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Korean Perspectives on Trade and Investment Multilateral Agreements and Dispute Resolution

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Korean Perspectives on Trade

PEPPERDINE DISPUTE RESOLUTION LAW JOURNAL

Korean Perspectives on Trade and Investment Multilateral Agreements and Dispute Resolution¹

Moderator: Lucy Reed

Speakers: E.Y. Park, Joongi Kim, Beomsu Kim & Kevin Kim

Lucy Reed: Welcome back, everybody. We are now moving to investor state issues. The heading of this next [panel is] Korean perspectives on trade and investment multilateral agreements and dispute resolution. I am Lucy Reed, and my co-panelists are Professor Joongi Kim from Yonsei Law School and Beomsu Kim, who is head of the international arbitration group at Shin & Kim. What is interesting is to see that, as with the panel before with E.Y. Park and Kevin Kim, both Joongi and Beomsu are Korean lawyers with [a] great deal of experience in the US, practicing law and studying, and as Kevin was saying before, this is very common for the international arbitration scene, which is a very vibrant one in Korea. There is a lot of cross-pollination and a lot of cross education, and many friendships actually, and co-counsel positions in that whole field. And both of my co-panelists are active in the Korean Council of International Arbitration, which was mentioned.

1. This is a transcript of the second of four panels from the “Dispute Resolution in the Korean Community” Symposium, co-hosted by Pepperdine’s Straus Institute for Dispute Resolution and the Pepperdine Dispute Resolution Law Journal, which was held March 6, 2015 at Pepperdine Law School in Malibu, CA. This panel was moderated by Lucy Reed, a partner at Freshfields Bruckhaus Deringer, with presentations from Professor Joongi Kim from Yonsei Law School in Seoul, Korea and Beomsu Kim, a partner at Shin & Kim, along with input from previous panelists, Kevin Kim, a partner at Bae, Kim & Lee, LLC, and E.Y. Park., a partner at Kim & Chang.

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What we are going to do is this: We realize that not everybody here will be familiar with the basics of what investment treaty arbitration is, so I am going to spend ten or fifteen minutes at the most going over some basic principles and illustrations of investment treaty arbitration. Then we will hear from Professor Kim on the Korean treaties that exist, and which we hope are coming, and then from Beomsu Kim on some of the Korean practice in the area, which again is new and robust. Each will offer you some real life stories of some high profile cases that are going on right now, and then to wrap up, I am going to list five questions that I posed on this topic in 2007—well more than five years ago—and see how the scene has changed on investment treaty arbitration in Korea. We will wrap up with that. We welcome questions and interventions from the audience and from the panel at any time. I of course apologize in advance for those of you who know everything about this field and it will seem elementary, so you have permission to daydream if you wish.

Why do we even have investment treaties? The reason is this: Foreign investments can obviously be subject to lots of risk. I have put a few on the slide: Civil unrest, exhibit A, Egypt and the number of cases pending involving Egypt; fiscal changes, Greece; nationalization of assets—the list is too long recently, but I will mention Venezuela and Bolivia; arbitrary and discriminatory conduct by the host state—again the list would be extremely long, so I can just mention Russia right now. So investors, whether U.S. or Korean or whatever nationality, that have invested in many states in the world over the past twenty years are facing a great deal of disruption. What an investment treaty does is limit or manage the exposure for foreign investors by providing various protections of different types. And all an investment treaty is, is a treaty between two states, if it is bilateral, or many states, if its multilateral, in which the host states, welcoming the investment, promise to give certain protections to the investors from the other state or states in their territory. For those of you who have not seen an investment treaty you would be surprised by how short and simple they are; often no more than five to ten pages and they are following various templates at this

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point. Different governments have different model treaties. There are three basic types—I have mentioned them, bilateral, and multilateral like NAFTA, which has three states, or the energy charter treaty. And then the newest area, particularly in Asia, is free trade agreements, which are big trade agreements in which there will be one chapter on investment and investment protection. We will be hearing about the Trans-Pacific Partnership, which is of course again on the front burner, at least for now.

I have put up, so you can read it yourselves, a typical preamble to a bilateral investment treaty. This is the treaty between Korea and the Netherlands, which you can see sounds a lot like the old treaties of friendship, commerce, and navigation. States say, “We are very good friends, and we are friends so that we can promote investment, one way or two ways, and stimulate the flow of capital, raise the standard of living, etc., and we will be sure to treat these investments fairly and equitably (which has become quite a catch phrase).” So that is not new in diplomacy—the inviting of investment and promising to protect.

What is new with investment treaties is that they allow the private investor, when there is a dispute over the investment, to bring its own claim directly against the host government in international arbitration. Before this, investors were dependent on what we call diplomatic protection or espousal, which States do not generally like to do. For example, when I was in the U.S. State Department, and that was in the late eighties, early nineties, I worked on one of the very last cases in which the U.S. government espoused the claim of a U.S. investor abroad. We did not win the claim for the investor and a lot of diplomatic capital was spent. So the States would rather not be involved with every trade dispute. They leave it now to the private investors. I really have to underscore what an innovation this is, because in public international law disputes are between States and, no matter how many treaties they sign, States do not really like having to answer to private parties, but that is what is happening in investment treaty arbitrations. And so they come with a great deal of tension, and we should not pretend otherwise.

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The main arbitration options in these treaties are ICSID, which is the International Center for the Settlement of Investment Disputes, which is a World Bank center that administers an arbitration mechanism, which you will hear more about, and UNCITRAL, which are ad hoc rules for arbitration of disputes now between States and investors. And the private institutions for international arbitration are all competing hard to attract investment treaty arbitrations, to which I am known to say again and again that be careful about getting what you wish for. I sound negative—but I have been doing this, unlike most people in the field, since the early 80s, and they are very complicated cases. They have not taken politics out of arbitration; they are still very political and complex cases, hence my warning.

Here is a chart for you from UNCTAD, which shows you that there are over 3,000 investment treaties signed. The grey line is the cumulative number. It is now up to over 3,000. You can see the biggest rise was in the mid-1990s; there were four new treaties a week on average in those years. Now it has slowed quite a bit. The orange, by the way, are bilateral investment treaties and the green tips are other ones. Why has it slowed? It has slowed for two reasons: mainly because there are not that many permutations of States to enter into treaties anymore and most of them are done, and also because a lot of States are losing excitement about entering into more treaties. Back in the early 80s, you can see how few there were, so this is a very big change.

There are three things you think about when you deal with arbitrating under these treaties. The first is qualifying criteria. Who is an investor? And basically the treaties are all the same; an investor has to be a natural person or a legal person, in the case of the Korea and Netherlands treaty, either a Korean or Dutch company. Sometimes it is not enough to be, say, a Korean registered company. You have to show that you have your headquarters and that you are actually carrying out business in Korea. This is something the U.S. government insists on in its treaties—the United States

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does not protect shelf companies registered in, say, Delaware. You actually have to be doing business in the U.S. to get protection.

What will be protected? What is an investment? This is usually a very broad definition. You see here every kind of asset, owned or controlled—controlled is important—directly or indirectly, by an investor of one state against the other. Lots of ink has been spilled on what is direct and indirect control in this area and the treaties can vary quite a bit. What is not covered? A contract. A simple contract right is not an investment. If you have a contract with a Korean government purchaser, say for paperclips, and it is breached you do not have an investment treaty against the government of Korea.

I call your attention just to the penultimate bullet here: an indirect claim by a partial shareholder under most treaties is a qualifying claim. One of the earliest cases we did was for CMS Energy against Argentina, which was the first of the cases against Argentina after their economic crisis. CMS Energy owned less than a quarter of the shares in the relevant Argentina pipeline company, but ultimately was awarded compensation for the unfair and inequitable treatment of its interest in that pipeline.

What are the substantive protections? We all know there can be no expropriation of your investment without compensation. Fair and equitable treatment—you are not supposed to be whipped around by the government, treating you well one day and less well another day. You are not supposed to be discriminated against as compared to the locals or other national investors, and you are entitled to receive full protection and security, particularly when there is disruption.

Most important are procedural rights under the treaties. We have already talked about this. You have direct recourse to arbitration with the host State. Those of you who study arbitration and may say, “it’s supposed to be consensual, how does this work?” The treaty is a standing consent for the State to arbitrate with an investor. The investor triggers that consent with a claim when there is an alleged dispute. There are cooling off periods to try to get States and investors talking, though this almost never leads to

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settlement. A very interesting and growing topic is how we can make inroads into settlement or mediation of these disputes.

I will go very quickly through the next slides. ICSID is the single biggest arbitration avenue for investment treaty arbitrations, based on a Convention that has about 160 countries signed up to resolve their investment disputes peacefully using this mechanism. It is important that ICSID is detached from national courts, so the New York Convention does not matter at all. There is an annulment process for ICSID awards, with factors similar to those in the New York Convention, but it is all internal to ICSID. Generally international law does not float unconnected to national territories, but in ICSID it actually does; it is a free floating system. This map shows you all the countries that have ratified the ICSID Convention. They are the blues. The yellow countries are those where there has been a signature but not a ratification yet. This graph, you can see very quickly, shows the increase in arbitration cases registered in ICSID, with the big increase starting in the early 2000s against Argentina, Venezuela, and the Czech Republic. For a long time, to work at ICSID meant only one or two cases a year, but now they are very busy.

This pie chart is interesting, in that it shows you the geographical breakdown of ICSID cases. The big purple piece is Central Asia at 24% and the pink or light purple is South and East Asia at 8%. So that is a total of 32% of ICSID cases with a geographical connection to Asia. But look at this pie chart. This is the distribution of appointments of arbitrators in ICSID cases. The orange piece is for arbitrators from Southeast Asia and the Pacific at 11%, and to the right the tiny purple one is arbitrators from Eastern Europe combined with Central Asia at 2%, so only 13% of all arbitrators come from Asia—despite the 32% of cases with geographic connection to Asia. This is a very big topic that we all continue to discuss.

This slide is important for those who think there are good reasons why States do not want to be bound by ICSID anymore, because investors are getting away with murder. This shows you ICSID cases only, and not other investment treaty arbitrations. The big purple piece of pie covers awards

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upholding the claims of investors against all States. 48% of investors win, and obviously 52% do not win, so it is not all pro investor. The red piece indicates cases that die at the jurisdiction phase, for example for lack of a qualified investor or investment. And the green piece covers the outright dismissals on the merits against States. So do keep this in mind when you are talking to taxi drivers in Seoul, who are against the TPP.

Another thing to keep in mind: the number of investment treaties that a State has entered into does not necessarily have a connection to how many arbitrations the State may get involved in. So you can see on this chart that China has over 100 investment treaties, but China has only one ICSID arbitration. South Korea has 57 BITs—the number has probably changed a little—and, when I did this chart from ICSID data, there was only one pending and one concluded ICSID arbitration. A couple more Korean cases are in the pipeline, we hear. But look at Venezuela—only 24 treaties but almost 50 cases. So it is not dependent on the number of treaties.

This slide includes statistics for all known investment treaty cases, ICSID and others, and it shows that States are successful in 60% of the cases brought against them. This includes UNCITRAL cases that are public (they are not all public). The total is 176 awards. And the investor claimants do not get what they ask for. In cases where the claimant wins, the average damages claimed are about \$166 million (USD), but the claimants are awarded only \$76 million. This is a big reduction from what is claimed, for different reasons—less than 50%. There are some outliers, including a couple of big awards like the Yukos award against Russia at \$50 billion.

To conclude, I have given three or four talks in my career, in Korea or involving Korea, about investor state arbitration and the TPP, starting in around 2005, ten years ago. I pulled out some slides I had used in 2007, I think it was with one of the Korean government programs, and reminded myself that I ended that talk by listing the questions that were on my mind as an experienced investment treaty arbitration advocate about what Korea might face. Here is the list, which we will return to: Will there be cases? How will the Korean government defend cases? How will Korean investors

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prosecute cases? Are they going to use international or local expertise or both, and what will be seeing? Will it be primarily international and treaty law or local law or both?

With that I am going to turn it over to Professor Joongi Kim to talk more about South Korea and its treaties.

Joongi Kim: While we are waiting for the slides, I want to thank Jack and Tom, and everyone else at the Pepperdine Law School for inviting me. It is a great honor and pleasure to be here.

Lucy gave a very comprehensive and great overview of investment arbitration. And what I will try to do is try to add some Korean flavor to it, and give you a more in-depth perspective of what is going on in Korea.

One of the few things that I think I got pretty close to being right—but my wife will say that I never get anything right of course—is what I predicted a couple years ago. I did an article reviewing the potential of Asian investors bringing cases. And, what I did among other things was I plotted various things. What you have to have if you want an investment treaty case—an investment arbitration case—is you have to have investors that are investing a lot overseas. Koreans do that. Second, what I thought was important was, you have to have a lot of arbitration experience. And, as we know from our pioneering counsel here in this room, Korean counsel and Korean clients have been very, very active in commercial arbitration. So they have a very solid foundation in how arbitration works. So we have that in Korea. I thought, therefore, we have those two factors and not many countries have those two things. So I felt that it is going to happen in Korea. And lo and behold, as we saw, we actually have this increase in cases and I will try to shed some light on that.

What I did [in this slide], among other things, is I tried to highlight some of the cases that are being brought in Asia. These are some of the major cases in Asia that have been brought recently. And, as you see, the nationalities of course can vary. And I will talk about that in a second, but, for instance, you have this very famous case involving Phillip Morris bringing a case against Australia concerning plain packaging cigarettes.

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They did this actually through a BIT—a bilateral investment treaty—between Hong Kong and Australia. So they actually deliberately did this by design. And you see here [in this slide], we have two cases against Korea. We know the first one involving Lone Star, and then we have found out last week that an Iranian investor has filed a trigger letter against Korea. This is apparently not an ICSID case, and the details have just been announced so we are still waiting to see what is involved, but this is actually another very surprising development, that investors are bringing cases against Korea. And as you see there, the case is . . .

Audience: Why is that surprising?

Joongi Kim: Well, that is a good question.

Audience: I am not surprised. We are in the mix.

Joongi Kim: We are in the mix. As a developed country, I guess I kind of was, a bit maybe, over-confident in the rule of law in Korea. And I guess I thought, you know, the Korean system, we have a good rule of law, courts are very good and efficient, and the process is very transparent and neutral, so investors should probably be content with the process that exists and would not have to resort to this very expensive process. But as my wife always tells me, I've been proven wrong again. We will see. There are scenarios that I will explore where I think there is potential, where Korea actually is vulnerable.

As Lucy pointed out, in Korea, again very similarly, we have bilateral investment treaties, and multilateral investment treaties. [Slide] The big shift in Korea is, we have shifted from adding what we call investment arbitration, the ISDS, Investor State Dispute Settlement, from BITs, and now we are shifting more to FTAs, and this will come up in a second. So in terms of numbers, as of March 2015, we have actually eighty-eight bilateral investment treaties. And that actually includes not a bilateral investment treaty, but a trilateral investment treaty between China, Japan, and Korea. And now, this is interesting, because this is, as you see there [in the slide], the second most in Asia; very, very aggressive in Asia. You do not see Japan there. You do not see any other major Asian country other than

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China. So recently Koreans, the Foreign Ministry, and the Korean government, have been very, very forthright in trying to push for BITs, primarily for Korean investors when they invest overseas.

In terms of FTAs, we have nine FTAs with investor state arbitration provisions, and three are in the works. The three are with China—we are in the final stages of finalizing and ratifying an FTA with China, and it came out last week, and also includes an ISDS provision—and with New Zealand, and Columbia. So we have a total of twelve FTAs in the works that embrace investment arbitration as a means to settle investment disputes. And, as Lucy mentioned, we have TPP. We only have a leaked draft of TPP that came out three years ago. So of course if anyone in this room has any more knowledge, I would be very, very interested to hear about that.

If we look at the treaties in force [slide], you see how the numbers have changed, and you have this big jump between the 1990s and the 2000s. It is a very similar jump as you saw the total numbers that Lucy showed earlier. So Korea basically followed that trend very actively. And here, [the slide] illustrates those numbers even more. So you see those big blocks in the 90s and the 2000s. That is where you had this huge upsurge in BITs and FTAs with these investment arbitration provisions. And, one thing we want to note is, you see the light blue line at the top [of the slide], and those represent a huge number of BITs and FTAs with South and East Asian and Pacific countries. So that has been a very important area for us that we have been focusing on.

Now this [slide] is the same thing but based on the region. And why I did this was, it gives you a flavor of how things have changed. So if you look at the bottom, which is the light pink and the red, it goes from the 60s to the 70s to the 90s and 2000s. You had this shift in focus. Basically as E.Y. mentioned earlier, Korea was a very poor country. So what did we need? We needed capital. So a lot of our BITs came from, for instance, Western European countries where we needed capital from. Then, the focus started to shift, because we were no longer an FDI importer, but we became more of an FDI exporter. So, therefore, we branched out, and we needed

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FTAs in other regions of the world for our investors, where we were investing all over the world, because, our investors, the Korean government felt that our investors needed protection.

So, two perspectives to keep in mind: There is the sovereign perspective, then there is the investor perspective. Sovereigns usually must prepare for claims against them. So from the sovereign perspective, Korea is really undergoing a baptism by fire. We are learning right now, with this very huge case that is brought against us, and we have another case in the works. So this builds institutional experience. Two countries come to mind: Argentina, as Lucy mentioned, and the other one is Iran, and they have extensive experience through the Iran-United States Claims Tribunal, where Jack and Lucy both have experience. So their governments have extensive experience in investment arbitration, and you would not have expected they would. They are very sophisticated and they know what is going on because they have so much experience. Similarly, the Korean government, therefore, is gaining this type of experience right now.

Where I see the vulnerabilities—this is what I had expected actually, more so than this current case—is regional governments within Korea. Our central government is very sophisticated, and they are generally sensitive to investor needs and rights, but in the regional governments in Korea, there is intense competition to get investments. Often under questionable terms, they will engage in projects to try to attract investment and there is I think a lot of vulnerability. So we expected that there might be more claims that would be brought because of things that had happened in the regional governments.

Another area, and this has actually already happened, is contract claims. So treaty claims are through the treaty, and that is the bulk of most investment arbitration claims, but there are also pure contract claims; you can have a pure contract and ask for a venue, such as ICSID or ICC. It is basically the same thing. And we actually had a very large, almost a billion dollar claim, brought against one of our regional governments, that was an ICC contract claim. But basically it was an investment arbitration.

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As with many cases, and this is the difficulty that lies if you are a sovereign, it is very difficult to settle, even though many times it makes more sense to settle, because of the political implications, you cannot just accept the risk. Some may question, “How come you settled for 100 million dollars?” Which maybe was a good deal, but then you could still be held accountable. Who knows, maybe it could have been fifty; maybe it could have been \$200 million. Therefore, governments are in a very difficult position, so a lot of times they cannot settle, even though in a commercial situation a commercial party usually might.

So from the investor perspective, Korean investors—and this is what I think I had somewhat predicted—need various things as I mentioned. You need critical mass, you need a sizable amount of investors investing overseas, you need able counsel, and you need able *in-house* counsel. Able in-house counsel can tell their CEOs, “You know we have a lot of experience with commercial arbitration, and it is basically a very similar thing—we were denied certain rights and we could bring a claim. This is a system that works.” And then, for a CEO or upper managers who have that experience, they can say, “Oh, maybe we should try that.” Then we have what I call the Se Ri Park or the Yuna Kim effect. And we might add, for those of us in the room that know him, the Shin Hi-Taek² effect as well. What I mean by this is, in Korea, as you know, Se Ri Park, is a legendary figure; out of nowhere, she comes and wins this major championship, and now we have this whole floodgate of phenomenal female golfers all over the world. And Yuna Kim is the same thing. Just one person can change it. If she can do it, I can do it. And I think that is very important, that kind of confidence. I think we have this now, basically, on the investor side. “Hey, that investor brought a case when their rights were violated, why can’t we do it?” And it kind of breaks the ice and breaks the mold, and I think that is

2. *Professor Hi-Taek Shin, Biography*, ARBITRATION ACADEMY, http://www.arbitrationacademy.org/?page_id=3073 (last visited May 13, 2015) (“[Professor Hi-Taek Shin] is currently on the panel of arbitrators of ICSID . . . as well as the Korea Commercial Arbitration Board.”).

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why, from this perspective, it kind of allays the concerns that many investors previously had.

And this is actually the case that Kevin briefly mentioned that was handled by Kevin's firm, which tied a standard commercial dispute with an investment treaty dispute. Kevin elaborated on it so I will not expand on it anymore, but it is a very interesting case where it kind of crosses both aspects of commercial arbitration with investment arbitration. What I will do now is briefly overview some of the key areas that might be of interest to you, that are common in many of the BITs and FTAs that Korea has.

As Lucy explained, these are the primary forums where investment disputes are settled. First, ICSID. I like ICSID for one big reason among other things: we are the same age. I was just celebrating their birthday last week in DC. ICSID is the primary institution, but we have other institutions. You can have, and there are, as Suzanne would of course explain, but the ICC has investment arbitration cases. PCA is another forum. The Yukos claim, the 50 billion dollar investment treaty claim—the largest in history—was at the PCA.

Audience: And that is? [referring to PCA]

Joongi Kim: Permanent Court of Arbitration in the Hague. It used to primarily deal with a lot of state-to-state disputes, but they now maintain a very active docket of investment treaty disputes as well. And as we saw, the largest case in history was held there.

We have in our BITs, amicus curiae provisions. This would be a provision for someone not directly involved in the dispute. There are certain qualifications that they must have, but they can actually file a submission, and they can also actually present—make oral submissions—as well. This exists in KORUS, Korea's FTA with the US, and in TTP in the leak draft that we know of. Interestingly, but maybe perhaps not surprisingly, in the Korea-China FTA we do not have the amicus curiae provisions.

Then we have transparency provisions. There is a big push right now in investment arbitration—international treaty arbitration is kind of a branch of general commercial arbitration—but because there is a public aspect that we

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should increase transparency. The KORUS FTA, which follows the model US BIT, has very extensive transparency provisions. So almost everything, including submissions are disclosed, and hearings themselves are supposed to be public, which is something you do not think of in your standard commercial arbitration, where parties treasure privacy and confidentiality. The TPP—also in the leak draft—contains a very similar provision. However, perhaps again not surprisingly, in the China-Korea FTA we do not have this transparency provision.

And this is just an interesting thing I dug up, in terms of language—and I know the Korean negotiators are very proud of this—because if there is a dispute under KORUS or KAFTA, which is the Korea-Australia FTA, Korean has to be used, with English as well, unless the parties decide otherwise. The Korean-Canada FTA is also very interesting. If the disputing party—the sovereign getting sued—is Korea, then things proceed in Korean and English. And if Canada is being sued, it has to be in French and English. We do not have this in other treaties.

And then, another thing that is very unique, that exists in the Korea-Canada FTA, and also probably because influenced by our Canadian friends, is this corporate social responsibility provision, which you do not really see that often. But Canada is very active in promoting this. It is just a general statement that countries should encourage enterprises to follow internationally recognized standards of corporate social responsibility, and then these principles address things such as labor, environment, human rights, corruption, and community relations. This is not something you normally see in many treaties, but this has been added in the Korea-Canada FTA and it exists in the draft for the TPP.

Lucy Reed: There are two things your presentation prompts me to say. The first is on language, which is very interesting. Language is one of the biggest sources of expense in investment treaty arbitration, as well as in commercial arbitration. We represented the Republic of Turkey in three ICSID and ICSID Additional Facility cases under the Energy Charter Treaty,

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all of which Turkey won. One called *Libananco*³ was brought by an alleged Cypriot investor in Turkey. As Cyprus and Turkey do not even have diplomatic relations, it was a bit suspicious. The other two were brought by alleged Polish investors. At the end of the day we were able to prove for the Republic of Turkey that the claimants were members of a Turkish family, now all under Interpol notices and fugitives, who had based their claims of being Cypriot and Polish investors at a critical point of time on fraudulent documents and testimony. We received what was, then, the biggest award of costs and fees at ICSID, roughly \$ 15 million in *Libananco*. A great percentage of that amount was for translation and interpretation costs, because the proceedings were in English only. And because this company, *Libananco*, was just a shell company in Cyprus, there were no funds to pay the costs award.

The second thing I want to mention, for your general knowledge in this area—and I do not know if Beomsu Kim plans to touch on it—is that in the past fifteen years we have seen a big change in how investment treaties drafted. The modern model BITs put a greater emphasis on corporate social responsibility, and carve out more robust regulatory room for the host States' in areas such as environment and public health. States following the US model BIT are reacting to cases like the Phillip Morris case, where the claimant is challenging the mandatory plain packaging of cigarettes in Australia on the alleged basis of an interference with their intellectual property rights in their branding that is taken off the packages. States are getting much more self-protective. And the area of unfair and inequitable regulatory treatment of investors, especially with indirect control of the investment, is being defined much more clearly. So, what I often say in Asia when I face a lot of doubters about the TPP or FTAs, is to remember just how much has been learned, remember we are way high on the learning curve for both investors and states. It is a different era. With that, onto Beomsu Kim for experiences in practice in this area.

3. *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8.

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Beomsu Kim: Lucy, thank you very much for your kind introduction. Before going further I want to repeat a big thanks to Professor Coe and Pepperdine University for providing this great opportunity. I have postulated kind of mixed feelings this morning because, as Kevin mentioned, we are just Korean born people and quite local lawyers—local kind of legal professionals—and we have never felt we were [making an impact] outside of Korea. Also I am here, and Kevin is here, everyone is here talking about international mess involving some Korean flavors and some Korean things, but not purely on Korean matters; things just happen to be in Korea, but the same thing may happen everywhere. So I realize that the legal profession, or lawyers, can do whatever they are supposed to do on behalf of someone else, regardless of whether it is in Korea or [elsewhere]. I am supposed to talk about some practices as a practitioner in Korea now, but it probably relates to generally everywhere in the current world.

I will briefly talk about some sentiments we had at the time of the KORUS FTA or involving the KORUS FTA, but I would like to mention some realities we have, regardless of the fears of additions, or concerns related to the FTA or across FTA. And I am going to talk about how the Korean petitioners have prepared, or how Korean government has prepared for the ISDS. And then why we need this BIT and why we need all these kinds of things as of now and how to develop this new era going forward, and then I would like to make to some kind of personal conclusion—or kind of some expectations or suspicions based on some prior experiences.

This morning I read an article about some statements made by Senator Elizabeth Warren in the US. She really criticized and opposed the ISDS and list to the TTP or FTA context. She criticized how unfair the proceeding is, how the taxpayers over here are suffering, and how the non-neutrality is being opposed by this system. That reminded me back to 2007 when we entered into KORUS FTA. We saw that there was a big demonstration on the streets every day and night and there was so much anti-American sentiment that arose at the time. And that was back in 2007. Again in 2012, when the KORUS FTA came into effect, there was another series of

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demonstrations on the street almost every day and night. Politicians, civil groups, and intellectuals really made a statement, and they opposed [strongly], and as Kevin mentioned, a number judges really opposed to this ISD being [put into] effect in Korea, but, fortunately or unfortunately, we have the FTA being placed in Korea today. And the same is going on today as well; the continued opposition and pressures to renegotiate about the Korea-US FTA and the ISDS.

As we have discussed this morning, we have around 100 BITs and FTAs, but why this ISDS is so critical in [the] Korea-US FTA is because everybody fears that some American investors are ready to, or are quite diligent to, make claims against the Korean government, which could, at the end of the day, directly or indirectly affect the Korean people. That is why, in my personal view, the demonstrations are going on regarding the entering of this Korean/US FTA as well as the reorganization of the Korea-US FTA. So we will see how this will go.

Regardless of this opposition, or fears or concerns or criticisms, we are having quite a different reality seen in Korea now, especially for this current government—Park administration—[which] has [a] really broad plan to make the FDI inward clear bound investment increase because the clear bound FDI wants a big drive to make economic development in Korea. And we are realizing that we are very low on the FDI in terms of absolute numbers and in terms of relative GDP in the OECD countries. We have one-fifth of the U.K. in terms of the GDP relatives, and one-ninth or one-tenth of the U.K. in terms of absolute numbers when talking about the amount of Korea-bound FDI. I will talk later about the FDI, as Professor Kim mentioned.

Korean officials need to invest abroad, and that is why we need another protection from the BIT or FTA regime to protect the Korean Commissioners. So in reality, we need these kinds of BIT and FTAs put in place for Korea-bound investment, and at the same time, for foreign-bound investment made by Korean investors. With this current situation, the Park administration made a big amendment to the Foreign Investment Promotion

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Act so that the Korean government can attract more foreign investors to come into Korea to make investments so that the Korean economy can make another leap up with these new investments. At the same time, the Park administration issued a kind of report, which is describing the general policies and measures to promote and encourage foreign investors to come into Korea. One of the incentives is to provide tax incentives and some other of the original or facility incentives so that many foreign investors can come into Korea and make investments again. That is the current situation we are in now.

At the same time, as Professor Kim mentioned, the Korean companies have been making huge amounts of investments into other countries as well. Data shows that the outward-FDIs exceeded by threefold to the Korea-bound foreign investment, which means Koreans are quite diligent in making investments in foreign countries, including some South Asian, West Asian, and Middle Eastern countries, along with America. So those really prompted the Korean government to put some protective measures in place, not only for the investors, but for Korean companies, too. That is why the data is changing, but we have about 100 BITs and FTAs as of now. My data shows 103 BITs and FTAs, but about 100 BITs and FTAs are in place [currently]. Thus, Korea is second to China in nation countries. We have been inviting foreigners to come into Korea to make investments, and at the same time, we have been promoting Korean companies to go abroad to make investments into other regions and to expand our markets. The Korean economy is making another step upward with those investments. With these FTAs and BITs, as Lucy mentioned, there is very extensive investment chapter in this FTA. The FTA is the big Bible about transactions between two countries or multiple countries. One of the chapters is the investment chapter, and one of the very important subchapters is the investment state dispute mechanisms. So the Korea-China FTA has such investment chapters with investment state dispute mechanism as well. And Korea had the same one, too. And we will see many more to come in relation to Korea's latest transactions, too.

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I am going to briefly talk about how Korea has prepared for this ISDS. We do not have any central agency to be the [center] for all ISD matters. Instead, the Korean government has had the ad hoc approach, so that some late agencies form a committee or a task force, [where] the members of the task force prepare the expenses and all the related proceedings. But, as Professor Kim mentioned, Korea may change this approach on how to plan or how to address this ISDS system going forward because if more cases arise, then the government might need to prepare and address those issues in a more consistent way. So the Korean government probably will answer the question of how to prevent the dispute and how to address the dispute in a way of having a centralized agency or some other creative ways down the road.

As of today, although we do not have a centralized agency, various government agencies and interest groups have prepared for this ISDS. The Supreme Court has formed a group through research as to what ISDS is and how the ISDS will affect the Korean judicial system because, as Kevin mentioned, maybe some judicial decisions may be subject to the ISDS system depending on the situation, so that is why the Korean judges are really kind of sensitive to this ISDS system and that is why they have formed a group to research what ISDS is, [and] how ISDS will affect the Korean Judiciary. At the same time, the Minister of Justice (MOJ) has been doing the central role to prepare the ISDS programs and it has reached an ISDS committee, comprising of all the government officials, and professors, and practitioners, and some specialists as the members for this committee. And the MOJ has co-organized the ISD forum with the Korean Commercial Arbitration Board (KCAB), where practitioners, professors, and officials have regularly met to discuss and exchange views and information about ISDS cases, regimes, and new developments. That is really helpful for the Korean practitioners to have very updated and very detailed valuation experience to share among these practitioners. And of course the practitioners, like myself, have studied ISD jurisprudence for years. And as Grant mentioned, once Koreans are engaged, we do you know, “bali bali”

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very, you know, in a hurry so we have been very diligent to learn a lot within a very short period of time. So, we try to make ourselves ready to respond or address ISDS issues when it is necessary. That is what we have done [thus far], and at the same time, we are learning a lot from international counsel in prominent positions, like Lucy, and from other great firms and lawyers, and trying to make our lawyers similar to them. We have been quite diligent to do this. At the same time we have very strong civic group to prompt the lawyers or some interest group to be ready for this ISD systems. So they really asked the legal professionals to prepare themselves with this ISDS systems and development.

Up to this slide I have talked about how the Korean government has viewed the BITs and FTAs and how Korean practitioners or interest groups have prepared this ISDS system. But my personal view is that as time goes by there [will be] more cases coming against the Korean government, fortunately or unfortunately, because Korean governments, including both the central and local governments, invited a lot of foreign investment, directly or indirectly. Thus, naturally, Korean governments, local and central, anticipate that conflicts with foreign investors will increase. It is quite natural that the more transactions, the bigger the possibility of conflict will arise from these transactions or relations. With all the experiences, knowledge, and information, it seems that the Korean government has viewed BITs and FTAs to correlate to the investment, inward or outward, and interestingly, they have kind of viewed that the FTA flows in Korea have been significantly increasing since the Korea-EU FTA has been in effect. As of now the EU, China, U.S., and Japan are four major trade partners with Korean companies and Korean government. The Korean government has viewed that with all these BITs, FTAs, and transaction investments among those countries, the Korean government insists that we need a system to respond to this ISDS system and to address these kinds of matters in another proper way. Quite interestingly, this month the Minister of Justice published this book, unfortunately it is in Korean only, but they have very diligently researched and prepared how to prepare, from the

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Korean perspective, for the ISDS to come. It is a really good guideline for Korean practitioners to follow. It is a quite interesting book, so if you are interested you can find good references and good directions from the Korean government from this book.

This is my personal view [regarding whether] BITs or FTAs have the potential to be the basis for another ISDS case. My personal view is that the BITs between Korea and EU member states may be the big potential . . . for the future of ISDS cases. And as Kevin [mentioned], the Korea-China BIT or Korea-China FTA may be another basis in taking into account all the transaction volumes and the transaction natures being made with the Korean investors, as well as Chinese investors in Korea because we have a lot of transactions between the two. So those BITs and FTAs may be the potential basis for future ISDS cases from the Korean perspective.

With all of this, I was about to show a kind of chart for this. This [slide shows] a summary chart of the complaints filed by foreign investors with the Korea Trades Agency Ombudsman System. So I highlighted—there are a lot—but I did find some items having more than 5% ratio to the cases. You will see the investment incentives, like the complaint, complained of activity of investment systems and procedures and taxation and so on. These are quite telling because, you will see this, I am looking for the Lone Star against Korean government for the first ICSID proceeding, now against Kevin. For the Lone Star case this piece arose in relation to the investment system procedure as well as taxation. As you have seen, the complaint related to the investment systems and procedures and taxations are taking very high positions compared to the other items. It is quite interesting to see from this perspective. At the same time, as we have heard, a new case by the Iranian investor has lead again to the investment systems and procedures because—my understanding is that—the investor wanted to make an investment, but for some reason the transfer did not go through, and that is why the union investor filed or encouraged Korean government to have this ISD case. It is also related to this investment system and procedure. And the next bullet point [on the slide], the particular significance is that the

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Korean government itself acknowledged or saw that it needs to improve foreseeability of government policies throughout the IFDI, which means that [the] Korean government saw that there was some gray area to be improved in relation to this investment regime because it may give some unforeseeability for the foreign investors; it may cause some complaints filed by foreign investors, [and] later on it may develop into another dispute between Korean government and foreign investors. So it is quite useful to follow which areas that Korean-bound foreign investors have been feeling uncomfortable [about]. So those are my personal views—that the Korean government must really view those systems or as a regime, you know, to reduce the possibilities or probabilities of future ISD cases. That is all I have today, thank you very much. Thank you.

Lucy Reed: I have asked Professor Kim to tell you briefly about the case that nobody has known about until now.

Joongi Kim: This is a very interesting case that no one knows about and it is the first case where a Korean investor actually obtained an award. I do not know if it is the first case that was filed, but it is, from what we know, the first case where an investor received an award. The basic facts are this. There is a treaty—that even Lucy Reed does not know about—called the Moscow Convention, and if anyone knows about this treaty I would really welcome their input. I have asked several experts in Russia about this treaty. It is basically a treaty involving about four or five CIS countries. And this treaty has a very unique provision that allows investors from non-member states of the treaty. The investment treaty is basically for investors from the member states of the treaty, but it allows for investors of non-member states to bring a case against a country that is party to the treaty. There is apparently a Korean investor, apparently a real estate developer, and he brought a case against Kyrgyzstan at a very not that well known arbitral institution in Moscow, and he obtained an arbitral award through this treaty. Not a small claim, about—I think—\$10 million. And there are several other investors that brought claims under this treaty, and won awards. The award is currently being challenged in Moscow courts, and apparently there is a

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similar, parallel case where that award was set aside. So there is a likelihood that the award might be set aside, but for whatever it is worth, it is the first investment award by a Korean investor.

Lucy Reed: So, any questions at this point from the audience for this panel?

Audience: Who are the parties for the Moscow treaty?

Joongi Kim: I do not know exactly, but, if I recall correctly, Kyrgyzstan, Ukraine, and several other—four or five—CIS countries. Not that many.

Audience: Mr. Beomsu Kim, you mentioned nine Lone Star Cases? Most of the transactions that Korea did were sometime in 1997 during the financial crisis, but the Korea-US FTA and the Korea FTA with EU took place sometime in 2012, so how are they able to invoke this ISD?

Beomsu Kim: I should probably make some corrections if it was unclear before, but Lone Star cases involved a U.S. investment company, but the ISD was invoked based on not the Korea-US FTA or Korea-US BIT, but instead, is based on Korea-Belgium BIT, which has been in effect since the mid-70s, so the invocation of the BIT is not the Korea-US FTA or the Korea-EU FTA.

Lucy Reed: It would be worth spending a few minutes explaining and describing the Lone Star case for those who don't know it, because it is such a touchstone of a case.

Beomsu Kim: We have discussed today that since 1997, Korea, in a meaningful sense, has become a member of the international community. Before that, Korea was, as someone called it, a hermit kingdom; we were a very distant and small country. However, it was hit hard by the Asian financial crisis, together with Thailand and some other Asian countries in 1996 and 1997. That really prompted Korea to become a member of the international community, and after the financial crisis, many Korea-bound investments were made—which were sometimes fortunate and sometimes unfortunate. With this flood of Korea-bound investments, many bankrupt companies were revived and the Korean economy flourished—particularly

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since 1999 and 2000. With this, the Lone Star, a private equity fund, made huge investments into a Korean bank, which nearly went bankrupt in early 2000. Lone Star made a huge investment, and it took a longer time to make an exit from such an investment, so that really made the basis for a claim against the Korean government. That case is really the first case against the Korean government with a huge claim amount of \$4.5 billion. Before the Yukos case, the Lone Star case was the biggest ICSID case in terms of the claim amount to the extent of my knowledge. And that proceeding started in 2012, based on the Korea-Belgium BIT, and is still on-going.

Lucy Reed: Just to add, because counsel cannot say too much, a couple of things. The existence of ICSID disputes is always public. The World Bank has a website listing all the cases filed and a brief procedural history of each, not the content usually. UNCITRAL and other cases are not always publicly known until the awards come out, if at all. This is one of the reasons for the inexact data. We know about Lone Star, because it is an ICSID case and, as I understand from public sources, the theory is that Lone Star wanted to get out of its investment and was not allowed to, and over time, the investment lost a great deal of value. You said how many billion?

Beomsu Kim: 4.5 billion.

Lucy Reed: I am not involved, but it must involve claims of unfair and inequitable treatment, maybe indirect expropriation, maybe umbrella clause. It is the focus of a lot of attention.

Audience: Just a quick follow up on that—so once there is an arbitration award, how does the collection happen?

Lucy Reed: That is a good question. It is one that we as counsel who represent investors ask before we start a case—what will happen if you win an award? Until the Argentina cases, virtually all States that had lost in ICSID arbitration—generally they were contract disputes selecting ICSID arbitration—voluntarily paid. If not paid voluntarily, the investor must resort to the provision in the ICSID Convention that says that any signatory State of the ICSID convention is to enforce ICSID awards in its national courts as if they were final judgments of their highest courts—so there is no

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opportunity to review on the merits. This avenue has not yet been actually tested in a highly disputed ICSID award. Also, as in commercial arbitration, we often see that after a treaty award comes out there is negotiation of the amount. Again, there are interesting developments in the field. There are hedge funds that buy unpaid ICSID awards at some discount, lump them together if there are multiple awards (as there have been against Argentina), and then negotiate for payment. Argentina recently paid off the five or six old awards that it had not paid to a hedge fund that owned them all. You can securitize almost anything.

A second related thing is that third party funders now are investing in quite a number of cases for investors. This can be critical where a small-to-medium-size investor lost its entire investment, and might not be able to proceed without financial support.

To go back to this gentleman's question, a very good question, let me add that sophisticated investors, particularly in infrastructure and natural resource concessions, look before they invest to make sure they are investing through an entity incorporated validly in a country that has an investment treaty with the host State. It is, as I was saying yesterday, effectively malpractice now for advisors to investors—/corporate partners in a law firm, for example—not to have on the due diligence checklist a question asking if there is a treaty for “Armageddon” protection if the investment goes wrong. And I do mean Armageddon; these are not easy cases.

Joongi Kim: Just two things. States have very powerful incentives to comply with the awards voluntarily because it effects their reputation so most states will comply.

Lucy Reed: I do not really buy that, because investors are going back in Argentina, Chile, and Bolivia. If there is oil or other resources at a deep enough discount, investors go back. But it is bad for the population, because the terms are much worse, the protections are much higher payment guarantees. It is very bad for the people of those countries.

Joongi Kim: Just to add one more thing—if it is a non-ICSID award, then you just go through the New York Convention.

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Lucy Reed: Like an UNCITRAL award. We took an UNCITRAL award, Freshfields did, all the way to the U.S. Supreme Court, for British Gas. This is the first investment treaty case the Supreme Court has decided, and they found in favor of enforcement of the award.

Audience: In the ICSID arbitration, is there a different dynamic, as opposed to commercial arbitration?

Joongi Kim: Yes. Through standard investment arbitration, the parties will usually choose their wings and they will agree upon the chair. The difficulty is where they do not agree upon the chair. There are various procedures where the institutions will try to help them, but if that does not work, then ultimately, if it is for ICSID to decide, they will appoint the chair.

Beomsu Kim: One thing to add is that those must be third party nationals.

Joongi Kim: In the case of ICSID, unless the parties agree otherwise.

Lucy Reed: There is a strict rule that the chair cannot be a national of any of the parties, and ICSID has certain lists from which it has to pick arbitrators. The Permanent Court of Arbitration makes a lot of appointments as well in non-ICSID cases. Do we think about different things in appointing arbitrators in treaty rather than commercial arbitrations? Yes, we think about very different things including familiarity with treaty law, public international law, and expertise with accounting and discounted cash flow quantum.

Audience: It seems to be about only twenty people are historically appointed.

Lucy Reed: Well, each State gets to name four to its list, but they often name people without expertise whom ICSID cannot call upon, so there is a smaller list of tried and true public international arbitrators. Too small actually for the ongoing good health of the system.

Audience: Most of awards that I have seen are about 150 pages. They seem to be getting longer and longer. Do you have thoughts or comments about that aspect? To me it seems almost ridiculously long.

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Lucy Reed: They are longer, in part, because they are going to be public. Unlike an average commercial award where the parties know the facts, they know the background, and all they need to know is “you win or you do not win” with basic reasons. . Here, I think tribunals are aware that their awards are going to be published and the people reading them will have no idea of what the facts were and what each side argued, yet the awards will be cited by parties in future arbitrations in discussions of applicable law and interpretation of common treaty provisions, and they are going to be used by future tribunals for better or worse. There are issue conflicts.

By the way, issue conflict is another reason you see repeat ICSID arbitrators. At Freshfields, we have a rule that none of our lawyers can sit as treaty arbitrators because of issue conflict—if you decide what an umbrella clause means, or unfair and inequitable treatment means in an award with your name on it, it can be hard to argue for your client a different way. So now there is a natural evolution to where individuals are either going to be treaty arbitrators and FTA arbitrators, or they are going to be counsel, and not both, so that is narrowing the field.

Joongi Kim: Some of the submissions are a thousand pages long anyways.

Beomsu Kim: One thing is that there is an undermining proceeding about the awards that one of the reason is to make the words well-reasoned and well-drafted.

Lucy Reed: Let me go back to my five questions from 2007, and get some help in answering some of them. The first one is “will there be cases”? The answer is yes, there are cases. We know of maybe four. Two definite cases against the Republic of Korea, and we hear of two more, and maybe more. How many cases have there been by Korean investors against other States?

Joongi Kim: From what I know, three cases. That is what I know. And more in the pipeline apparently.

Kevin Kim: Three cases, we are representing claimants.

Lucy Reed: So you have all three?

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Joongi Kim: If they have three, then there are four, I think.

E.Y. Park: If you count those cases there are cases that are officially filed, there are two or three. But there are a bunch of cases that have not gone as far to be filed officially, but they are in negotiation with a foreign sovereign or in serious discussion just before the filing and so forth. And that, I think, is a great area for development. It is interesting how it goes to the next level before being filed. I know there are many big corporations that are hesitant to file because of various reasons. One reason is that some foreign sovereigns might take it personally, then they may have difficulties.

Lucy Reed: That is absolutely one of the factors that our clients weigh. You have to think long and hard before you sue certain governments. And a lot of trigger letters are written and sent to say “; we have a dispute starting a three or six month cooling off period”, with perhaps no intention of ever really pursuing the case.

The second question is “how will the ROK government defend the cases”? We see they are defending the cases quite seriously and professionally and aggressively.

The third is “how will ROK investors prosecute the cases”? I am sure they are also aggressive, serious, and professional. The fourth is “are they using international or local expertise, or both”? As you heard, in the Lone Star case there are Korean firms—Shin & Kim and Bae Kim & Lee for either side, and international firms Arnold Porter and Sidley Austin. These are great teams, and we know there is a mix of international and local counsel in other cases. For ROK investors, I personally would be happy to see only Korean law firms involved in the prosecution. They are very experienced at this point with the law, and well able to do it. But there will always be a factor of who is on the tribunal, in thinking whether one of the international firms needs to come in or not.

My last question was “will the focus be more on international treaty law or local law”? In the cases against the Republic of Korea, I guess there is more focus on international and treaty law, which is always the default governing law, but there will definitely be lots of Korean law. You saw the

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list that we were talking about—taxation issues, labor issues, governance issues—so there is always going to be some Korean law.

The question I would add going forward is “are there Korean nationals to be named as arbitrators in investment cases”? I know one person, Professor Hi-Taek Shin, has been. So, it is not the hermit kingdom anymore in this area—a very interesting area of development.

Thank you all for your attention. I have saved my thanks for all for the end. As you have heard, our Korean colleagues here are very busy people, and many of them are getting ready for the Lone Star hearing in May—these hearings are real marathons of preparation and execution. Thanks as well to others, including judges and practitioners coming this afternoon. For many of us, coming here shows the great respect and loyalty that we feel for Professor Coe and Professor Stipanowich and Pepperdine for sharing their ideas and their community with us over the years. And for me, this goes to Jack Coe in particular, whom I met at the Iran-US Claims Tribunal, where I was the U.S. Agent and Jack worked for a U.S. judge. That Tribunal, led by the United States and Iran, saw fit to publish all of its major awards on expropriation and international contract breach, which are now being used by so many young practitioners in investment treaty arbitration. So we are always very happy to come to Pepperdine.

