July 2006, ICSID No ARB/01/12, online: <icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC507_En&caseId=CS> [*Azurix*].

62 *El Paso Energy International Co v Argentina*, Decision on Jurisdiction, 27 April 2006, ICSID No ARB/03/15, (2006) 21 ICSID Rev—Foreign Investment LJ 488 at paras 240–43.

63 *LG&E Energy Corp v Argentina*, Decision on Liability, 3 October 2006, ICSID Case No ARB/02/1, (2006) 21(1) ICSID Rev—Foreign Investment LJ 203.

64 *Ibid* at para 195. See also *El Paso Energy International Co v Argentina*, Award, 31 October 2011, ICSID Case No ARB/03/15 at para 241 [emphasis added], online: <italaw.com/documents/El_Paso_v_Argentina_Award_ENG.pdf>.

65 *KORUS-FTA*, *supra* note 61, annex 11-B.3(b).

66 *Ibid*.

67 *Ibid*.

68 **The Constitution of the Republic of Korea (Korean Constitution), article 35:**

(1) All citizens shall have the right to a healthy and pleasant environment. The State and all citizens shall endeavor to protect the environment.

(2) The substance of the environmental right shall be determined by Act.

(3) The State shall endeavor to ensure comfortable housing for all citizens through housing development policies and the like.

69 For example, the Constitutional Court of Korea recognized the constitutionality of legislation to improve the residential environment under the name of “public welfare.” See 13-1 KCCR 129, 137, 99 Hun-Ma 636, 18 January 2001.

70 *KORUS-FTA*, annex 11-B.3, n 19.

One impressive example is the special sacrifice doctrine⁷¹ used by South Korean constitutional theory. The KORUS-FTA provides that in considering the character of a government action, the tribunal is required to analyze “whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest.”⁷² This wording bears a curious resemblance to the South Korean *Green Belt* ruling, in which the court recognized the expropriation-like effect in an exceptional case where a property owner was forced to endure disproportionately special or exceptionally severe burdens in comparison to the constitutional public obligations assumed by other people in the public interest. This expropriation-like effect is recognizable when a government action effectively blocks any meaningful use of a property.⁷³ The US negotiators seemed to adopt the South Korean demand because they did not find serious contradictions with the indirect expropriation doctrine.⁷⁴

In addition, the KORUS-FTA allows the government to consider “real estate stabilization,”⁷⁵ which includes a measure “to improve the housing conditions for low-income households.”⁷⁶ This reflects the South Korean situation in which unregulated land speculation has inflated the cost of housing to such an unreasonable level that many low-income people cannot afford to own houses or even to pay rent. Traditionally in South Korea, strong regulation of land speculation and housing supply has been politically sensitive. Therefore, the South Korean government strongly insisted on securing the minimum level of regulatory power in drafting the contents of indirect expropriation.

In addition to reformation of the substantive norms of BITs, there were significant developments in securing fairness and transparency in drafting the procedure of the ISA system, which was one of the sorest points in the KORUS-FTA, in addition to the indirect expropriation clauses. Those updates are believed to prevent the tribunal from staying unexpectedly away from the intention of treaty drafters. While the 2001 Korean Model BIT includes six key elements, the KORUS-FTA, which is almost identical to the 2004 US Model BIT, prescribes 13 detailed articles.

First of all, from the perspective of jurisdiction, the 2001 Korean Model BIT prescribes simply “any investment dispute,” whereas the KORUS-FTA narrowed the scope of dispute by allowing an investor to submit only a dispute concerning the breach of a substantive norm of the treaty. In addition, the KORUS-FTA provides options for selecting arbitration procedures outside of ICSID. Fairness of arbitration is given considerable attention in the KORUS-FTA, which prescribes provisions such as “conduct of the arbitration” (article 11.20) and the “transparency of arbitral proceedings” (article 11.21). In addition, the KORUS-FTA prescribes several indirect mechanisms to control the investment tribunal. For example, the KORUS-FTA authorizes the joint committee to make a binding decision about treaty interpretations (articles 11.23.1 and 11.23.2). Lastly, the KORUS-FTA can open a discussion for the establishment of the appellate body.

CHALLENGES AND OPPORTUNITIES OF ISA FOR SOUTH KOREA

An Ironic Belief in the Effects of ISA to Attract More Foreign Investment

In response to public criticism of ISA in the KORUS-FTA, the South Korean government has insisted that ISA is a global standard to attract foreign investment. Nevertheless, no empirical evidence has been offered as to whether and how the conclusion of a BIT influences foreign investors; in practice, an investment decision is influenced by many factors, including cheap labour and political stability.⁷⁷

71 See SB Jeong, *Analysis on KORUS-FTA Investment Chapter (HanmiFTA Tujabun-ya Yeongu)* (Seoul: Ministry of Justice in Republic of Korea, 2008) at 123–4; Choi & Lee, *supra* note 21 at 126–27.

72 *KORUS-FTA*, *supra* note 61, annex 11-B.3(1)(iii).

73 10-2 KCCR 927, 89 Hun-Ma 214, 90 Hun-Ba 16, 97 Hun-Ba 78 (consolidated), 24 December 1998, Full Bench [*Green Belt*].

74 Nevertheless, the Trade and Environment Policy Advisory Committee criticized this adoption by claiming that the doctrine of a special sacrifice is foreign to US legal principles. See Trade and Environment Policy Advisory Committee (TEPAC), “The U.S.-Korea Free Trade Agreement: Report of the Trade and Environment Policy Advisory Committee (TEPAC)” (2007) at 3, online: <ustraderep.gov/assets/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Reports/asset_upload_file267_12791.pdf>.

75 *KORUS-FTA*, *supra* note 61, annex 11-B.3(b).

76 *Ibid.*

77 See JW Yackee, “Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence” (2011) 51:2 Va J Intl L 397; KP Sauvart & LE Sachs, *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (Oxford: Oxford University Press, 2009).

A recent study seems to shed new light on this question, its analysis arguing that foreign investors seem to consider rule of law one of the top three elements in making investment decisions, along with “ease of doing business” and “a stable political environment.”⁷⁸ With this in mind, the study claims that the rule of law at the national level is more important to foreign investors than the existence of BITs, although foreign investors evaluate BITs as one of the major elements in their investment decisions.⁷⁹

Securing legal stability through the rule of law is crucial for foreign investors due to the “dynamic inconsistency problem” in which the host state has unilateral discretion to withdraw its commitment to a contract with a foreign investor after the investment is made.⁸⁰ A foreign investor is required to accept some degree of risk associated with unfamiliar legal circumstances in a foreign state. The foreign investor takes into account the stable cooperation of the host state for maintaining business there because many investments are closely associated with the state’s long-term projects or public interest at the domestic level. If the host state withdraws its original promise for investment protections, foreign investors, as private actors, have no other formal power to control the home state.

This risk is increased in the country that has a weak tradition of rule of law. Therefore, the home states (mostly developed countries) and foreign investors want to secure a minimum level of property protection through investment treaties to bind the host states (mostly developing countries) internationally. In this way, the risk of maintaining investment at the domestic level can be alleviated by more legal protection of investment at the international level.

This implies that if the national rule of law in the host country is established in a way that advances the investors’ interests, the risk that investors have to bear is reduced. To the same extent, the beneficial effects of the BITs, including ISA to attract more investment, will be lessened. Further, those investors can also expect protection of their investment under the domestic legal system, even in a dispute. In other words, foreign investors facing a dispute would consider the domestic legal remedy as the first option because investment arbitration usually costs more than domestic legal remedies.⁸¹ From all this, it could be fair to say that the inclusion of the ISA system in the BIT would not make any difference in highly developed countries; at the least, it might be less influential on foreign investors’ decision making than expected.

Nevertheless, even after the *Lone Star* case was filed, the South Korean government did not change its original pro-ISA policy. This commitment to the value of ISA is recognized in the experience of the Korea-Australia FTA. While Australia did not want to adopt ISA in the FTA, South Korea insisted on its inclusion. The Australian government stated that it would not adopt clauses for ISA in future trade agreements in accordance with the principle that it would not “support provisions that would constrain the ability of Australian governments to make laws on social, environmental and economic matters in circumstances where those laws do not discriminate between domestic and foreign businesses.”⁸² Nevertheless, the South Korean government demanded that the FTA include ISA provisions, consistently arguing that ISA was a global standard to attract foreign investment. The Korea-Australia FTA was not established until 2013, when the incoming conservative Australian government changed the original ISA policy into a selective inclusion of ISA; the Korea-Australia FTA incorporated the ISA provisions, whereas Australia and Japan agreed to abandon the ISA system in the Australia-Japan FTA.⁸³

In a sense, this strong support for ISA in South Korea ironically implies that the South Korean government admits that its legal system should not be relied upon by foreign investors. In other words, the Korean government does not seem to find any reason why it cannot persuade global investors to rely on Korean legal remedies rather than international systems. The Korean government consistently argued

78 See H Lovells, *Risk and Return: Foreign Direct Investment and the Rule of Law* (2015) at 22, online: <www.biicl.org/documents/625_d4_fdi_main_report.pdf?showdocument=1>.

79 *Ibid* at 41.

80 See AT Guzman, “Explaining the Popularity of Bilateral Investment Treaties” in KP Sauvant & LE Sachs, eds, *The Effect of Treaties on Foreign Direct Investment* (Oxford: Oxford University Press, 2009) at 78–83; AT Guzman, “Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties” (1998) 38:4 Vand J Intl L 639 at 658–66.

81 See UNCTAD, *Investor-State Disputes: Prevention and Alternatives to Arbitration* (New York & Geneva: United Nations, 2010) at 16–19, online: <unctad.org/en/docs/diaeia200911_en.pdf> (arguing for inefficiency in cost and time frame of investment arbitration proceeding).

82 See Australia, Department of Foreign Affairs and Trade, “Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity” (2011) at 14, online: <www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf>.

83 See EJ Jung, “ISD, a Critical Issue in Korea-Australia FTA (*Han-hoju FTAui Tteugeoun Jaengjeom ISD*)”, *Hankyoreh* 21 (13 May 2014), online: <h21.hani.co.kr/arti/special/special_general/37040.html>.

that the ISA system is beneficial for Korea and global investors. As discussed earlier, the beneficial effects of BITs including ISA outweigh the risks of ISA when the legal system of the host state is not stable. The benefits of ISA inclusion in BITs are also more apparent and necessary in undeveloped legal systems. If those premises are accepted, it could be inferred that South Korean policy makers seem to unintentionally insinuate that the South Korean legal system is so undeveloped that the government should guarantee the legal stability for global investors through international legal remedies rather than through domestic ones.

A Useful Tool to Protect Overseas Investment

Although there is no definite answer to the question of whether signing BITs attracts more foreign investment, ISA and treaty-based protection of investment will be beneficial to an economically strong but politically weak country such as South Korea, in light of the efficiency of remedies.

Nation-states in the current world economy have a demanding task in protecting their own citizens' investments abroad without creating direct diplomatic friction with the host state.⁸⁴ In fact, states find it increasingly difficult to unilaterally protect their own citizens' overseas property when there is a dispute with another state. On the one hand, a state action such as gunboat policy or retaliation lead to political or diplomatic crises. On the other hand, investment-exporting states might face political criticism at home if they turned a blind eye to the sufferings of their own citizens. The investment treaty and ISA can save home states from this dilemma by helping their citizens to demand direct remedies of their own accord.⁸⁵

Politically weak investment-exporting states such as South Korea may be better off resorting to the investment treaty regime. Given South Korea's limited political powers in the international community, it seems unrealistic that it would take diplomatic measures against politically strong countries on behalf of aggrieved South Korean investors. Eventually, an international investment legal system will allow South Korea to protect its own investments from the arbitrary measures of foreign countries without apparent diplomatic conflicts — in particular with politically strong countries such as China or the United States. While individual South Korean investors are qualified to seek a legal remedy through ISA, the South Korean government can protect investments by simply telling the host state, "Follow the global rule."

In practice, the South Korean government and practitioners recommend that South Korean investors abroad use ISA for leverage. For example, Ansung Housing, a South Korean property developer, raised the second ICSID claim against a Chinese local authority after China entered into the ISA regime. This claim is related to an investment in the construction of a golf and country club. The South Korean investor made investments in late 2006 in Sheyang-Xian, Jiangsu Province, but a series of alleged illegal and arbitrary measures by the local government forced the South Korean developer to sell its investment at a lower price. Ansung Housing then alleged that the local government infringed upon the use and enjoyment of the investment in order to thwart the original investment plan.⁸⁶ Although this arbitration is pending, the Korean investor appears to be using the ISA claim as a strategic tool to influence public authorities. In many cases, it has been proven that even the submission of a case to arbitration can cause a considerable chilling effect that forces the host state to withdraw its measure or to make a compromise before taking a substantial step, because the government is afraid of massive damage when it fails in the case.⁸⁷

Trapped by the Past

Today's South Korean policy makers seem to believe that South Korea still needs to adopt the ISA system as a global standard in order to attract more foreign investment. At the same time, as South Korea

84 See KJ Vandeveld, "A Brief History of International Investment Agreements" in KP Sauvant & LE Sachs, eds, *The Effect of Treaties on Foreign Direct Investment* (Oxford: Oxford University Press, 2009) at 12–15.

85 See JW Salacuse, "The Emerging Global Regime for Investment" (2010) 51:2 Harv Intl LJ 427 at 462–63.

86 See *Ansung Housing Co Ltd v China*, Pending, ICSID Case No ARB/14/25, online: <icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/14/25>.

87 See H-J Lee & S-W Kim, "Korean Companies Filling ISDs ("Danghal Sumaneun Eobseo". *ISD Geoneun Hanguggieob*)", *Mae-Il Kyeong-Je* (1 December 2015), online: <news.mk.co.kr/newsRead.php?no=1139559&year=2015>.

becomes a major capital exporting country, South Korean investors see the usefulness of ISA to protect their own investments in host states. In response to public concerns, the South Korean government argues that the South Korean BITs and FTAs, especially after the KORUS-FTA, eliminate any risks of challenging constitutionally justifiable regulatory power. So far, it remains to be seen whether this new approach will be successful in the future because no investment arbitration case has been raised on the grounds of the KORUS-FTA or the post-KORUS-FTA investment treaties.

New situations have raised new concerns about ISA. Since the South Korean government has been engaged in three investment arbitrations so far, it is not able to insist that South Korea is immune from investor-state claims. South Korea's ISA policy will be influenced by the results of those claims. The investors in all three cases based their claims on old BITs that were established before the KORUS-FTA. The *Lone Star* case is an impressive example. Lone Star, a private equity firm incorporated in Belgium, submitted the South Korean governmental measures to ISA on the grounds of breaches of the Korea-Belgium BIT. The claimants to the arbitration alleged that repeated harassment and capricious conduct, including tax assessment by South Korean authorities, violated the Korea-Belgium BIT. The investor is seeking damages of KRW5 trillion, which were allegedly caused by regulatory delays related to interference with the sale of its controlling stake in the investment, a South Korean bank. This treaty was established in 1976 and amended in 2011; the post-KORUS-FTA elements were not reflected in the amended treaty.

A similar pattern of litigation is observable in two arbitrations against the South Korean government. South Korea was in dispute with Hanocal Holdings, a Dutch subsidiary of the Abu Dhabi-based International Petroleum Investment Company, under the Korea-Netherlands BIT.⁸⁸ The dispute pertains to a taxation measure on the sale of their stake in a South Korean company to another South Korean. The purchaser of the South Korean stake did not pay the full price but insisted that 10 percent of the total price was paid as tax on the sale to South Korea's National Tax Service instead of Hanocal. The investor argued that the tax should be refunded because this measure was taken against the double-taxation avoidance agreement between South Korea and the Netherlands. Finally, the investor submitted a claim to ICSID on the ground of refusing a tax refund. Concurrent with this case, Hanocal brought another claim to the national court, but the South Korean district and appeal courts rejected that request on the grounds that Hanocal is a ghost company that cannot be subject to the double-taxation avoidance agreement. The case is now pending in the South Korean Supreme Court. While Hanocal claimed that it was exempt from taxation in South Korea because of a double-taxation avoidance agreement between South Korea and the Netherlands, the South Korean courts have ruled against the company, finding that the company was in fact an Arab firm. Currently, Hanocal has withdrawn the claim by filing a request for the discontinuance of the proceeding.⁸⁹

In the third case, an Iranian investor filed a suit before the arbitration on the Korea-Iran BIT. Although the concerned BIT was established in 2007, the drafting model follows the liberal approach of pre-KORUS-FTA policies.⁹⁰ An Iranian electronics company, Entekhab Group, filed an international arbitration lawsuit against South Korea on September 14, 2015. The investor alleged the South Korean government breached the provisions of fair and equitable treatment during the merger and acquisition process. In contrast to two other cases, this case was submitted and proceeded according to the rules of the United Nations Commission on International Trade Law (UNCITRAL).

Especially interesting from the South Korean side is that global investors in the above-mentioned arbitration cases seem to exploit legal loopholes in the old BITs, which were made or updated under the 1990s liberalist influences. The old generation of South Korean BITs is worded in favour of investment protection. The Korea-Belgium BIT in the *Lone Star* case and the Korea-Netherlands BIT in the *Hanocal* case were established between South Korea and developed countries when the South Korean economy was undeveloped in the 1970s. Two BITs were commonly replaced with a liberalist model in the early

88 *Hanocal Holding B.V. and IPIC International B.V. v Republic of Korea*, Pending, ICSID Case No ARB/15/17 [*Hanocal*], online: <icsid.worldbank.org/apps/icsidweb/cases/Pages/casedetail.aspx?caseno=ARB/15/17&tab=PRO>.

89 YI Phee, "Hanocal, filing a request for the discontinuance of ISD Arbitration (*Hanocal, ISD Jungjae Chwiha Uisa Pyomyeong*)", *The Edaily* (28 July 2016), online: <www.edaily.co.kr/news/NewsRead.edy?SCD=JA11&DCD=A00101&newsid=02522326612719112>.

90 See Yonhap, "Iranian Firm Files Claims against Korea over Failed Deal", *The Korea Times* (21 September 2015), online: <www.koreaherald.com/view.php?ud=20150921001251>.

2000s when South Korea had just entered into the phase of developed economy; the Korea-Belgium BIT and the Korea-Netherlands BIT were replaced with new treaties, in 2006 and in 2003, respectively.

Those fleshed-out treaties were updated in a liberalist way, not only in terms of substantive investment protection norms but also in their procedural aspects. In relation to this, one eye-catching point is that the Korea-Netherlands BIT allowed for the right to directly claim against the host state by dropping the exhaustion clause. Such a procedural change in the ISA system was a significant point that the South Korean policy makers overlooked in the renegotiation process. Initially, the exhaustion clause of the BITs discouraged investors from submitting the case to investment arbitration by requiring the investors to go through an additional procedure. It would be undeniable that investors in the above-mentioned three arbitration cases might have faced considerable procedural challenges if the exhaustion clauses had existed. In this context, the liberalist amendment of South Korean BITs opened a Pandora's box by increasing the possibilities for investors to file investment claims.

CONCLUSION: AN UNPREDICTABLE FUTURE FOR SOUTH KOREAN ISA

As discussed so far, South Korea has consistently pursued policies to include ISA in BITs or FTAs. In the early period of South Korean BITs, South Korea adopted the requests of the developed countries by promising more investor-oriented terms. As the South Korean economy develops, South Korea now seems to be required to take a dual position as both an investment-importing and -exporting country. Of course, such a dual position in treaty negotiation provided a strong impetus to liberalize the original ISA model in favour of investors. Moreover, support for ISA policy has become more apparent because South Korea needs to protect its overseas investment to the same extent that it attracts foreign capital through the promise of investment protections.

However, it should also be pointed out that the South Korean government tends to use more sophisticated language in drafting BITs or FTAs in order to secure legitimate regulatory powers. Originally, South Korea accepted liberal language in favour of global investors because the most urgent national task was to boost the national economy by attracting more foreign investments. However, the current South Korea, like any other country, pays attention to the stable pursuit of the public interest even if it would collide with the private interests of global investors. Consequently, the general model of new South Korean BITs after the KORUS-FTA shows significant differences in securing legitimate governmental powers when compared with the old model.

While global investors challenge the South Korean government by using pre-KORUS-FTA BITs that were established or updated in the zenith of neo-liberalism, it leaves more to be investigated and answered empirically as to whether ISA itself can have a role in attracting foreign investment. Nonetheless, it is at least said that ISA could contribute in some degree to protecting South Korean overseas investment. Actually, a growing number of South Korean investors have started to employ ISA as a tool to protect their own investments against the regulations of developing countries such as China or Vietnam. Additionally, given the limited political powers of South Korea in international relations, ISA could look beneficial to the South Korean government in the sense that the investor's home state can resolve the dispute without any direct contact with the host state. The international investment legal regime can allow South Korea to save some political burdens to protect its investors against foreign states. The South Korean government could carry out its constitutional duty to protect overseas South Korean investors simply by calling for commitment to the global autonomous legal systems. Here, the home state could get away with political criticism even if the South Korean investor were to fail to win the case because the disputes are resolved relatively independently from the national nexus.

As a matter of fact, the current South Korean public opinion over the ISA system simmered away rapidly once the KORUS-FTA was passed in the South Korean National Assembly. Of course, the governing party's unilateral action led to public anger for some time, but it did not last long in people's memory. Although anti-American campaigners played a significant role in the anti-KORUS-FTA movements, they do not pay much attention to FTAs with countries other than the United States. In addition, general criticism of FTAs does not appeal to politicians, who know that increasing numbers of South Korean people are being persuaded to believe that FTAs in general will be beneficial to the South Korean economy. Although the agricultural and fishery industries will be badly harmed, the South Korean people expect that such damage can be balanced out by a boost in other sectors, such

as service or manufacturing, which employ most South Koreans.⁹¹ South Koreans are of the opinion that FTAs will draw more investment and encourage South Korean investors to enter foreign markets.⁹²

Currently, South Korean politicians, except for a small number of progressive party members, do not strongly object to FTAs and ISA. The South Korean National Assembly made a symbolic gesture by passing a legislative resolution to urge the executive branch to renegotiate so-called “poisonous clauses” of the KORUS-FTA after the governing party rammed the bill through the South Korean National Assembly. However, the executive branch has not taken any substantial measures because that resolution is not legally binding. Despite the executive’s response, no further actions have been taken by the legislative branch.⁹³ The main opposition party does not have a clear position on FTAs and ISA, but it has not shown any apparent objection to the recent FTAs or BITs concluded after the KORUS-FTA.⁹⁴ On the other hand, the minor progressive parties do not have any meaningful influence on the government’s policies regarding ISA and FTAs.

In order to appease public concerns over the KORUS-FTA, the South Korean government launched a civil-government joint task force team to review whether it is imperative to renegotiate the KORUS-FTA and relevant ISA provisions. Although the final paper was not officially issued to the public, it is known that the advisory opinion stated that the criticisms raised by civil society and critical scholars are unfounded and it is not necessary to renegotiate the KORUS-FTA and the relevant ISA provisions.⁹⁵ In addition, the government insisted that South Korea will seldom be engaged in serious investment claims to hinder public policies because South Korean government actions will not be arbitrary or discriminatory against global standards.⁹⁶ Although South Korea is currently involved in several investment claims, government officials assure the public with confidence that the government will not lose the cases because South Korean treatments of foreign investors is both legitimate and reasonable.⁹⁷ In addition, the *Hanocall* case seems to make the government’s stance more convincing, given that the claimant discontinued proceedings when it became clear that the investor could not win the case.

Nevertheless, the South Korean stance on the ISA system will depend on how the future unfolds. The debate over the future of the ISA system will bubble up again if the South Korean government loses even one of two pending arbitration cases. Especially if the government fails in defending the *Lone Star* case, criticism of ISA will gain significant public support in civil society. The political impact of the *Lone Star* case will be much greater than other cases against South Korea in terms of anti-American sentiment. From the point of view of critical activists, *Lone Star* is not just an individual private company; it is ideologically associated with American influence, as its headquarters are located in US territory. Given this political context, if South Korea loses the *Lone Star* case, the case and relevant ISA policy will quickly become politicized. The South Korean critical commentators and media would make a political issue of this legal event by describing the *Lone Star* company as a foreign — namely, American — invader.⁹⁸

The second factor to shape the future model of ISA is the global trend of international investment law. Historically speaking, South Korea has usually served as a rule-taker rather than a rule-maker, although there were a few exceptional cases found in the KORUS-FTA negotiation. In this regard, if future major trade pacts such as the Transatlantic Trade

91 For example, more than half of South Korean people think that the Korea-China FTA will be beneficial to the South Korean economy. YS Kim, “54% of Korean People Expect that Korea-China FTA will be Beneficial with Other 28% Anticipating Loss (“Gukmin 54%, Hanjung FTA Urinarae Iikdoel Geos” 28%neun Sonhae Yesang)”, *Koomin Ilbo* (4 December 2015), online: <news.kmib.co.kr/article/view.asp?arcid=0010131142&code=61111111&cp=nv>.

92 This view seems to be shared by the South Korean government that metaphorically describes the blind establishment of more FTAs with other countries as the expansion of “the economic territory.” See Yonhap, “FTA with US will leave South Korea with larger ‘economic territory’ than US”, *The Korea Times* (October 12, 2011), online: <www.koreatimes.co.kr/www/news/nation/2011/10/116_96489.html>.

93 See JM Seon, “National Assembly, Resolution to Renegotiate the KORUS-FTA (Guk-oe, Han-miFTA Jae-hyeop-sang Gyeo-ru-i-an ui-gyeo)”, *Chosun Ilbo* (30 December 2011), online: <news.chosun.com/site/data/html_dir/2011/12/30/2011123001869.html>.

94 For example, the bill to approve the ratification of the Korea-China FTA was passed by the two rival parties in November 2015 on the condition that the government take appropriate measures to support the agriculture and fishery industries, a measure that will cost around KRW1 trillion (US\$865 million) over the next 10 years. See Yonhap, “S. Korea ratifies FTA with China”, *The Korea Times* (30 November 2015), online: <www.koreatimesus.com/s-korea-ratifies-fta-with-china/>.

95 See J-H Kim, “ISA Civil-Government Joint Task Force Team, It Is Not Necessary to Renegotiate the ISA Provisions” (*ISD Mingwan TF “Hantbsmi FTAtui ISD Gaejeong Bulpiyo”*), *The Kyunghyang Shinmun* (17 July 2013), online: <http://bizn.khan.co.kr/khan_art_view.html?artid=201307171451331&code=920100&med=khan>.

96 See J-H Lee, “Ministry of Trade, Industry and Energy, It Is Not Necessary to Abolish the ISA System of the KORUS-FTA (*Saneobbu “Hantbsmi FTA Tujaja-guggasosong(ISD) Pyegi Pilyoobsda”*)”, *Chosun Biz* (10 April 2014), online: <biz.chosun.com/site/data/html_dir/2014/04/10/2014041002274.html>.

97 See I-M Oh & C-S Yun, “4.6 Trillion Won, Eat and Run Lone Star’s the First ISA Claim (4.6jo Meoktwi Ronseuta ISDsosong Iho Jojim... Jeongbu “Gangryeokdaeeung Bangchim””, *Seoul Newspaper (Seoul Shinmun)* (30 May 2012), online: <www.seoul.co.kr/news/newsView.php?id=20120530001006>.

98 *Lone Star* also seemed to exploit this political context in order to manipulate public opinion. The *Lone Star* fund intentionally leaked to the public its intention to arbitrate after related cases were filed in a national court and just one month before the South Korean presidential election. The media focused on this historically important lawsuit because this situation contrasted sharply with the government’s promise that South Korea would never be involved in an investment claim. *Lone Star*’s actions succeeded in provoking public concerns about ISA again after the KORUS-FTA. This situation imposed considerable political burdens on the ruling party and the executive branch. It can be inferred from a series of investors’ behaviours that *Lone Star* intended to embarrass the executive branch, and the judicial branch indirectly, by escalating the arbitration to a nationwide issue once again in South Korea.

and Investment Partnership deviate from ISA in its current form (and as implemented in current South Korean BITs and FTAs), this deviation will provide meaningful suggestions for South Korean policy makers.⁹⁹

On the other hand, the Trans-Pacific Partnership (TPP) is not expected to change South Korea's policy on ISA. President Park Geun-hye officially expressed an intention to join the TPP, led by the United States at the summit with US President Barack Obama. Currently, it appears that the ISA provisions of the TPP investment chapter resemble the KORUS-FTA model. If so, future negotiation of the TPP may become a source of public controversy, just as the KORUS-FTA did. The TPP is considered a significant part of a US-led regional trade regime. When it comes to geopolitics in East Asia, the TPP regime will cause a potential conflict with regional economic integration led by China. From a political perspective, the TPP can be interpreted as another US influence on the South Korean peninsula. Given this political context, launching the TPP negotiations with the United States carries the risk of provoking similar social turmoil again in South Korea.

99 If the South Korean government were to lose in its current arbitration cases, the government might look to the Transatlantic Trade and Investment Partnership (TTIP) as an alternative model to the current ISA system. It is said that public backlash from the defeat in Lone Star would impose incredible pressure to curb ISA policy. In that case, one of the alternatives for the South Korean government to defend ISA could be to promise to adopt the TTIP model. The South Korean government could appease public concerns by insisting that the TTIP is a new global standard proposed by major game-changers. This moderate solution could allow the government to maintain its pro-ISA policy without extreme policy changes such as abolition of the ISA system or termination of existing BITs or FTAs.

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