# 2014 International Conference

# *Trade and Investment in the East Asian Perspective*

**Date : 19December 2014**

**Venue : Olive Room (19th Floor)**

**IBIS Hotel, Myeong-dong**

**Seoul, Korea**

**Hosts:**

**KoreanSociety of International Economic Law (KSIEL)**

**Korean Commercial Arbitration Board (KCAB)**

**INAL(Institute for Northeast Asian Law)of Chonbuk National University**

**Law Research Instituteof University of Seoul**

**Sponsor:**

**Ministry of Trade, Industry and Energy (MOTIE)**

| Friday, 19December | Moderator : KANG Jun-Ha (Hongik University) |
|---|---|
| 09:00– 09:30 | Registration |
| 09:30 –10:00 | Welcome AddressOlive Room (19th Floor)<br>KIM Dae-Won, President of Korean Society of International Economic Law |
| 10:00 – 11:30 | Session 1 (in Korean)<br>CHAIR:SEO Chul-Won (Soongsil University)<br>Presenters<br>1.LEE Seu-Yeun (Yonsei University): State Counterclaims Arising in Investor-State Arbitration<br>2. KIM Kyubin (Chungbuk National University): International Investment Standards and Environmental Protection: *Analysis of Environmental Provisions in Multilateral Agreement on Investment (MAI)*<br>Discussants<br>OH Hyun-Suk (Korean Commercial Arbitration Board)<br>WANG Sang-Han (Sogang University) |
| 11:30 – 14:00 | Lunch & Board Meeting |
| 14:00 –15:30 | Session 2 (in English)<br>CHAIR:CHOI Seung-Hwan (Kyunghee University)<br>Presenters<br>3. Kang Sung-Jin (Korea University): ISDS in the EU after Lisbon Treaty and Its Implications to Korea<br>4. QURESHI Asif Hasan (Korea University): Developments in the Public International Law of Taxation: *A Perspective on Trade and Investment Related Tax Issues*<br>Discussants<br>Hwang Joung-Wook (Hankuk University of Foreign Studies)<br>LEE Eunjai (Lee&Ko)<br>Junior Discussant<br>KO Min-Young (Korea University) |
| 15:30–16:00 | Coffee Break |
| 16:00 - 17:30 | Session 3 (in English)<br>CHAIR:CHUNG Chan-Mo (InhaUniversity)<br>Presenters<br>5. TSAI Chang-hsien (Robert) (National Tsing Hua University): The Institutional Development of Taiwanese Investment Policy towards Mainland China: *A Regulatory Competition Perspective*<br>6. LEE Se-Ryon (Chonbuk National University) & Kim Dae-Won (University of Seoul): Investor-State Arbitration in Korea-China FTA: *Old Wine in a New Bottle?*<br>Discussants<br>KIM Joon-Gi (Yonsei University)<br>KIM Dae-Jung (Dong-A University)<br>Junior Discussant<br>JIN Ming-Zi (Yonsei University) |
| 17:30-18:00 | General Meeting |
| 18:00 | Dinner |

# Session 1 (in Korean)

CHAIR:SEO Chul-Won (Soongsil University)

## Presenters

1. LEE Seu-Yeun (Yonsei University): State Counterclaims Arising in Investor-State Arbitration
2. KIM Kyubin (Chungbuk National University): International Investment Standards and Environmental Protection: Analysis of Environmental Provisions in Multilateral Agreement on Investment (MAI)

## Discussants

OH Hyun-Suk (Korean Commercial Arbitration Board)

WANG Sang-Han (Sogang University)

# Possibility of Counterclaims in Investment Treaty Arbitration

Seuyeun Lee*



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# I. The Argument for Host State Counterclaims in Investment Treaty Arbitration

Traditionally, arbitration grounded on the dispute resolution clauses in international investment agreements (hereinafter 'IIAs') was thought of as a "one-way street"; only claims made by the investor can be entertained before the arbitral tribunal.[1] Sovereign states conclude international investment agreements to, at the very least, provide protection to their investors who have established investments in the territory of the other contracting state by obligating the other contracting state to provide such protection. As a result, most of the substantial provisions of IIAs consist of obligations that the host state owe to the protection of foreign investors; finding the opposite is a rarity.[2] Also, IIAs provide for arbitration in their dispute resolution clauses as a recourse for investors in the case that the host state fails to provide for the protection stipulated in that IIA. Therefore, all IIA violation claims in investment treaty arbitration are claims of the investor of the host state violating an IIA obligation.

In today's complex world, however, the "one-way street" view is found to be too naive. Foreign investors and investments are subject to the domestic law of

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1) Laborde calls this the "Classic Paradigm" of investment treaty arbitration (Gustavo Laborde, "The Case for Host State Claims in investment treaty arbitration," *Journal of International Dispute Settlement* vol. 1 no. 1 (2010), p. 97).

2) Some IIAs include provisions on corporate social responsibility, like Article 810 of the Canada-Peru FTA (Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies [...].) and Article 12.2 of the 2008 Ghana Model BIT (Nationals and companies of one Contracting Party in the territory of the other Contracting Party shall to the extent possible, encourage human capital formation, local capacity building through close cooperation with the local community, create employment opportunities and facilitate training opportunities for employees, and the transfer of technology.) but such provisions usually encourage, not obligate, foreign investors to exercise corporate social responsibility.

the host state, and based on that law, forge a legal relationship with the host state. One can anticipate that in certain circumstances, the alleged IIA violation of the host state being triggered by a violation by the foreign investor of the host state's domestic law. This is even so when the foreign investor and the host state have a contractual relationship. If the foreign investor decides to resort to investment treaty arbitration in such a situation, according to the traditional view, the arbitral tribunal can only decide on whether the host state has breached its IIA obligations, and the host state has no choice but to bring its case before its national courts. The situation can be aggravated if the arbitral tribunal and the court each finds that the host state and the foreign investor have violated their respective laws. Such conflicting results can greatly reduce the reliability of the IIA dispute resolution system.

To solve this dilemma, a more progressive view is emerging, i.e. a view that supports host states in placing a counterclaim before the investment arbitral tribunal. Supporters of this view argue that whether a counterclaim can be placed before the arbitral tribunal is a matter of interpreting the consent to arbitration and therefore should be decided according to the dispute resolution clause of the relevant IIA.[3] As a rule, disputing parties can bring their dispute

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3) Such supporters include: Laborde, *supra* note 1, pp. 105-106; Pierre Lalive and Laura Halonen, "On the Availability of Counterclaims in Investment Treaty Arbitration," *Czech Yearbook of International Law* vol. 2 (2011), p. 146; Dafina Atanasova, Carlos Martínez Benoit and Josef Ostřanský, "Counterclaims in Investor-State Dispute Settlement (ISDS) under International Investment Agreements (IIAs)," *Trade and Investment Law Clinic Papers* (2012), p. 12; Mark Bravin and Alex Kaplan; "Arbitrating Closely Related Counterclaims at ICSID in the Wake of Spyridon Roussalis v. Romania" *Transnational Dispute Management* vol. 4 (2012), p. 6; Jean E. Kalicki, "Counterclaims by States in Investment Arbitration," *Investment Treaty News* vol. 3 no. 2 (January 2013), p. 4; Anne K. Hoffmann, "Counterclaims in Investment Arbitration," *ICSID Review* vol. 28 no. 2 (Fall 2013), p. 447; Andrea Marco Steingruber, "Antoine Goetz and others v Republic of Burundi: Consent and Arbitral Tribunal Competence to Hear Counterclaims in Treaty-based ICSID Arbitrations," *ICSID Review* vol. 28 no. 2 (Fall 2013), p. 293; Hege Kjos, *Applicable Law in Investor-State Arbitration*, Oxford University Press (2013), p. 128.

before an arbitral tribunal only when they agree to do so.[4] But the consent to arbitration for investment treaty arbitration differs from that of commercial arbitration.[5] Indeed, the consent to arbitration for the former is regarded to be embedded in the dispute resolution clause, as the State's invitation to arbitrate is accepted by the investor when the investor submits the notice of arbitration according to the procedure stipulated in the clause.[6] If the dispute resolution clause of the specific IIA defines the dispute that can be brought to arbitration broadly enough, counterclaims of the respondent state can fall under the jurisdiction of the arbitral tribunal.

Against this background, this paper will elaborate on the discussion on allowing counterclaims in investment treaty arbitration. The criteria for allowing counterclaims will be reviewed in two steps: jurisdiction and admissibility.

## II. Criteria for Determining Jurisdiction/Admissibility for Counterclaims in Investment Treaty Arbitration

As mentioned above, whether counterclaims by host states can be entertained by the arbitral tribunal, or in other words whether counterclaims are in the jurisdiction of the arbitral tribunal, is decided by the consent of arbitration of the disputing parties. Also, in investment treaty arbitration, the consent of arbitration is implied in the dispute resolution clause. Therefore, to see if the arbitral tribunal has jurisdiction over counterclaims, one has to look into the dispute resolution clause, especially the scope of dispute. If the arbitral tribunal decides that it has jurisdiction over counterclaims, then the arbitral tribunal has

4) Jeswald Salacuse, *The Law of Investment Treaties*, Oxford University Press (2010), p. 369; 박덕영・이서연, "국제투자중재의 관할권," in 『국제투자법』, 박영사 (2010), pp. 436-437.
5) Hoffmann, *supra* note 3, p. 446.
6) Ibid.

to find whether it can judge that particular counterclaim, or in other words, whether that particular counterclaim is admissible. Admissibility is determined by the connexity between the claim of the investor (or primary claim) and the counterclaim.[7)]

## 1. Deciding Jurisdiction : The Implied Consent to Arbitration

### (1) The ISDS Clause of the IIA

How the different wording of the dispute resolution clause can affect the tribunal's jurisdiction over counterclaims can be seen by comparing two cases: *Spyridon Roussalis v Romania*[8)] and *Antoine Goetz and others v Burundi*.[9)] The tribunal of *Spyridon Roussalis v Romania* declined jurisdiction over counterclaims,[10)] whereas the tribunal of *Antoine Goetz and others v Burundi* did not.[11)]

In *Spyridon Roussalis v Romania*, the dispute resolution clause of the relevant IIA, Article 9.1 of the Romania-Greece BIT, goes as follows:

> *Disputes* between an investor of a Contracting Party and the other Contracting Party *concerning an obligation of the latter under this Agreement*, in relation to an investment of the former, shall, if possible, be settled by the disputing parties in an amicable way. [emphasis added]

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7) Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*, 2nd ed, Cambridge University Press (2009), p. 751; Kjos, *supra* note 3, p. 147.

8) *Spyridon Roussalis v Romania,* ICSID Case No ARB/06/1, Award (7 December 2011).

9) *Antoine Goetz and others v Republic of Burundi,* ICSID Case No ARB/01/2, Award (21 June 2012).

10) *supra* note 8, para. 864.

11) *supra* note 9, para. 276.

According to Article 9.1 of the Romania-Greece BIT, the investment treaty disputes that can be brought to the attention of Article 8.1 are those that "concern[] an obligation of the [host state] under this Agreement" The majority of the *Roussalis* tribunal stated that such wording limits the scope of dispute to only treaty violations by the host state,[12] and left no room for interpretation to allow counterclaims of the respondent state be submitted to the tribunal when the counterclaims are in essence obligations of the investor.[13]

In *Antoine Goetz and others v Burundi*, the dispute resolution clause of the relevant IIA, Article 8.1 of the Belgium-Luxemburg-Burundi BIT, goes as follows:

> For the purposes of this article, a dispute relating to an investment is defined as a dispute concerning:
> (a) The interpretation or application of a specific investment agreement between a Contracting Party and an investor of the other Contracting Party;
> (b) The interpretation or application of any investment authorization granted by the authorities of the State where the investment is made in respect of foreign investments;
> (c) The alleged violation of any right conferred or established by this convention with regard to investments.[14]

Whereas Article 9.1 of the Romania-Greece BIT limits the scope of dispute to only treaty violations, the scope of dispute in Article 8.1 of the Belgium-Luxemburg-Burundi BIT encompasses disputes on contract, investment authorization and treaty obligations.[15] The *Goetz* tribunal stated that the Burundi's counterclaim of the claimant failing to honor the terms of a free-zone certificate was related to Article 8.1(b), and therefore fell into the category of disputes to

12) *supra* note 8, para. 869.
13) Ibid.
14) The translation of the French text of the Belgium-Luxemburg-Burundi BIT into English is borrowed from Hoffmann, *supra* note 3, p. 449.
15) *supra* note 9, para. 276.

which it had jurisdiction.[16)]

Some IIAs, like the NAFTA and the almost concluded EU-Canada Comprehensive Trade and Economic Agreement (hereinafter the "EU-Canada CETA"),[17)] mention counterclaims in its text. Under the heading of "Indemnification or Other Compensation," Article X.37 of the EU-Canada CETA stipulates that the respondent state cannot assert a counterclaim that the investor has received compensation from insurance and the such as a method to reduce the amount of compensation it allows to the investor. By the logic of *argumentum a contrario*, this means that counterclaims other than the one described in Article X.37 are allowed to be submitted before the arbitral tribunal.[18)]

From the above, we can deduct that determining whether counterclaims are available under a particular IIA is a process of carefully interpreting the dispute resolution clause of that IIA. This is mostly because only a very rare number of IIAs explicitly allow counterclaims of the respondent state.[19)]

(2) The Arbitration Rules of the Selected Arbitration Forum

In 2013, over half of the investors who resorted to arbitration under an IIA's dispute resolution clause brought its dispute to the International Center for the Settlement of Investment Disputes (hereinafter "ICSID") and therefore was

16) Ibid.

17) The negotiations for the EU-Canada CETA had finished in August 2014 and both Canada and the EU published the final negotiation text on 27 September 2014 on their respective websites for public reference. For the complete text, please refer to <http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf, last visited 15 December 2014>.

18) Bjorklund remarks the same on the similar Article 1137.3 of NAFTA, see Andrea K. Bjorklund, "The Role of Counterclaims in Rebalancing Investment Law," *Lewis and Clark Law Review* vol. 17 no. 2 (2013), pp. 468-469; Kjos is of a more dubious opinion, see Kjos, *supra* note 3, p. 146.

19) Ibid., p. 467.

subject to the ICSID Arbitration Rules, and another 35% selected the United Nations Commission on International Trade Law (hereinafter "UNCITRAL") Arbitration Rules as the governing procedural rules of their arbitral case.[20] Such procedural rules do not create the consent to arbitration *per se*, but can help decipher the consent to arbitration when determining if the jurisdiction of the arbitral tribunal extends to the respondent state's right to counterclaim or not.

In the case of ICSID arbitration, the relevant provisions to the host state's counterclaim are Articles 25 and 46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules. Article 46 of the ICSID Convention, which stipulates that the ICSID tribunal can determine counterclaims albeit under certain conditions, and Rule 40 of the ICSID Arbitration Rules, which provides for the procedure of submitting counterclaims, are especially relevant because these provisions explicitly show that the ICSID arbitration system acknowledges counterclaims by the respondent state. Article 46 of the ICSID Convention provides that:

> Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counterclaims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

In *Antoine Goetz and others v Burundi*, the arbitral tribunal of that case stated that by consenting to ICSID arbitration, the disputing parties automatically consented to the tribunal's jurisdiction over counterclaims.[21] This is because consenting to ICSID arbitration means that the disputing parties are consenting to the application of the ICSID Convention and Arbitration Rules, including Article

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20) The relevant statistical information can be found in UNCTAD, "Recent Developments in Investor-State Dispute Settlement (ISDS)," *IIA Issues Note* no. 1 (April 2014), p. 4.

21) *supra* note 9, para. 278.

46 of the ICSID Convention and Rule 40 of the ICSID Arbitration Rules.[22] If the disputing parties wish to exclude the tribunal's jurisdiction, they can always agree to do so.

In regard of the jurisdictional requirement that the counterclaim be within the scope of consent of the parties and be within the jurisdiction of ICSID, this should be understood to mean the scope of dispute contained in the dispute resolution clause should be broad enough,[23] and the counterclaim arise directly out of an investment.[24] On the latter requirement, the tribunal of *Amco v. Indonesia* found that a counterclaim accusing the claimant of tax fraud does not arise directly out of an investment.[25]

Moving on to the UNCITRAL Arbitration Rules, Article 21.3 of the 2010 UNCITRAL Arbitration Rules provides as follows:

> In its statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counterclaim or rely on a claim for the purpose of a set-off provided that the arbitral tribunal has jurisdiction over it.

As with the ICSID Arbitration Rules, the 2010 UNCITRAL Arbitration Rules also requires as a jurisdictional condition for the arbitral tribunal to have jurisdiction in regard of the applicable law over the counterclaim.[26]

## 2. Deciding Admissibility : Link Connecting the Counterclaim and Primary

22) The tribunal of *Hamester v Ghan*a also acknowledged Article 46 of the ICSID Convention as a basis for jurisdiction over counterclaims. *Gustav F W Hamester GmbH & Co KG v Ghana*, ICSID Case No ARB/07/24, Award, (10 June 2010), para. 353.

23) Schreuer *et al*, *supra* note 7, p. 756.

24) Ibid., p. 755.

25) *Amco Asia Corporation et al v Republic of Indonesia*, ICSID Case No. ARB81/1, (resubmitted case), Decision on Jurisdiction (10 May 1988), para. E(2).

26) David D. Caron and Lee M. Caplan, *The UNCITRAL Arbitration Rules: A Commentary*, Oxford University Press (2013), p. 426.

## Claim

When the arbitral tribunal is found to have jurisdiction over counterclaims in general, the next step is to determine whether the arbitral tribunal is able to entertain that particular counterclaim the respondent state is submitting. This issue of admissibility is decided by judging whether the relationship between the primary claim and counterclaim is close enough, as was seen in *Saluka v. Czech Republic*[27] and *Paushok v Mongolia*.[28] This close connection between the primary claim and counterclaim is needed to prevent unnecessary repetition of procedure and conflicting judgements, and fulfills an "equitable and practical filtering function."[29]

### (1) Close Relationship between the Counterclaim and Investment

The close relationship between the primary claim and the counterclaim is in essence the closeness of the relationship between the dispute's particular investment and the counterclaim.[30] In Article 46, the ICSID Convention requires the counterclaim to "aris[e] directly out of the subject-matter of the dispute." In Article 19.3 of the 1976 UNCITRAL Arbitration Rules, the respondent's counterclaim needs to "aris[e] out of the same contract." The requirement of the 1976 UNCITRAL Rules were so worded because the Rules were originally meant as procedural rules for commercial arbitration.[31] In *Saluka v Czech Republic,* the tribunal acknowledges that the scope of dispute in the dispute

27) Ibid., para. 61.
28) *Paushok and others v The Government of Mongolia*, ad hoc Tribunal (UNCITRAL), Award on Jurisdiction and Liability (28 April 2011), para. 693.
29) Kjos, *supra* note 3, p. 147.
30) Schreuer *et al*, *supra* note 7, p. 751.
31) Caron and Caplan, *supra* note 26, p. 427.

resolution clause of the relevant IIA includes "all disputes,"[32] but eventually adopts a line of reasoning that falls in line with Article 19.3 "same contract" requirement.[33]

(2) Nature of the Counterclaim : Contractual Claims v. Non-Contractual Claims

If the primary claim of the investor is related to a contract, and the counterclaim of the respondent state is based on that same contract, then the close connection between the primary claim and the counterclaim can be easily found. In *Goetz v Burundi*,[34] one of the claimants, the SA African Bank of Commerce (hereinafter "ABC") argued that Burundi had unlawfully suspended its free-zone certificate because of alleged breaches to the terms of the certificate, and that the bank consequently had to be closed because of that suspension. To this, Burundi submitted to the arbitral tribunal to find that Burundi suffered injury because of ABC's breaches. After reviewing the facts, *Goetz* tribunal found that Burundi's counterclaim had a direct relationship with ABC's claim and found the counterclaim admissible.[35]

But in cases where the respondent's counterclaim is based on the investor's beach of domestic law, some arbitral tribunals show a tendency of refraining from rendering the counterclaim as admissible. In Saluka v Czech Republic, the tribunal dismisses non-contractual counterclaims on the grounds that the counterclaims do not constitute an "indivisible whole" with the primary claim.[36]

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32) *Saluka Investments B V v Czech Republic,* ad hoc Tribunal (UNCITRAL), Decision on Jurisdiction over the Czech Republic's Counterclaim (7 May 2004), para. 76.
33) Ibid., para. 82.
34) *Antoine Goetz and others v Republic of Burundi*, ICSID Case No. ARB/01/2, Award (21 June 2012).
35) Ibid., para. 285. However the counterclaim was dismissed on the merits (Ibid., para. 286).
36) *supra* note 32, para. 79.

Also, in *Paushok v Mongolia,* Mongolia submitted a total of seven counterclaims to the tribunal.[37] These counterclaims concerned the claimant's alleged breach of Mongolian tax and environmental law and tort. In regard of the admissibility of these counterclaims, the *Paushok* tribunal stated the following:

> All these issues squarely fall within the scope of the exclusive jurisdiction of Mongolian courts, are matters governed by Mongolian public law, and cannot be considered as constituting an indivisible part of the Claimants' claims based on the BIT and international law or as creating a reasonable nexus between the Claimants' claims and the Counterclaims justifying their joint consideration by an arbitral tribunal exclusively vested with jurisdiction under the BIT.[38]

The logic behind the Paushok tribunal's rejection of non-contractual counterclaims is that if the tribunal deem such claims as admissible, that would bring around the result of the respondent state extending its enforcement jurisdiction beyond its borders.[39]

Commentators argue that the *Saluka* tribunal and other subsequent tribunals in its wake apply too strict an approach in regard of the close connection requirement.[40] Also, in the recent *Occidental v Ecuador*, by reviewing on the merits various counterclaims Ecuador had submitted, including those based on tort,[41] the tribunal adopted a very flexible approach in regard of the close connection requirement.

In the author's point of view, this issue should be dealt with along the lines of applicable law. In investment treaty arbitration, the default rules applicable to the

37) *supra* note 28, para. 678.
38) Ibid., para. 694.
39) Ibid., para. 695.
40) Lalive and Halonen, *supra* note 3, p. 154; Hoffmann, *supra* note 3, p. 452; Kjos, *supra* note 3, p. 152.
41) *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Ecuador*, ICSID Case No ARB/06/11, Award (24 September 2012), paras. 856-868.

case at hand are the IIA on which the case was initiated, the arbitration rules of the selected arbitration forum, and general international law. To determine a counterclaim that is based on the national law of the respondent state, the tribunal will have to apply national law, which is not the applicable law of the tribunal without explicit reference in the IIA or an agreement between the disputing parties. Hence the counterclaim that the tribunal would find admissible would be a claim based on the applicable law of the case.

## III. Concluding Remarks

The necessity of counterclaims by the respondent state are based on the foundation of judicial economy and consistency of judicial decisions. But nowadays, some regard counterclaims as a tool that can expand the state's right to regulate in international investment law. Since counterclaims represent the state's right/investor's obligation relationship, in some aspects it can help bolster the state's right to regulate.

Counterclaims should not be considered as panacea, however. When the governing law of the primary claim and counterclaim differ, the tribunal should take a more cautious approach when deciding whether the counterclaim is admissible.

국제경제법 학술대회

# 국제투자규범과 환경보호

## -다자간투자협정(MAI)의 환경규정 분석-

2014. 12. 19

충북대학교
김규빈

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- 다자간투자협정을 위한 계획
- 다자간투자협정의 기본방침
- MAI 협상과정과 결렬
- MAI 체결에 대한 비판 · 요구

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Chapter 1 OECD의 다자간투자협정

## 1. 다자간투자협정을 위한 계획

### ❖ 국제투자레짐과 구속력 있는 국제투자규범의 정립

- 국제법상 국제투자레짐의 부존재
- 국제투자레짐을 통한 투자자유화 및 높은 수준의 투자규범확립 (OECD + OECD 비회원국 포섭)
  * 외국인 투자자의 국제시장에 대한 자유로운 접근 보장
  * 자유화조치 · 규제철폐조치를 통한 국가규제로부터 투자자 보호 및 투자보호 (투자 전(실행단계) · 후 단계)

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Chapter 1 OECD의 다자간투자협정

## 2. 다자간투자협정의 기본방침

❖ 외국인투자 · 투자자에 대한 강력한 보호장치 마련

❖ 기존 OECD 투자규범에 대한 법적 구속력 부여

- 자본이동자유화규약 · 경상무역외자유화규약, 내국민대우원칙, 최혜국대우원칙, 간접투자

❖ 효율적인 분쟁해결절차 구축

- 국가간 분쟁해결절차 및 투자자-국가간 분쟁해결절차

❖ MAI 협상의 場으로서의 OECD, WTO 모델로서의 MAI

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Chapter 1 OECD의 다자간투자협정

## 3. MAI 협상과정과 결렬

❖ 협상그룹(Negotiating Group) 구성

- OECD 각료이사회(1991) : 지본이동 및 경상무역외거래위원회(CMIT)와 국제투자 및 다국적기업위원회(CIME)에 MAI 준비작업 위임
  * 2004. CIME와 CMIT가 투자위원회로 합병
- OECD 이사회(1995) : 1997. 5. MAI 출범을 위한 협상그룹 구성 및 협상개시

❖ 협정(안) 마련

- 협정(안) 마련(1997. 1.)
- 1997. 2. 부터 협정(안)과 당사국별 유보사항 및 예외규정 협상
- NGO, EU 등 의견대립으로 1997. 5. 협상시한을 1998. 4. 27.-28. OECD 연례각료회의 때까지로 연장함

❖ 협상결렬

- 1998. 2. 환경 및 노동사안, 지역경제통합기구(REIOs)조항에 관한 타협안 협상실패
- MAI 체결에 대한 전세계적인 반대운동과 프랑스의 불참선언으로 협상 결렬
- 1998. 10.20. 기간연장 없이 협상중단

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Chapter 1
OECD의
다자간투자협정

## 4. MAI 체결에 대한 비판·요구

❖ **포괄적인 MAI 협정(안)**

- 외국인투자 특히, 기술적 Know-how의 이전, 포트폴리오(portfolio) 투자의 보장
  * 포트폴리오투자 또는 포트폴리오자본의 국내외 이동을 규제하고자 하는 정부의 입법권한을 제한

❖ **NGO의 영향**

- MAI의 잠재적인 사회적 · 환경적 영향 조사요구
- 환경, 노동, 보건, 안전 및 인권분야에서의 투자자의 의무 강화
- 정부 · 시민의 권리가 없는 국가에 대한 투자자소송의 분쟁해결절차 반대
- 간접수용규정 반대

❖ **개발도상국의 협상지위**

- MAI 의 친기업적 성향으로 개발도상국의 협상지위 약화
- 개발도상국의 발전목표 및 정책에 대한 고려 미흡
- TRIMs의 구조적 문제와 연계

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## 2 MAI 협정(안)의 환경규정

- MAI의 목적
- MAI 협정(안)의 환경관련규정

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Chapter 2
MAI 협정(안)의 환경규정

# 1. MAI의 목적

❖ MAI의 기본원칙 하에 외국인투자를 위한 국제법상 구속력있는 기본규범 정립
- 기본원칙 : 점진적 자유화(roll back), 현상동결(standstill), 내국민대우, 비차별원칙, 최혜국대우원칙

❖ 투자조치의 자유화와 규제철폐를 통한 외국인투자자의 자유로운 시장접근 보장

❖ 다국적 기업과 국가간의 상호신뢰 강화

❖ 자유화 의무 이행을 위한 수준 높은 투자보호규정 및 분쟁해결절차규정 마련

❖ OECD 비회원국에게 가입을 개방하는 독립조약(free standing treaty) 허용

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Chapter 2
MAI 협정(안)의 환경규정

# 2. MAI 협정(안)의 환경관련규정

❖ 환경규정의 3대 기둥 : 서문, 본문, OECD 다국적기업가인드라인

❖ 서문(Preamble)

- 법적 근거

* 해석기준이 되는 협약의 일부분으로서 일반해석규정으로 인정

** IGH Morocco-Fall(1952)

* 「조약법에 관한 비엔나협약」 제31조 제2항 : 협약당사국의 공동의지에 중점을 둠

* MAI에서의 서문의 정치적(협약의 구성부분) · 법적 중요성(해석의 기준) 인정

- 환경에 관한 목표제시적 논의

* 환경규범에 대한 협약당사국의 기본적 의무 제시

a) '국제환경법에 부합되게'

b) '환경보호와 보전 및 사전예방원칙 · 오염원인자부담의 원칙을 포함하여'

* OECD 다국적기업가이드라인의 적용규정

** 환경보호를 위한 권고

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Chapter 2
MAI 협정(안)의 환경규정

# 2. MAI 협정(안)의 환경관련규정

## ❖ 투자(Investment)의 개념

- 자산접근방식
  * 투자자가 직접적 또는 간접적으로 소유하거나 통제하는 모든 종류의 자산
- 투자의 종류
  a) 기업(enterprise)
  * 협약당사국의 법률에 의해 조직·구성된 법인, 영리기업, 비영리기업, 민영기업·국영기업, 주식회사, 신탁회사, 합명회사, 개인회사, 합작회사, 지점(branch), 협회 및 조직을 포함
  b) 주식, 증권 또는 기타 기업에 대한 지분참여 및 이로 인해 보유한 권리
  c) 각종 채권(bonds and debentures), 대출, 기업의 기타 부채 및 이로 인해 보유한 권리
  d) 완성품인도(turnkey)·건설·경영·생산·이윤배분계약을 포함하는 계약상의 각종 권리
  e) 예금·파생상품 등 금전청구권과 성과(performance)에 대한 청구권
  f) 지적재산권 및 특허·면허·인허가 등 법률 또는 계약에 의해 부여된 권리
  g) 유·무형 및 동산·부동산, 리스·저당·담보·보증 등의 재산권
- 간접투자, 지적재산권, 특허(concessions), 공공부채(public debt), 부동산의 경우 확정되지 않음

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Chapter 2
MAI 협정(안)의 환경규정

# 2. MAI 협정(안)의 환경관련규정

## ❖ 내국민대우(National Treatment), 최혜국대우(MFN)

- 내국민대우
  《협약당사국은 투자의 설립, 취득, 운영, 처분 등 모든 과정에 있어서 다른 당사국의 투자가 및 투자행위에 대하여 최소한 내국민과 동등한 대우를 하여야 함》
- 최혜국대우
  《협약당사국은 투자의 설립, 운영, 처분 등 모든 과정에 있어서 특정 당사국의 투자가 및 투자행위에 대하여 최소한 여타 체약국의 경우와 동등한 대우를 하여야 함》
- 주요 쟁점
  * 모든 투자단계에 적용: 투자허가단계의 문제
  * 사실상(de facto), 법률상(de jure) 차별금지
  * 최혜국대우 : 상호호혜주의에 근거를 두지 않음
  * 최혜국대우에서 발생된 '무임승차' (free rider) 문제 고려
  * 3대 원칙에 대한 예외, 유보조항 : 협약당사국의 의무와 조정 인정

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# 2. MAI 협정(안)의 환경관련규정

## ❖ 예외규정

- 일반적 예외

《협약당사국은 동 협정에도 불구하고 국가안보상의 목적, UN헌장에 의한 국제평화 · 안전의 유지 및 공공질서의 유지를 위해 필요한 조치를 취할 수 있으며 안보상 이익에 반하는 정보에 대해서는 공개하지 않을 수 있음》

a) 전제요건 : 공공보건, 조리, 공공질서, 국가안보

b) 유보조항 포함

c) NAFTA 제1114조 제1항, GATS 제XIV조에 근거를 둠

- 국가별 예외

a) 개별조항의 적용에 대한 예외 인정

b) 연계조항 : 내국민대우, 최혜국대우, 조세규정

c) 현상동결 : 'bottom up', 'top down' 방식

d) 국가별 예외 목록작성에 대한 기준 제시

- 점진적 자유화(roll back) 적용





# 2. MAI 협정(안)의 환경관련규정

## ❖ 환경기준을 낮추지 말 것(not lowering standards)

- 국가환경조치에 적용
- 국제환경규범을 포함할 지 여부는 설명하지 않음
- '조치'(measures)와 '기준'(standards)을 고려

a) NAFTA 제201조 제1항의 'measures'를 인용

*조치 : 모든 종류의 법, 규제, 절차, 요건 및 관행

b) TBT 협정 부록서의 'standards'를 인용

* 기(표)준 : 일정한 범위 내에서 최적 수준의 목표를 달성하고 공통적이고 반복적인 사용을 위하여 일련의 규칙, 지침, 특성을 제공(비강제적 특성)

- 건강, 안전 및 환경조치의 완화를 부추기는 투자는 '부적절'(inappropriate) 함
- 내국민대우, 비차별원칙이 적용됨
- 투자유치 조건이 환경조치의 완화인 경우 '협의절차'(consultations) 마련

# 2. MAI 협정(안)의 환경관련규정

## ❖ 의무이행요건의 부과금지

- 의무이행요건
  * 외국인투자자의 투자의 설립, 인수, 확장, 관리, 실행, 운영, 판매, 처분 등에 관하여 일정한 의무를 부과
- 외국인과 내국인간의 존재할 수 있는 모든 경쟁제한적 조치 금지
  a) 외국인 투자자와 국내투자자에게 동등한 경쟁조건 마련
  b) 자국 기업, 금융기관을 보호하기 위한 생산품의 일정비율수출의무, 국산품 사용의무, 기술이전의무, 내국인 고용의무 등
- 종류
  * 일반금지(general prohibition), '이익과 연관된 경우 허용' (permissible when, linked to an advantage) '예외' (exceptions)
- 투자조치와 관련된 경우(재화 · 용역) 해당
  * NAFTA 제1106조, GATS, TRIMs 고려
- 환경보호의무규정에 대한 예외인정
  * GATT 제XX조 고려



Chapter 2 MAI 협정(안)의 환경규정

# 2. MAI 협정(안)의 환경관련규정

## ❖ 투명성조항

- MAI에 영향을 미치는 법률, 규제, 절차, 행정적 결정, 일반적 효력 등을 갖는 사법적 판결, 국제협정 등을 일반이 충분히 인지할 수 있도록 출판하거나 공지함

## ❖ 투자보호

- 투자자 · 투자에 대한 내국민대우, 최혜국대우를 구속적 의무로 규정
  * 설립 후 단계, 투자준비단계에도 적용
- 강력한 분쟁해결절차 규정
  * 협약의 실효성 보장
- 행정지도, 시장관행에 의한 유 · 무형의 차별에 대한 철폐
- 정보이전 및 정보처리
- 대위변제(Subrogation)
- 외국인 투자자산의 국유화, 전쟁 등으로 발생한 피해에 대한 적절한 보상
  * 내국민과 동등한 대우 보장

Chapter 2
MAI 협정(안)의 환경규정

## 2. MAI 협정(안)의 환경관련규정

### ❖ 분쟁해결절차

- MAI 협정문상의 의무 · 규정을 위반한 경우 당사국, 투자가가 직접 해당 당사국을 상대로 원상복귀, 협정이행, 손해배상요구
- 국가간 분쟁해결절차(State - State Procedures)

a) 일반규정(General Provisions) : 당사국이 다른 규정 또는 절차를 따르기로 합의하지 않는 한 체약국간 분쟁 및 갈등은 규정에서 정하는 협의, 화해, 중재 및 조정절차에 따라 처리

b) 60일간의 협의 → 협의실패 시 다자간 협의 → 60일 이내 심의 종료

c) 구속력 있는 결정을 위해 중재판정부에 중재요청 → 권고안 제시 → 최종 결정

- 투자자-국가간 분쟁해결절차(Investor- State Procedures)

a) 가능한 한 협상 또는 협의에 의해 해결

b) 불가피한 경우 협정위반국의 법원 또는 행정심판소에 직접 제소하거나 국가간 분쟁해결절차 준용

c) 금융분쟁에 대해서는 금융전문가로 구성된 별도의 패널 구성

* 건전성규칙에 대해서는 투자가 개인 또는 법인이 직접 국가를 상대로 분쟁을 제기할 수 없도록 규정

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## 3 다국적기업가이드라인의 환경규정

- MAI 협정(안)과의 관계
- 가이드라인의 환경규정

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Chapter 3 다국적기업가이드라인의 환경규정

# 1. MAI 협정(안)과의 관계

❖ MAI 협정(안) 국제협약과의 관계에 관한 장에 규정

❖ 가이드라인의 완성을 위한 협약당사국의 노력을 촉구

- 가이드라인의 적용, 해석, 개정 등 MAI 협약당사국과 OECD회원국간의 상호 협력

❖ 국가별 연락사무소 설치의무 규정

❖ 가이드라인의 부속서 규정

- 분쟁해결절차의 목적에 저촉되지 않아야 함
- 법적 구속력 부여

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Chapter 3 다국적기업가이드라인의 환경규정

# 2. 가이드라인의 환경규정

❖ 다국적기업가이드라인의 특성

- 정부간 협의에 의해 마련
- 기업을 대상으로 적용되는 규범
- 규범 이행과 관련된 질문 처리, 이견 해소를 통한 사후적 이행 보장

❖ 다국적기업의 환경보호의무

- 1991. 환경에 관한 章을 마련 : 환경보호에 대한 공공의 인식과 관심을 반영
- 목적설정
  a) '의제21' 의 '환경과 개발에 관한 리우선언' 에 포함된 원칙과 목표를 포괄적으로 반영
  b) 환경문제에 대한 정보 접근성,의사결정에 대중의 참여, '사법 접근성에 관한 협약' 고려
  c) 환경경영시스템에 관한 ISO 기준 등의 문서에 포함된 기준 반영
- 낮은 수준의 환경기준 제어
  * 공해천국가설(pollution heaven hypothesis)과 관련 규정(제2장 제5조)
  《인권, 환경, 보건, 안전, 노동, 조세, 금융 인센티브, 기타 현안과 관련된 법적, 제도적 기본 틀에서 고려되지 않은 면제를 추구하거나 수용하지 않음》

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Chapter 3 다국적기업가이드라인의 환경규정

# 2. 가이드라인의 환경규정

## 서문

기업은 진출국의 법규 및 행정관행의 기본 틀 안에서 관련된 국제협약, 원칙, 목표, 기준을 고려하여 환경, 공중보건 및 안전을 보호할 필요와 지속가능한 개발이라는 보다 넓은 목표에 기여할 수 있는 방식으로 전반적인 기업 활동을 수행할 필요를 마땅히 고려해야 함

## 환경경영

a) 기업 활동이 환경, 보건, 안전에 미치는 영향에 대한 적절하고 시의성 있는 정보를 수집하고 평가한다.
b) 측정 가능한 목적의 수립과, 적절한 경우, 이러한 목적들 간의 지속적인 연관성에 대한 정기적인 검토를 포함한 환경성과 및 자원 활용 개선 목표를 설정한다. 적절한 경우, 목표는 관련 국가 정책 및 환경에 대한 국제적 의지와 부합해야 한다.
c) 환경, 보건, 안전에 관한 목적 또는 목표의 진전 상황에 대하여 정기적으로 감시하고 검증한다.

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Chapter 3 다국적기업가이드라인의 환경규정

# 2. 가이드라인의 환경규정

## 비용, 기업비밀, 지적재산권 관련

a) 환경성과 개선에 대한 진전 상황 보고를 포함하여 환경, 보건, 안전에 미치는 잠재적 영향에 관한 적절하고, 측정 및 검증 가능하며, 시의성 있는 정보를 일반 및 근로자들에게 제공하여야 한다.
b) 기업의 환경, 보건, 안전에 관한 정책과 그 실행으로 인해 직접적인 영향을 받는 지역사회와 적절하고도 시의성 있는 대화 및 협의를 가져야 한다

## 환경영향평가

공정, 제품, 서비스의 전 수명주기에 걸쳐 결부된 예측 가능한 환경, 보건, 안전에 관계된 영향을 피하고, 피할 수 없다면 이를 완화하기 위해서 기업은 의사결정과정에서 이러한 영향을 평가하고 다루어야 한다. 이러한 활동들이 환경, 보건, 안전에 중대한 영향을 미칠 수 있고 관할 당국의 의사결정 대상이 되는 경우 적절한 환경영향 평가를 준비해야 한다

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Chapter 3 다국적기업가이드라인의 환경규정

## 2. 가이드라인의 환경규정

### 사전예방과 과학기술

환경이 심각하게 파괴될 위험이 있는 경우, 이 리스크에 대한 과학적, 기술적 이해에 부합하여 인간의 보건 및 안전을 고려하되, 이러한 위험을 예방 또는 최소화할 수 있는 비용효율적 조치의 실시를 지연시키기 위해 과학적 확실성이 불충분하다는 점을 이용하여서는 안 된다.

### 환경오염예방시스템 구축

사고 및 긴급사태를 포함하여 기업 활동으로 인해 야기될 수 있는 환경 및 보건에 대한 심각한 피해를 방지, 완화, 통제하기 위한 비상계획을 유지하고 관할 당국에의 즉각적인 보고체계를 유지해야 **한다**



Chapter 3 다국적기업가이드라인의 환경규정

## 2. 가이드라인의 환경규정

### 환경성과의 지속적 개선

a) 최고의 성과를 낸 부서의 환경 성과기준을 반영한 기술 및 운영절차를 전사적 차원에서 적용한다.
b) 환경에 부정적 영향을 미치지 않고, 의도된 용도로 사용 시 안전하고, 온실가스 배출을 감소시키고, 에너지 및 천연자원 소비효율이 높고, 재사용 및 재활용이 가능하며 안전하게 폐기될 수 있는 제품 및 서비스를 개발하고 공급해야 한다.
c) 제품에 대한 정확한 정보 (예: 온실가스 배출량, 생물다양성, 자원효율성, 및 기타 환경 문제) 제공을 통해서 당해 기업의 제품 및 서비스의 이용이 환경에 미치는 영향에 대한 소비자의 인식을 제고한다.
d) 배출량 감소, 효율적 자원이용 및 재활용, 독성물질 대체 또는 감축, 생물다양성에 관한 전략 수립 등을 통해, 기업의 환경성과를 장기적으로 개선할 수 있는 방법을 모색하고 평가해야 한다.

## 2. 가이드라인의 환경규정

### 환경안전관리 교육 · 훈련

위험물질 취급 및 환경사고의 예방을 포함한 보건 및 안전 문제에 대해서는 물론, 환경영향 평가절차, 홍보, 환경기술과 같은 보다 일반적인 환경경영분야에 대해 근로자들에게 충분한 교육과 훈련을 제공하여야 한다

### 환경에 대한 인식제고

환경에 대한 인식과 보호를 제고할 파트너십 또는 이니셔티브 등의 방법을 통해 환경적으로 의미 있고 경제적으로 효율적인 공공정책 개발에 기여하여야 한다



## 4 검토 및 결론

- 환경규정에 대한 검토
- 결론

Chapter 4 검토 및 결론

# 1. 환경규정에 대한 검토

## 서문

a. 정치적(협약의 구성부분) · 법적 중요성(해석의 기준) 인정
b. 환경규범에 대한 협약당사국의 기본적 의무 제시
c. 규정간 충돌 시 MAI의 의무에 우선하는 규정 또는 목록 부재

## 본문

a. 투자개념 : 지적재산권에 대한 명확한 개념제시 필요
   * 생물다양성협약과 교토의정서의 배출권거래의 탄소시장 등 고려)
b. 내국민대우, 최혜국대우, 비차별원칙 : 투자 전 · 후 단계 보장
   * 다자간환경협약, TRIMs : 개발도상국에 대한 특별하고 차별적 대우 허용
   * 비차별원칙 적용 : 오염원인자부담의 원칙, 높은 수준의 환경기준 적용, 의무이행부과금지의 예외
   * 다자간환경협약의 '상호합의조건' (mutually agreed terms' 제도의 도입 제고 필요

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Chapter 4 검토 및 결론

# 1. 환경규정에 대한 검토

## 본문

c. 투명성 규정 : 투자를 위한 법령, 행정규칙, 조치 등을 공공에게 알림
   * 환경정책 · 관행의 투명성 을 높임
   * 다자간환경협약의 경우 모든 의사결정과정에 적용됨
d. 환경기준의 수준을 낮추지 말 것 : 정부의 입법권한과 분쟁해결제도와의 명확한 관계정립이 이루어지지 않음
e. 의무이행부과금지 : WTO TRIMs, NAFTA 제1106조에 근거를 둠
   * GATT 제XX조의 적용여부에 대한 합의가 이루어지지 않음
   * 기술이전, 특허법적으로 보호된 권리의 양도문제
f. 투자보호 : 일반적인 동등대우, 수용 및 보상
   * 수용의 정당성: 공공보건, 안전, 조리, 공공복리의 필요성으로 인한 경우
g. 분쟁해결절차 : 국가간 분쟁해결절차, 투자자-국가간 분쟁해결절차
   * 투자 전 · 후 단계 구별 없이 적용

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Chapter 4
검토 및 결론

# 1. 환경규정에 대한 검토

## 다국적기업가이드라인의 환경규정

a. '의제21' 의 '환경과 개발에 관한 리우선언' 에 포함된 원칙과 목표 반영
b. 환경문제에 대한 정보 접근성, 의사결정에 대중의 참여, 사법 접근성에 관한 협약 고려
c. 환경경영시스템에 관한 ISO 기준 등의 문서에 포함된 기준 반영
d. 환경에 관한 법령, 행정규칙 등 존중
e. 환경친화적 기술적용, 이전
f. 환경경영시스템 도입 : 사전예방원칙, 환경영향평가

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Chapter 4
검토 및 결론

# 2. 결론

## 국제투자규범과 환경보호의 상생

◈ WTO에서의 협상재개 실패
- 선진산업국가의 협력의지 미흡
- 기업우호적인 정책과 TRIMs 적용의 문제 : 개발도상국의 입지가 약화됨

◈ MAI 협정(안)의 목적과 적용대상의 문제
- 일정 부분 관련조항을 포함하여 환경규정을 정립하고자 NAFTA 규정 또는 WTO/GATT 규정의 도입을 시도했으나 충분한 논의와 합의가 이루어지지 못함
- MAI의 경우 전통적인 투자협정의 성격을 벗어나지 못함

◈ 국제투자레짐을 위한 환경규범에 관한 기본 틀 제시
- OECD 또는 UN에서 기존의 MAI협정(안)에 대한 재검토 및 합의과정 필요
- FTA, BIT 등 환경규범에 대한 global standard를 제시할 필요가 있음

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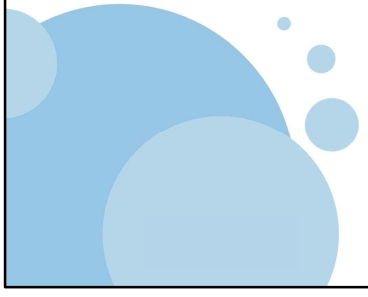
# 감사합니다!!



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# Session 2 (in English)

CHAIR:CHOI Seung-Hwan (Kyunghee University)

## Presenters

3. Kang Sung-Jin (Korea University): ISDS in the EU after Lisbon Treaty and Its Implications to Korea
4. QURESHI Asif Hasan (Korea University): Developments in the Public International Law of Taxation: A Perspective on Trade and Investment Related Tax Issues

## Discussants

Hwang Joung-Wook (Hankuk University of Foreign Studies)

LEE Eunjai (Lee&Ko)

Junior Discussant

KO Min-Young (Korea University)

# ISDS in the EU after Lisbon Treaty and Its Implications to Korea

Sungjin Kang

KSIEL – KCAB Joint International Seminar
December 19, 2014

2014-12-18

## About the Speaker



- Sungjin Kang
  - PhD Candidate, Korea University
  - LLB, Korea University / LLM, University of Michigan Law School
  - Member of New York Bar

# Outline of the Discussion

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- Introduction - Inclusion of Investment into Common Commercial Policy
- Transitional Measures by the EU
  - Review of the Existing BIAs
  - Role Distribution between MS and the EU in an ISD
- ISD in Recent Trade Agreements (TTIP, CETA)
- Conclusion - Need for "Investment" Chapter in Korea-EU FTA?



# Introduction

4

- Common Commercial Policy (CCP) of the EU
  - Exclusive Competence of the EU
  - Basis of the EU's trade negotiating power, TDI, etc.
  - Did not include "investment" until 2009
- Lisbon Treaty – inclusion of investment in the CCP
  - Articles 3 and 207
  - Lack of clear implementing rules

# Transitional Measures by the EU

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- Review of the Existing Bilateral Investment Agreements (BIAs)
  - There are about 1,400 BIAs between EU MS and 3rd countries
  - "Progressive" incorporation of FDI policy into CCP
  - Need for 1) negotiating principle of new BIAs; and 2) Rules on what to do with the existing BIAs



# Transitional Measures by the EU

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- Review of the Existing BIAs (Cont'd)
  - Existing BIAs continue to bind the MS until the new BIA is executed by the EU and the third country
  - MS must notify their BIAs concluded before Dec. 1, 2009 or the date of accession for review by the Commission
    - Commission review: Consistency of the BIA with the EU law
  - MS can negotiate/conclude BIAs between Dec. 1, 2009 and Dec. 20, 2013, subject to notification to the Commission
    - Commission approves them as long as the BIAs do not constitute "serious obstacles" to the BIAs between the EU and the 3rd country

# Transitional Measures by the EU

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- Role Distribution between the MS and the EU in an ISD
  - Key question: Who is responsible if the EU or an MS becomes a respondent in an ISD?
  - Distribution of financial responsibility
    - ISD solely based on MS' measures: MS
    - ISD based on the EU's measures or MS' measures implementing EU's measures: EU



# Transitional Measures by the EU

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- Role Distribution between the MS and the EU in an ISD
  - Determination of who becomes respondent in an ISD
    - After Consultation between EU and MS, MS normally becomes respondent, except
      - When EU decides to financially responsible
      - When the similar dispute also went to the WTO DSB
      - If the MS informs the Commission in writing that it won't be a respondent
  - Close cooperation between MS and the EU in ISD proceedings

# ISD in Recent Trade Agreements

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- Transatlantic Trade and Investment Partnership (TTIP)
  - The biggest bilateral FTA in history
  - ISDS became a thorny issue
    - Question on regulatory autonomy
    - US and DG Trade in favor, MS objecting
  - Public Consultation of the ISD in the TTIP: Mar. 2014 – Jul. 2014
    - Over 150,000 responses
    - Negotiation suspended until the result is fully analyzed



# ISD in Recent Trade Agreements

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- Comprehensive Trade and Economic Agreement (CETA)
  - Negotiation completed in September 2014: Pending ratification
    - Likely ratification in late 2015 – early 2016
  - Major overhaul of ISDS
    - Importance of Bilateral consultation
    - Significantly narrower scope of ISD
      - Breach of NT
      - Specifically defined breach of FET
      - Expropriation
  - Full transparency

# ISDS in Recent EU Political Situation

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- New EU Leadership (Nov. 2014 ~)

| | | |
|---|---|---|
|  |  |  |
| Donald Tusk,<br>President of the European Council | Jean-Claude Juncker<br>President, European Commission | Cecilia Malmstrom,<br>Commissioner, Trade |



# ISDS in Recent EU Political Situation

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- MS defiant against ISDS: Germany, France
  - Are MS happy with the CETA or EUSFTA's ISDS?
  - Can the Commission persuade the MS?
- Vattenfall v. Germany (II)
  - Germany's nuclear phase-out brought before the ICSID
  - Disadvantage to German firms (E.On, RWE)?
  - Reinforcing the case against the ISDS?

# Need for "Investment" Chapter in Korea-EU FTA?

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- Korea has BITs with 23 EU MS
  - Need to fill the "gap" with MS without BITs
- EU is likely to negotiate CETA-like provisions with Korea
  - EU-Singapore FTA also provides for similar provisions
- Adding a chapter in the Korea-EU FTA will be helpful
  - Seamless coverage of investment protection with the EU
- Ratification: Lobbying to the MS will be crucial



# Questions and Answers

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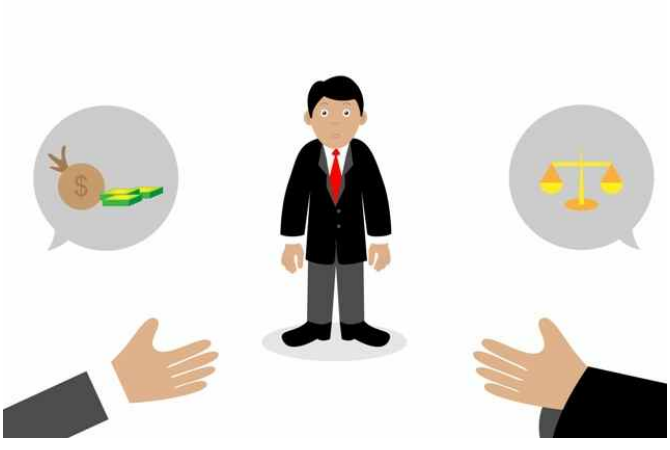


# COHERENCE IN THE PUBLIC INTERNATIONAL LAW OF TAXATION: DEVELOPMENTS IN INTERNATIONAL TAXATION AND TRADE & INVESTMENT RELATED TAXATION

Asif H Qureshi
Professor of International Economic Law
Korea University

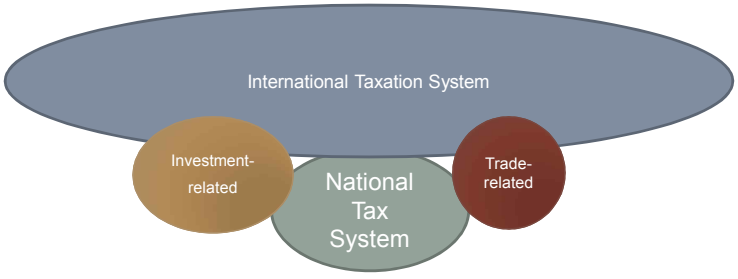


## Focus

- Brief introduction to recent developments in international tax law in particular from the perspective of national fiscal autonomy.
- Recent developments in International Trade and Investment Law as it relates to international taxation in particular from the perspective of national fiscal autonomy.
- Coherence in the Public International Law of Taxation?
  - Coherence --- is it a correct premise for PILT? Is it a correct analytical framework?

# Nature of Tax Systems

Coherence as between tax systems?




# Public International Law of Taxation (PILT)

- What is Public International Law of Taxation?
- What are the sources of the Public International Law of Taxation?
- What recent developments have taken place in the Public International Law of Taxation?
- The idea of PILT MAY suggest:
  - Some kind of management of national fiscal autonomy
  - The existence of a coherent set of international tax norms

**Should discourse on coherence in the PILT must be set against the background of the premise in International Fiscal Law of national fiscal autonomy?**

## Developments in PILT: Tax Treaty Practice

- Treaty practice in the elimination of double taxation
  - Changes to the OECD Model Tax Convention on Income and on Capital have taken place in 1994, 1995, 1997, 2000, 2003, 2005, 2008, 2010 and 2014.
  - Changes to the United Nations Model Double Taxation Convention between Developed and Developing Countries have taken since 1980 in 2001 and 2012.
  - There are now some 3000 double taxation agreements based on these Models (OECD 2014). However not effectively synchronized with changes in Models.
  - Convention on Mutual Administrative Assistance in Tax Matters (as amended 2010). Some 60 countries signatories to it.
  - OECD Model agreement on exchange of information on tax matters 2002. (More than 1100 EOI Treaties based on this Model as of 2013: Source OECD)). 'The Big Bang '!

## Developments PILT: Managing Tax Avoidance and evasion

- Two important OECD initiatives:
  - Harmful Tax Competition (Started in 1998)
- OECD/G20 Base Erosion and Profit Shifting Project (Launched in 2013).
  - OECD/G20 Base Erosion and Profit Shifting Project: Explanatory Note September 2014: Contains first set of reports and recommendations addressing seven of the actions in the BEPS Action Plan published in July 2013.

# OECD BEPS

- 'Base erosion and profit shifting (BEPS) is a global problem which requires global solutions. BEPS refers to tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid. BEPS is of major significance for developing countries due to their heavy reliance on corporate income tax, particularly from multinational enterprises (MNEs).
- In an increasingly interconnected world, national tax laws have not always kept pace with global corporations, fluid movement of capital, and the rise of the digital economy, leaving gaps that can be exploited to generate double non-taxation. This undermines the fairness and integrity of tax systems. Fifteen specific actions are being developed in the context of the OECD/G20 BEPS Project to equip governments with the domestic and international instruments needed to address this challenge. The first set of measures and reports were released in September 2014. Combined with the work to be completed in 2015, they will give countries the tools they need to ensure that profits are taxed where economic activities generating the profits are performed and where value is created, while at the same time give business greater certainty by reducing disputes over the application of international tax rules, and standardising requirements. '
- Source OECD

# BEPS September 2014 Action Plans

- Includes a proposal to Develop a Multilateral Instrument to Modify Bilateral Tax Treaties to implement BEPS
- Neutralizing Hybrid Mismatch Arrangements
- Preventing Treaty abuse and transfer Pricing
- Better Transparency
- Tax challenges in in digital economy.
- Progress on Containing Harmful Tax Measures

# Developments in PILT: Enforcement of international tax policy

- In 2013 some 4499 disputes considered through the Mutual Agreement Procedures set in DTA based on OECD Model. (Source OECD 2014)
- One hundred twenty jurisdictions signed up to the OECD international standard of transparency and exchange of information (EOI). Reviews under Global Forum on Exchange of Information and Transparency for Tax Purposes: 100 peer review reports have been completed and published; 652 recommendations have been made for jurisdictions to improve their ability to cooperate in tax matters; and 68 jurisdictions have already introduced or proposed changes to their laws to implement more than 300 recommendations. (Source OECD 2013)

## BEPS Action Plan

- **'September 2014**
- An in-depth report identifying tax challenges raised by the digital economy and the necessary actions to address them (Action 1);
- Recommendations regarding the design of domestic and tax treaty measures to neutralise the effects of hybrid mismatch arrangements, both from a domestic and treaty law perspective (Action 2);
- Finalise the review of member country regimes in order to counter harmful tax practices more effectively (Action 5);
- Recommendations regarding the design of domestic and tax treaty measures to prevent abuse of tax treaties (Action 6);
- Changes to the transfer pricing rules in relation to intangibles (Action 8);
- Changes to the transfer pricing rules in relation to documentation requirements (Action 13); and
- A report on the development of a multilateral instrument to implement the measures developed in the course of the work on BEPS (Action 15).

- **September 2015**
- Recommendations regarding the design of domestic rules to strengthen Controlled Foreign Companies (CFC) Rules (Action 3);
- Recommendations regarding the design of domestic rules to limit base erosion via interest deductions and other financial payments (Action 4);
- Strategy to expand participation to non-OECD members to counter harmful tax practices more effectively (Action 5);
- Tax treaty measures to prevent the artificial avoidance of permanent establishment status (Action 7);
- Changes to the transfer pricing rules in relation to risks and capital, and other high-risk transactions (Actions 9 and 10);
- Recommendations regarding data on BEPS to be collected and methodologies to analyse them (Action 11);
- Recommendations regarding the design of domestic rules to require taxpayers to disclose their aggressive tax planning arrangements (Action 12);
- Tax treaty measures to make dispute resolution mechanisms more effective (Action 14).

- **December 2015**
- Changes to the transfer pricing rules to limit base erosion via interest deductions and other financial payments (Action 4);
- Revision of existing criteria to counter harmful tax practices more effectively (Action 5); and
- The development of a multilateral instrument (Action 15).'

**Source OECD**

Issues arising from the development of State and treaty practice in International Taxation?

- Impact of the development of international taxation on State autonomy in the international taxation sphere?
  - DT
  - Co-operation to manage avoidance and evasion
    - Information exchange about taxpayers

**Fundamentally national autonomy in taxation preserved.**

- Impact of the development of international practice on the development of General International Law international taxation norms?

- How coherent is the development in the Public International Law of Taxation with normative developments in the trade and investment related taxation spheres?

## Sources of Public International Law

- Sources of PIL --- Article 38 [1] d of the ICJ.
  - Treaties/Customary International Law/General Principles of Law

- Sources of Public International Law of Taxation.
  - General international norms
  - Specific tax related.

  - Fiscal Jurisdiction
  - DTA --- OECD and UN Models
  - Substantive fiscal norms

    - Bretton Woods related agreements --- IMF/World Trade Organization/Bilateral Investment Agreements (BITS)

    - Facilities of PIT --- DTA (MAP); Exchange of Information; Assistance in Recovery of Claims

## Impact of developments in State Treaty practice and State practice in international taxation on General International law

- '…the single tax principle states that income from cross-border transactions should be subject to tax once (that is, not more but also not less than one) at the rate determined by the benefits principle. The benefits principle allocates the right to tax active business income primarily to the source jurisdiction and the right to tax passive investment income primarily to the residence jurisdiction.'

  R. S.Avi-Yonah, *International Tax as International Law*, (CUP: 2007)

## Avi-Yonah's thesis

- US practice in the use of Controlled Foreign Company (CFC) and related legislation to combat anti-avoidance.
  - No *opinio juris*
- Treaty Practice in DT

- Contra Asif H Qureshi BIFD (1987) & J Crawford in Brownlie's Principles of International Law at p. 457.

# WTO and Taxation

- WTO set up in 1995. Concerned with liberalization of trade in goods and services.
- WTO agreements only concerned with trade-related aspects of taxation. Expressly focused on indirect taxes. Direct taxes if result in subsidies. DT – carve out.
- GATT Panel in Japan –Alcoholic Beverages (1987) para 5.13

  "… that the General Agreement reserved each contracting party **a large degree of freedom** to decide autonomously on the objectives, level, principles and methods of its internal taxation of goods.'
- 'The Panel concluded therefore from the text, system and objectives of the General Agreement that, even though each contracting party retained broad freedom as to its internal tax policy also in respect of its internal taxation of goods, the General Agreement did not provide for the possibility of justifying **discriminatory or protective taxes** inconsistent with Article III:2 on the ground that they had been introduced for the purpose of "taxation according to the tax-bearing ability" of domestic consumers of imported and directly competitive domestic liquors.'
- --------Discriminatory Taxation; Protective Taxation; Fiscal Subsidies-----

# WTO Agreements

- More focussed on Indirect Taxes because:
  - Immediate impact on prices of goods
  - Integrity of tariff concessions
- MFN:
  - Indirect taxes (Goods) --- MFN
  - Services --- MFN (Direct and Indirect taxes) Except DTA
- NT & Protective Taxation --- internal taxes:
  - Indirect taxes (goods)
  - Services in Schedules of Concessions (except where necessary to ensure equitable or effective imposition or collection of direct taxes for example measures to avoid DT)

# Calculation of tax base

**Goods** --

- Customs Duties – Generally transaction value
- Related Parties --- 'arm's length'
  - GATT L/5271 and GATT cases viz., US DISC case and the cases involving Income Tax Practices of France, Belgium and Netherlands.
- Certain export related deductions considered as subsidies.
- **Services** –
  - No detailed disciplines for calculation. No subsidies code either.

# Subsidies

- Subsidies interact with taxation but no detailed code in services sector. However, in goods sector there is a detailed code which touches on both direct and indirect taxes.

  Subsidies Annex 1 Illustrative list of prohibited export subsidies.
  - 'The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.'(Footnote: Paragraph '**is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member**.'
  - 'The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.'
  - 'The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.'

## Border Tax Adjustment

- Destination Principle --- indirect taxes
- Direct taxes --- Origin principle.

## WTO cases: Fiscal Subsidies for exports

- United States – Tax Treatment for 'Foreign Sales Corporations'. (1997)
  - Tax subsidies under US system of corporation tax for exports.
    - Successive DISC (1971);FSC (1984)and ETI (2000) legislation. In 2006 US legislation to repeal ETI.
      - Qualified US exporters offered substantial tax benefits on income derived from the export of 'export property'.
      - DSC (inside jurisdiction) (Deferral of tax); FSC (outside jurisdiction) (exemption of tax); ETI (exclusion of tax: extraterritorial income excluded from tax).
- (Background --- European – Territorial: Advantageous for exports – place income receiving entity outside/favourable TP rules/emphasis on indirect tax). US Worldwide approach --- can also take advantage of some of territorial features to give export advantage).

# WTO cases: Fiscal Subsidies

US challenges

- Belgium – Certain Tax Measures Constituting Subsidies (1998)
  - Tax exemption for recruitment of export manager.
- Netherlands – Certain Income Tax Measures Constituting Subsidies (1998)
  - Tax measure allowed 'export reserve' for income derived from exports.
- Greece – Certain Income Tax Measures Constituting Subsidies (1998)
  - Tax measure allowed Greek exporters a special annual tax deduction calculated as a percentage of export income.

# WTO cases: Fiscal subsidies

- Ireland – Certain Income Tax Measures Constituting Subsidies (1998)
  - Special trading houses qualifying for a special tax rate in respect of trading income from the export sale of goods manufactured in Ireland.
- France – Certain Income Tax Measures Constituting Subsidies (1998)
  - Measure allowed deduction for start up expenses of foreign operations.

## WTO Cases: Fiscal Subsidies

- Peru – Tax Treatment on Certain Imported Products (2002)
  - Chile alleged sales tax exemption not allowed to imports but allowed to domestic products in question.
- Uruguay –Tax Treatment on Certain Products
  - Chile complained about tax on imports using a fictitious price.
- Thailand –Customs and Fiscal Measures on Cigarettes from the Philippines (2011)
  - Challenges of customs valuation; excise tax; health tax, TV tax, VAT regime. Transaction value not used as primary basis. Discriminatory taxes and lack of due process.

## WTO cases: Fiscal Subsidies

- United States –Equalizing Excise Tax Imposed by Florida on Processed Orange and Grapefruit Products. (2002)
  - Equalizing excise tax on fruit grown outside US only.
- China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and other Payments (2007)
  - Refunds,exemptions,reductions from taxes owed by Enterprises on condition that those enterprises purchase domestic over imported goods, or on export performance criteria.

  Brazil — Certain Measures Concerning Taxation and Charges (Complainant: European Union)(2013)

## WTO cases: Discriminatory Indirect Taxes

Alcoholic Beverage cases involving discriminatory indirect taxes:

- Japan – Taxes on Alcoholic Beverages (1996)
- Korea – Taxes on Alcoholic Beverages (1999)
- Chile – Taxes on Alcoholic Beverages (1999)
- Philippines – Taxes on Distilled Spirits (2011)

## Free Trade Agreements & Taxation

- There are four different types of tax provisions to be found in FTAs.:

- Trade-related.
  - Main focus on indirect taxation. Concerned mainly with discriminatory practices and tax subsidies. Mirror WTO Agreements --- in some cases with deeper and more effective integration provisions.
    - See for example Article 1.4 of US-Korea FTA
      Article 2.11 of US-Korea FTA
      Article 11.11 of EU – Korea FTA

      Article 2.12 of US-Korea FTA --- Engine Displacement Tax (Vehicle Tax)
      Article 15.3 of US-Korea FTA --- Digital Products

# Free Trade Agreements & Taxation

- **Investment-related**
  - **Concerned mainly with expropriation and taxation including enforcement of such issues.**

- For example : ANNEX 11-F of US-Korea

'TAXATION AND EXPROPRIATION

The determination of whether a taxation measure, in a specific fact situation, constitutes an expropriation requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including the factors listed in Annex 11-B and the following considerations:

(a) The imposition of taxes does not generally constitute an expropriation. The mere introduction of a new taxation measure or the imposition of a taxation measure in more than one jurisdiction in respect of an investment generally does not in and of itself constitute an expropriation;

(b) **A taxation measure that is consistent with internationally recognized tax policies, principles, and practices should not constitute an expropriation. In particular, a taxation measure aimed at preventing the avoidance or evasion of taxation measures generally does not constitute an expropriation;**

(c) A taxation measure that is applied on a non-discriminatory basis, as opposed to a taxation measure that is targeted at investors of a particular nationality or at specific taxpayers, is less likely to constitute an expropriation; and

(d) A taxation measure generally does not constitute an expropriation if it was already in force when the investment was made and information about the measure was publicly available.'

See also Korea – Singapore Art 21 (4)
Korea – Peru Art 24 (7)
ASEAN --- Art 10; 12;18.

# Free Trade Agreements & Taxation

- **Taxation Carve Out:** Provisions that ensure the FTA does not affect certain fiscal measures of the parties in particular DTAs.

For example: OF Korea-EU
ARTICLE 15.7: TAXATION

1. This Agreement shall only apply to taxation measures in so far as such application is necessary to give effect to the provisions of this Agreement.

2. Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention between Korea and the respective Member States of the European Union. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between Korea and the respective Member States of the European Union, the competent authorities under that convention shall have sole responsibility for jointly determining whether any inconsistency exists between this Agreement and that convention.

3. Nothing in this Agreement shall be construed to prevent the Parties from distinguishing, in the application of the relevant provisions of their fiscal legislation, between taxpayers who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested.

4. Nothing in this Agreement shall be construed to prevent the adoption or enforcement of any measure aimed at preventing the avoidance or evasion of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements or domestic fiscal legislation.

See also Article 23-3 US-Korea
Article 2; 13;20; and 22 of ASEAN
Korea/Peru Articles 5.18; 24.4 ; 14.3.
Korea-Singapore – Art 21.4
Korea-Chile – Art 20 (3)
Korea-Turkey —Article 8.1

# Free Trade Agreements & Taxation

- **Incorporation of International Tax Norms**
  (Not many but see for example EU-Korea: )

**ARTICLE 7.24: GOVERNANCE**

'Each Party shall, to the extent practicable, ensure that internationally agreed standards for regulation and supervision in the financial services sector and for the fight against tax evasion and avoidance are implemented and applied in its territory. Such internationally agreed standards are, inter alia, the Core Principle for Effective Banking Supervision of the Basel Committee on Banking Supervision, the Insurance Core Principles and Methodology, approved in Singapore on 3 October 2003 of the International Association of Insurance Supervisors, the Objectives and Principles of Securities Regulation of the International Organisation of Securities Commissions, **the Agreement on Exchange of Information on Tax Matters of the Organisation for Economic Co-operation and Development (hereinafter referred to as the "OECD"), the Statement on Transparency and Exchange of Information for Tax Purposes of the G20,** and the Forty Recommendations on Money Laundering and Nine Special Recommendations on Terrorist Financing of the Financial Action Task Force.'

# NAFTA

- NAFTA, article 2103(1), which
- states: "Except as set out in this Article nothing in this agreement shall apply to taxation measures". Article 2103(2) states:
- "Nothing in this Agreement shall affect the rights and obligations of any Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency"

## Conclusion on trade related taxation norms

- Domestic fiscal autonomy starting premise.
- Main focus on indirect taxes and subsidy related tax measures.
- Carve outs for DTAs and internationally agreed tax measures.
- Some asymmetry in good and services in the framework of the WTO.
- Non-comprehensive as it relates to trade-related taxation.

## Bilateral Investment Agreements and Taxation

Korea –Uruguay BIT Article 3 :

**'Treatment of Investment**

**4. The national treatment and most-favoured-nation treatment as provided for in paragraphs 1 and 2 do not apply to:**

**(a) government procurement;**

**(b) subsidies or grants provided by a Party, including government- supported loans, guarantees, and insurance; or**

**(c) taxation measures.'**

**Contra: WTO trade related tax measures.**

# US Model BIT 2012

- Article 21: Taxation

- 1. Except as provided in this Article, nothing in Section A shall impose obligations with respect
- to taxation measures.
- 2. Article 6 [Expropriation] shall apply to all **taxation measures**, except that a claimant that
- asserts that a taxation measure involves an **expropriation** may submit a claim to arbitration under
- Section B only if:
- (a) the claimant has first referred to the competent tax authorities21 of both Parties in
- writing the issue of whether that taxation measure involves an expropriation; and
- (b) within 180 days after the date of such referral, the competent tax authorities of
- both Parties fail to agree that the taxation measure is not an expropriation.
- 3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to
- all taxation measures.
- 4. Nothing in this Treaty shall affect the rights and obligations of either Party under any **tax**
- **convention. I**n the event of any inconsistency between this Treaty and any such convention, that
- convention shall prevail to the extent of the inconsistency. In the case of a tax convention
- between the Parties, the competent authorities under that convention shall have sole
- responsibility for determining whether any inconsistency exists between this Treaty and that
- convention.

- **See also** for similar provisions --- German Model; French Model; Belgium-Luxembourg Model; Canadian Model. Source OECD International Investment Perspectives 2006.

## Bilateral Investment Agreements and Taxation

- Principal features of BITS related to taxation:

- Generally exclude:

  - Expressly taxation matters from the application of the National and Most Favoured standards;

    - But see NAFTA case : MARVIN FELDMAN v. MEXICO CASE No. ARB(AF)/99/1 (2002) (NAFTA Case)
    - Occidental Exploration and Production Company And The Republic of Ecuador UNCITRAL (2004)

    And

  - Matters relating to relief of double taxation in particular those dealt with in DTAs.

## Subject to BIT disciplines

- Taxation with reference to expropriation
  - For example MARVIN FELDMAN v. MEXICO CASE No. ARB(AF)/99/1 (2002) (NAFTA Case)

And

- Taxation with reference to general investment protection related disciplines such as the Umbrella Clause; and the Fair and Equitable Treatment provisions.
  - For example: Guarantees on future changes to tax laws set out in concession agreements protected by Stabilisation Agreements/Umbrella Clause

DUKE ENERGY INTERNATIONAL PERU INVESTMENTS NO. 1, LIMITED and REPUBLIC OF PERU ICSID Case No. ARB/03/28 (2008);
Kaiser Bauxite v Jamaica ICSID Case No. ARB/74/3), (6 July 1975); Alcoa Minerals of Jamaica, Inc. v. Jamaica (ICSID Case No. ARB/74/2), 1975; Goetz v Burundi ARB95/3 (1999).
Aguaytía Energy, LLC v. Republic of Peru (ICSID Case No. ARB/06/13) (Award dated 11 December 2008)

Fair and Equitable Treatment for example Occidental Exploration and Production Company And The Republic of Ecuador UNCITRAL (2004)

(See for example UNCTAD Issues in International Investment Agreements 2000 and Edwin van der Bruggen 2012 at http://www.jdsupra.com/legalnews/investment-arbitration-in-tax-matters-43179/)

## DUKE ENERGY INTERNATIONAL PERU INVESTMENTS NO. 1, LIMITED and REPUBLIC OF PERU

'The stability regime granted to investors as provided for by section (a) of Article 10 of Legislative Decree No 662 implies that, in the event the income tax should be modified during the effective term of the stability agreement in such a manner that it results in a variation of the tax base or the percentages imposed on the profit generating company, or in the creation of new taxes imposed on the company's income, or for whatever other cause of equivalent effects the profits or dividends distributable or available to the investor is reduced in terms of percentage with respect to pre-tax profits in comparison with the ones distributable or available at the time the guaranteed tax regime became effective, by virtue of the protection granted by the agreement the tax rate(s) applicable to the profits or dividends the investor is entitled to shall be reduced in order to allow the profits or dividends finally available or subject to allocation are equal to the ones that were guarantied [sic], up to the possible limit as to the tax imposed 0n profits or dividends.' para 198 of Annulment .

'The guarantee of tax stabilisation applied not only to laws, but also to stable interpretations or applications of the law. It may also be invoked to protect the investor in the absence of a prior stable interpretation to the extent that 'stabilized laws will not be interpreted or applied in a patently Unreasonable or arbitrary manner.' Award 227.

*Occidental Exploration and Production Company And The Republic of Ecuador*

Exclusion of matters of taxation under Article x of BIT

- 'To this extent, Respondent's view that all matters of taxation are exempted from dispute settlement under the Treaty, with the exception of the specific categories mentioned in Article X, is not persuasive.' Para 68
- 'The Claimant might be right in believing that the exception refers only to a certain category of taxes typically dealt with under conventions for the avoidance of double taxation. The negotiating history of the Article in fact evidences a connection to this interpretation. The law of the WTO and of the Andean Community might also provide aspects in support of such views. But this is not the approach the Tribunal believes appropriate to follow for the proper interpretation of Article X. Among other reasons for not pursuing the discussion between direct and indirect taxes under Article X is that the evidence is not conclusive on this point. There are, however, other elements that are persuasive in attending to the interpretation of the Article.' Para 69

*Occidental Exploration and Production Company And The Republic of Ecuador*

- 'This dispute has also a very particular meaning for the parties. In spite of it having been extensively discussed as a tax matter, a closer look might lead to the conclusion that what is really disputed is whether there is a right to refund of taxes unchallengedly due and owing and in fact paid, and, if so, how to achieve such reimbursement. [n fact, the parties do not dispute the existence of the tax or its percentage. What the parties really discuss is whether its refund has been secured under Factor X of the Contract, as claimed by the Respondent, or if that is not the case, whether, as argued by the Claimant, it should be recognized as a right under Ecuadorian Tax Law.' Para 74.

*Occidental Exploration and Production Company And The Republic of Ecuador*

Fair and Equitable Treatment

184. 'The Tribunal must note in this context that the framework under which the investment was made and operates has been changed in an important manner by the actions adopted by the SRI. It was explained above that the contract has been interpreted by the SRI in a manner that ended up being manifestly wrong as there is evidence that V AT reimbursement was ever built into Factor X. The clarifications that OEPC sought on the applicability of VAT by means of a "consulta" to the SRI received a wholly unsatisfactory and thoroughly answer. The tax law was changed without providing any clarity about its meaning and extent and the practice and regulations were also inconsistent with such changes.'

187. 'The Tribunal accordingly holds that the Respondent has breached its Obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty. '

## Conclusion on tax related investment measures

- Focus is investment-related and expropriation focused with carve outs for domestic fiscal autonomy and foreign fiscal policy.
- Some differences in the way NT and MFN provisions are dealt with respect to taxation from trade agreements.
- Some ambiguous terminology in BITS for example 'tax measure' and tax convention.
- Generally potential for affecting domestic fiscal autonomy more seriously than in trade regimes.

## Issues arising from trade and Investment related Tax Developments?

- How much do the international investment and trade regimes preserve national fiscal autonomy?
- What coherence is there in the international design of trade and investment related tax norms respectively, as well as between these respectively and international tax law as set out mainly in DTAs?
- How do these different sub-sets of the international tax regime set out in different legal regimes serve the objectives of the international tax order and the international economic order?

## Configuration of taxation in international tax; and international trade and investment regimes

- The three spheres have different perspectives:
  - Liberalisation of international trade
  - Protection of foreign investment
  - Objectives of the international tax order ---- Relief of double taxation/neutrality and fairness in taxation/combating avoidance and evasion/re-distribution amongst nations(?).
    - Objectives of the domestic tax system
- Tax in multilateral trade is driven by liberal trade imperatives
  - No compensation for Taxpayer but fiscal legislation can be changed
- Tax in bilateral investment driven by investment protection imperatives.
  - Fiscal legislation cannot be changed but compensation available for taxpayer.
- No coherent configuration of taxation into the multilateral trade and bilateral investment regimes respectively despite the obvious economic relationships.
  - Tax is not focused in terms of its substantive relationship with trade liberalization and investment protection and liberalization but in terms of the formally set out trade and investment provisions in the investment and trade regimes.
  - Objectives of the international tax order (for example non DT, neutrality, fairness) not positively integrated not only in trade and investment but also in international taxation as such given it exists in sub-sets of regimes such as DT/avoidance and evasion.
  - Conflict avoidance with international tax practice and fiscal autonomy

# Conclusion

- Both trade and investment regime set out from the premise of the sanctity of fiscal sovereignty.
- In practice the trade and the investment regimes can impact on both indirect and direct taxes.
- Trade and Investment frameworks are different with different objectives and enforcement systems.
- Need for a clearer focus on the configuration of international tax objectives in trade and investment agreements as well as in the international taxation practice --- set against the international economic system as a whole.
- Need to move away from a fragmented approach to taxation.

# Session 3 (in English)

CHAIR:CHUNG Chan-Mo (InhaUniversity)

## Presenters

5. TSAI Chang-hsien(Robert)(NationalTsingHuaUniversity):The Institutional Development of Taiwanese Investment Policy towards Mainland China: A Regulatory Competition Perspective
6. LEE Se-Ryon (Chonbuk National University) & Kim Dae-Won (University of Seoul): Investor-State Arbitration in Korea-China FTA: Old Wine in a New Bottle?

## Discussants

KIM Joon-Gi (Yonsei University)

KIM Dae-Jung (Dong-A University)

Junior Discussant

JIN Ming-Zi (Yonsei University)

# The Institutional Development of Taiwanese Investment Policy towards Mainland China:
## A Regulatory Competition Perspective

**Chang-hsien TSAI**
**Associate Professor,**
**Institute of Law for Science and Technology,**
**National Tsing Hua University, Taiwan**

## Outline

- THE INTERNATIONAL LAW MARKET
- THE POLITICS OF THE CAPITAL CONTROLS
  - The Transition to Capital Mobility
  - The Regulation's Ineffectiveness in Controlling Capital Flight
- EXIT AND VOICE IN TAIWAN'S CAPITAL CONTROLS, 1997-2008
  - Problems of Enforcement: Strong Intention but Weak Capability
  - The Relationship between Capital Flight and Changes in Political Policy
- Competing Explanations for the Taiwan Case
- Further Liberalization of the Investment Restrictions
- CONCLUSION

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# THE INTERNATIONAL LAW MARKET

- **Law market forces --active in international regulatory/jurisdictional competition**
  - **Globalization→ Int'l Regulatory Competition**
  - **Law Market Demand and Supply Forces→ The feedback mechanisms: options of exit and voice**
- **Case study of Taiwan**
  - **Taiwan's regulatory transitions from 1997 to 2008**
  - **Thesis: Int'l Regulatory Competition spurred by capital flight nudges Taiwan's gov't to relieve the costly regulation & create a more flexible regime**

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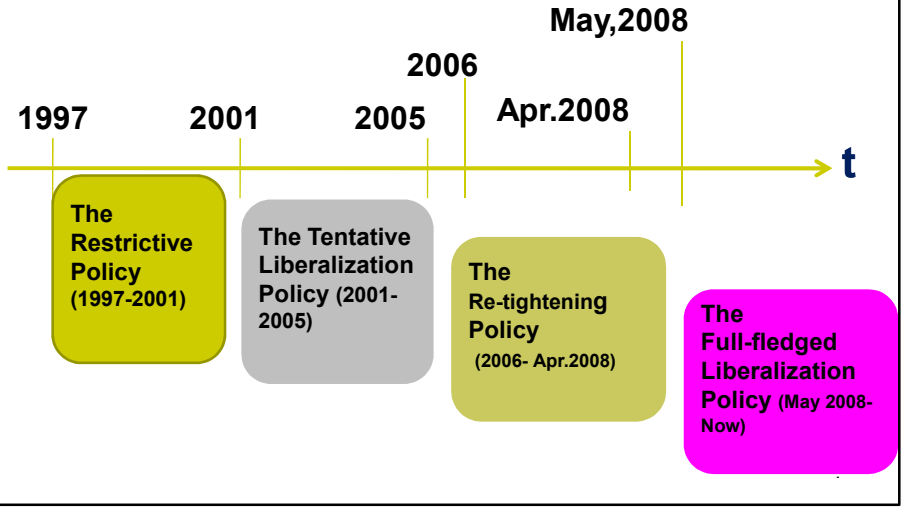
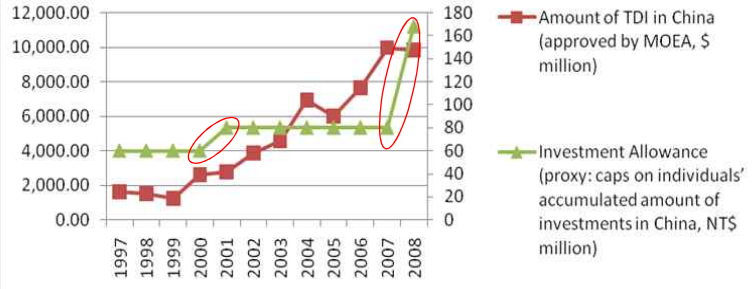
# THE POLITICS OF THE CAPITAL CONTROLS: The Transition to Capital Mobility



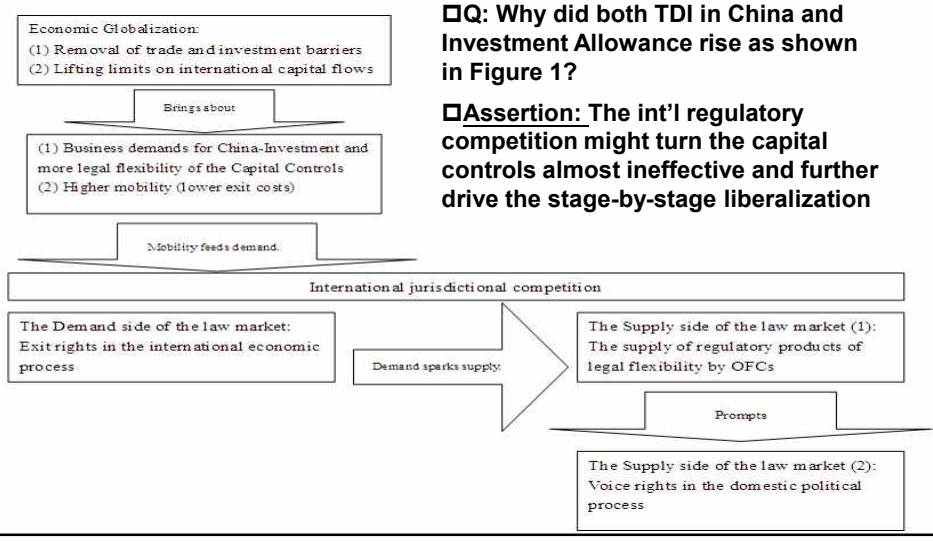
# THE POLITICS OF THE CAPITAL CONTROLS: The Regulation's Ineffectiveness in Controlling Capital Flight

Figure 1 **Comparison between the Surge of TDI in China and the Increase of Investment Allowance**




*Source:* This Author

# THE POLITICS OF THE CAPITAL CONTROLS: The Regulation's Ineffectiveness in Controlling Capital Flight (Cont.)




- **Q: Why did both TDI in China and Investment Allowance rise as shown in Figure 1?**
- **Assertion: The int'l regulatory competition might turn the capital controls almost ineffective and further drive the stage-by-stage liberalization**

## EXIT AND VOICE IN TAIWAN'S CAPITAL CONTROLS,1997-2008: Problems of Enforcement— Strong Intention but Weak Capability

- Ignoring Business Demands under Globalization
- High Enforcement Costs
  - Pervasive Evasion
  - Regulatory Failure

## EXIT AND VOICE IN TAIWAN'S CAPITAL CONTROLS,1997-2008: Problems of Enforcement— Strong Intention but Weak Capability (Cont.)

- Onshore Jurisdictions' Regulatory Capacity Impaired by Globalization
  - The Role of Offshore Financial Centers in International Regulatory Competition
    - Bypassing the Capital Controls through OFCs
  - Home Regulation Invalidated by Internationally Oriented Firms with Unfettered Capital Mobility
    - The increasing globalization of business would be rendering local lawmaking authority obsolete
  - Economic Sovereignty Eroded by International Regulatory Competition
    - Examining the interaction between the state and business in the era of globalization

## EXIT AND VOICE IN TAIWAN'S CAPITAL CONTROLS,1997-2008: The Relationship between Capital Flight and Changes in Political Policy

- **The Relaxation from the Restrictive Policy in 1997 to the Tentative Liberalization Policy in 2001**
  - Business demands, via exit and voice rights, push for the relaxation from the Restrictive Policy to Tentative Liberalization Policy
- **The Relaxation from the Re-tightening Policy in 2006 to the Full-fledged Liberalization Policy in 2008**
  - The re-tightened capital controls in 2006 compel Taiwanese companies to avoid the more severe regulation
  - In the 2008 presidential election, given the torrential exodus of Taiwanese firms, both presidential candidates of different parties were similarly in favor of prospective relaxation of the capital controls

## EXIT AND VOICE IN TAIWAN'S CAPITAL CONTROLS, 1997-2008: The Relationship between Capital Flight and Changes in Political Policy (Cont.)

- **International Regulatory Competition Fuelled by Capital Flight Drives Changes in Political Policy**
  - From an integral perspective of law market forces underlying international regulatory competition led by OFCs
  - This article's descriptive or positive argument

## Competing Explanations for the Taiwan Case

- What Are Politicians' Incentives?
- Does Mere Exercise of Political and Military Power Cause the Relaxation?
- Are the Capital Controls Loosened Due to the Popular Support for Less National Security Concern and for More Economic Integration?
- Why Does the Regulatory/Jurisdictional Competition Story Not Apply to Hong Kong?

## Further Liberalization of the Restrictions on Outward Investment in China, after 2008~ (1)

- General Trend: Further Liberalization
  - Especially after 2008: The ruling party KMT has promoted policies favoring outward investment in Mainland China.
  - Economic Cooperation Framework Agreement, or The China-Taiwan ECFA (2010): A framework for free-trade across the Taiwan Strait
- Example I: Fund Raising for Investing in China
  - Investment Ceiling raised from 40% to 60% in 2008, and even abolished in 2012
  - Fund raised in foreign markets or by foreign firms: No limitation after the 2008 policy change

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## Further Liberalization of the Restrictions on Outward Investment in China, after 2008~ (2)

- Example 2: In the Financial Industry
  - 2010: Allowing FCMs to directly or indirectly invest in futures trading companies in China
  - 2011: Up to 30% of NAV of investment funds can be invested into Chinese securities
  - 2012: Allowing to trade Chinese stocks in HK, Macao or other foreign stock markets
- Example 3: In Other Industries
  - Changes made to the negative list of investment in China since 2010
    - E.g. 2010: Investing in Banks, Financial Leasing and Trust Services in China is allowed

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## CONCLUSION

- **The regulatory evolution is associated more closely with the regulatory/jurisdictional competition story than with other alternative theories**
- **If regulating jurisdictions refuse to recognize business demands backed by economic globalization, firms have incentives and ability to seek out more cost-justified and flexible laws worldwide**


Thank You!

# Investor-State Arbitration (ISA) in Korea-China FTA: Old Wine in a New Bottle?

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## Contents

## Leading Questions

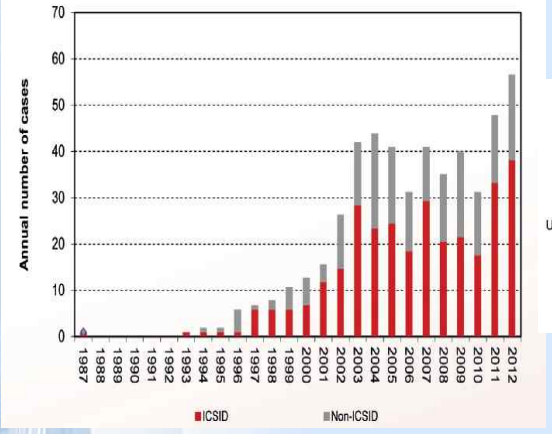
1. What makes the level of ISA differing?
2. How about the present investment status between two countries and its implications to ISA of KCFTA?
3. What are the ISA differences between KORUS and KCJIT?

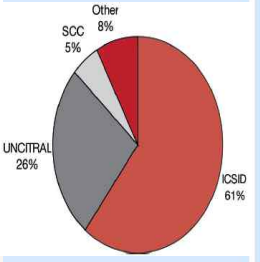


## Introduction to the ISA

- Special form of international arbitration provided by bilateral instruments to protect the interests of foreign investors and foreign investments
- Largely bilateral/ North-South/ Special status of investors beyond traditional diplomatic protection mechanism
- Legitimacy criticism (public policy)

# Known ISA Cases and their Distribution (UNCTAD 2013)






# Trends and Scope of ISA

- Increasing international investment treaties has been paralleled by a rise of ISA
- Investment provisions tend to be increasingly sophisticated and complex in content
- The ISA scope can be diversified with substantive settings, for example, pre-establishment rights, FET and MS.

## Defining ISA *externally*

A. Political and Economic considerations
   - **Investment trends (inward/ outward FDI)**

B. Legal format
   - Bilateral (BITs/FTA)
   - Regional (COMESA/APEC)
   - Multilateral (TRIMs/Energy Charter Treaty)

C. National security



## 2010 Inward and Outward FDI Flows (UNCTAD WIR 2012)

- Korea
  - Inward FDI: 8511 (Millions of USD)
  - Outward: 23278
    - To China: 3000.1 (Korea EximBank)
- China
  - Inward: 114734
  - Outward: 68811
    - To Korea: 410.4 (Korea EximBank)

## 2013 Inward and Outward FDI Flows (UNCTAD WIR 2014)

- Korea
  - Inward FDI: 12221 (Millions of USD)
  - Outward: 219050
- China
  - Inward: 123911
  - Outward: 101000



## Legal Sources

**Korea**

- BITs
  - Korea-China BIT
  - Korea-China-Japan IT
- FTA
  - Korea-US FTA
- WTO Member

**China**

- BITs (131)
  - China-Canada (2012)
- PTA (11)
  - Comprehensive investment rules (6)
  - China-New Zealand FTA
- WTO Member

# Defining ISA *internally*

- Scope of investor and investment
- Pre/post-establishment (NT and MFN)
- Standard of treatment : NT, MFN, FET, MS
- Performance requirements
- Expropriation (direct/indirect) and Compensation
- Transfer of money
- Dispute settlement structure
- Transparency



# Overview of Chinese Legal Sources (Axel Berger 2013)

**Table 2: Investment provisions in Chinese PTIAs and selected BITs**

| Agreement | | | Cooperation | | Protection | | | | | | Liberalisation | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Partner | Type | Year | Promotion | Framework for future negotiations | Definition of Investment / investor | NT* [3] | MFN* | FET* | Expropriation | ISDS* [4] | Right of establishment [5] | Transfer of funds | Performance Requirements |
| Australia | BIT | 1988 | | | • | | • | • | • | (•) | | • | |
| Philippines | BIT | 1992 | | | • | | • | • | • | (•) | | • | |
| Finland | BIT | 2001 | | | • | • | • | • | • | • | (•) | • | |
| APTA [1] | PTA | 2001 | | | | | | | | | | | |
| Côte d'Ivoire | BIT | 2002 | | | • | (•) | • | • | • | • | | • | |
| Germany | BIT | 2003 | | | • | • | • | • | • | • | | • | |
| Hong Kong | PTIA | 2003 | • | | | | | | | | | | |
| Macao | PTIA | 2003 | • | | | | | | | | | | |
| Chile | PTIA | 2005 | • | • | | | | | | | | | |
| Pakistan | PTIA | 2006 | • | • | • | (•) | • | • | • | • | | • | |
| New Zealand | PTIA | 2008 | • | | • | • | • | • | • | • | (•) | • | • |
| Singapore [2] | PTIA | 2008 | • | | • | • | • | • | • | • | (•) | • | |
| Peru | PTIA | 2009 | • | | • | • | • | • | • | • | (•) | • | |
| ASEAN | PTIA | 2009 | • | | • | • | • | • | • | • | (•) | • | |
| Costa Rica | PTIA | 2010 | • | | • | • | • | • | • | • | | • | |
| Taiwan | PTIA | 2010 | • | • | | | | | | | | | |
| Korea, Japan | BIT | 2012 | • | • | • | • | • | • | • | • | (•) | • | • |

Source: Author's compilation on the basis of a framework provided by UNCTAD, *Investment Provisions in Economic Integration Agreements* (UNCTAD 2006, 42)

**Figure 2: Institutional variance of Chinese PTIAs in relation to the China-Canada BIT (2012)**