

# Investment Treaty Arbitration

*Contributing editors*

Stephen Jagusch QC and Epaminontas Triantafylou



2018

GETTING THE  
DEAL THROUGH

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Published by  
Law Business Research Ltd  
87 Lancaster Road  
London, W11 1QQ, UK  
Tel: +44 20 3708 4199  
Fax: +44 20 7229 6910

© Law Business Research Ltd 2017  
No photocopying without a CLA licence.  
First published 2013  
Fifth edition  
ISSN 2053-8960

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Printed and distributed by  
Encompass Print Solutions  
Tel: 0844 2480 112



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# Korea

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## Background

### 1 What is the prevailing attitude towards foreign investment?

Korea exhibits a positive and welcoming attitude towards foreign investment. The government's creation of agencies and laws to promote and assist foreign investors, and to streamline investment processes, shows a clear attempt to attract more investments into the country. The business environment encourages foreign investments and is welcoming towards investors. For example, specifically designated foreign investment zones, free economic zones and free trade zones have been created by the Korean government to foster investment and trade, tax incentives are offered to foreign investors and the past 20 years have seen a liberalisation of the securities market with a lifting of regulatory ceilings on foreign investments in various markets and industries.

### 2 What are the main sectors for foreign investment in the state?

Historically, the manufacture of tangible goods was the main sector for foreign investment in South Korea, including chemical goods manufacturing, machine and equipment manufacturing, transportation machinery and electrical or electronic goods production. In recent years, the intangible goods and services industries have increasingly attracted foreign investment, and further growth is expected in the coming years based on the current figures. Banking and finance, insurance, real estate and business services, research and development facilities, logistics centres and regional headquarters of multinational corporations are the areas of particular note.

### 3 Is there a net inflow or outflow of foreign direct investment?

In the past five years, there has been a slight increase in the annual amount of direct investments inbound and a slight decrease in the annual amount of direct investments outbound. Nonetheless, there has been a net outflow of foreign direct investments, without great changes in any specific trends. In the first quarter of 2017, the outflow was US\$11.42 billion and the inflow was US\$4.44 billion, resulting in a net outflow of US\$6.98 billion. In 2016, the outflow was US\$27.27 billion, and the inflow was US\$10.83 billion, resulting in a net outflow of US\$16.45 billion.

### 4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

The Act on Contracts to which the state is a party applies to all contracts entered into by the Korean government or any of its agencies or branches. The scope of the procurement contracts applies generally to commodities, construction work and services as necessitated by presidential decree, and potential government purchase of agricultural, fishery or livestock for the purposes of stabilisation of such industries. Such contracts are overseen by a designated public official, and may be jointly concluded by officials of other relevant domestic government agencies or local governments.

Additionally, the Financial Investment Services and Capital Markets Act (FSCMA) regulates foreign investments in government bonds, monetary stabilisation bonds, national housing bonds, other public bonds and public-purpose company stocks, as part of the legislation governing investment into the securities markets.

Among other areas, the FSCMA governs registration requirements for foreign investors with the proper regulatory bodies, reporting

guidelines and procedures, public disclosure of foreign investments by the Financial Supervisory Service and any caps on foreign investment by industry and form of financial instrument.

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## International legal obligations

### 5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party, also indicating whether they are in force.

Korea's bilateral investment treaty programme is extensive, with 87 treaties in force as of September 2017. Also, the agreement among the governments of the Republic of Korea (ROK), the People's Republic of China and Japan for the promotion, facilitation and protection of investment (ROK-China-Japan investment protection agreement) was executed and entered into force on 17 May 2014. The first-ever economic agreement among the three countries is expected to bolster the institutional foundation for the promotion and protection of investment among them. As such, investors will be able to invoke the investment protection agreement of their choice for their benefit. The ROK-China-Japan agreement is expected to help the three north-east Asian countries expand their scope of cooperation to include climate change, responses to natural disasters and strengthen strategic communication.

Korea has proceeded positively with the execution of free trade agreements as a means of policy implementation to encourage the continual growth of the Korean economy and to become an advanced trading country. Free trade agreements (FTAs) generally include provisions for the protection of investments between the contracting states and, as such, are broader instruments that also cover what BITs often provide for in the way of investor protections. The Korean government adopted the FTA Road Map for 2003, utilising it as a base from which to negotiate FTAs with major economic partner countries. As a result, a total of 15 FTAs (with 52 contracting parties such as ASEAN, China, Australia, Canada, Chile, EFTA, the European Union, India, Peru, Singapore, Turkey and the United States) were executed and have entered into force. In March 2017, Korea and five Central American countries initialled the ROK-Central America FTA. Also, the Korean government is continuing to conduct negotiations for new FTAs with other countries, such as Israel.

Korea became an observer to the Energy Charter Treaty on 17 December 2002, when its application was approved by the Energy Charter Conference at its 11th meeting.

As part of a regional collaboration, Korea participated in a Regional Comprehensive Economic Partnership (RCEP), for which Korea announced the commencement of negotiation at the East Asia Summit held on 20 November 2012. The RCEP is an initiative to link the 10 ASEAN member states and the group's free trade agreement partners: Australia, China, India, Japan, Korea and New Zealand. In total, the grouping of 16 nations includes more than 3 billion people and accounts for about 40 per cent of world trade. The RCEP agreement, which would create the world's largest trading bloc and would have major implications for Asian countries and the world economy, is expected to be finalised by the end of 2017.

Although it is not a bilateral or multilateral investment treaty, it is important to note that Korea is also a party to the Agreement on Government Procurement (GPA), a plurilateral agreement on government procurement through the World Trade Organization (WTO), since 1 January 1997. Signatories to the Agreement undertake to provide

national and non-discriminatory treatment to goods, services and suppliers of the other signatories, ensuring through detailed procedures a fair chance to compete for government contracts. While Korea made no specific reservations when becoming a party to the GPA, annexes 1 and 2 to Korea's GPA list certain areas and situations regulated by government agencies where the GPA does not apply, such as agriculture, fishery and livestock industries under certain conditions. Annexes 3-5 list other exemptions that do not fall under government agency purview. All such industries and categories exempted from the GPA are listed and updated on the WTO page on appendices and annexes ([www.wto.org/english/tratop\\_e/gproc\\_e/appendices\\_e.htm#kor](http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#kor)).

**6 If applicable, indicate whether the bilateral or multilateral investment treaties to which the state is a party extend to overseas territories.**

Not applicable.

**7 Has the state amended or entered into additional protocols affecting bilateral or multilateral investment treaties to which it is a party?**

Korea has amended or entered into additional protocols relating to matters such as customs rules for FTAs or adding a country that has joined the EU after the FTA was signed to the ROK-EU FTA.

**8 Has the state unilaterally terminated any bilateral or multilateral investment treaties to which it is a party?**

No.

**9 Has the state entered into multiple bilateral or multilateral investment treaties with overlapping membership?**

Yes. For example, as discussed in response to question 5, Korea is a party to the ROK-China-Japan investment protection agreement. This coexists with the ROK-China BIT and ROK-Japan BIT. Korea is also a member of various bilateral investment treaties that coexist with the ROK-EU BIT (eg, ROK-Austria BIT, ROK-Netherlands BIT, ROK-Germany BIT, etc) and the ROK-ASEAN Investment Agreement (eg, ROK-Malaysia BIT, ROK-Indonesia BIT, ROK-Vietnam BIT, etc).

**10 Is the state party to the ICSID Convention?**

Korea is a signatory party to the ICSID Convention as of 18 April 1966. The deposit of ratification took place on 21 February 1967, and the Convention entered into force on 23 March 1967. Contextually, Korea's first BIT with Germany was signed in 1964 and entered into force in 1967, and included a provision for disputes to be submitted before an arbitral tribunal. While no specific arbitration conventions or rules were named in the ROK-Germany BIT, the provision naming arbitration as the method of dispute resolution may have encouraged Korea's signing of the ICSID Convention.

**11 Is the state a party to the UN Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)?**

No.

**12 Does the state have an investment treaty programme?**

The Korean government has actively pursued investment treaties throughout every geographic region. Further, there are domestic government agencies that govern and oversee foreign investments into Korea to support the operational investment treaties. All investment treaties are currently negotiated and signed by the Ministry of Trade, Industry and Energy (MOTIE). The MOTIE has been restructured and renamed several times under different presidential administrations since the inception of its predecessor agency in 1948. It was previously the Ministry of Commerce, Industry and Energy (1998-2008) and Ministry of Knowledge and Economy (MKE) (2008-2013) but was finally given its current name in 2013. Unlike the MKE, the MOTIE is also responsible for the negotiations for BITs and FTAs as well as creation of policies for foreign investment and international trade, which are duties that were previously performed by the Ministry of Foreign Affairs and Trade.

As discussed above, the Korean government has also proceeded positively with the execution of FTAs as a means of implementing

the policy to create continual growth in the Korean economy and to increase Korea's prominence in international trade. The adoption of the FTA Road Map for 2003 has aided in the negotiation for FTAs with numerous countries, and also provides for promotion and protection for foreign investors into Korea.

**Regulation of inbound foreign investment**

**13 Does the state have a foreign investment promotion programme?**

Korea has implemented regimes to protect foreign investors, beginning with the liberalisation of foreign investment policies in the early 1980s, which has gradually progressed to further liberalisation of the Korean securities markets. Except as otherwise prescribed by the Acts of the Republic of Korea, a foreign national may conduct, without restraint, various investment activities in Korea. Foreign nationals are restricted from foreign investments in the following cases: where it threatens the maintenance of national safety and public policy; where it has harmful effects on public hygiene or the preservation of the environment or is against Korean morals and customs; and where it violates the Acts and subordinate statutes of the Republic of Korea.

In addition, the Korean legislature has passed laws to protect foreign investment. Under the Foreign Investment Promotion Act (FIPA), with respect to proceeds from stocks, bonds or other security instruments, including dividends and proceeds from sales of such security instruments, the liquidation of the principal, interest and service charges paid and the remittance thereof to foreign countries are guaranteed in accordance with the details of the permission or report of the foreign investment contract, or the licensing agreement in effect at the time of remittance. This gives foreign investors the assurance that any gains from their investment into the Korean economy will be transferable out of Korea and gives bargaining rights to the investor and its domestic partner.

The Korean Trade-Investment Promotion Agency (KOTRA) exists as a government agency that supports foreign direct investments into Korea and acts as a resource for foreign investors and domestic partners alike. The MOTIE, along with KOTRA and the agencies under it, are the main government bodies that exist specifically to promote, protect and regulate foreign investments.

**14 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.**

Korea has enacted a series of domestic laws that apply specifically to foreign investors and foreign investments. Registration requirements with the government entity that oversees the administration of any of the domestic laws, along with additional reporting requirements, apply to foreign investors.

**Domestic laws on foreign investment**

FIPA was first enacted in 1998 to encourage foreign direct investments, following the 1997 Asian financial crisis. FIPA provides protection for foreign investments, supports a foreign investment stimulation plan, lays out foreign investment procedures and creates incentives such as tax abatement and exemptions for foreign investments. Contemporaneously, the Korean government also expanded the liberalisation of the securities market and phased out ceilings on foreign direct investment into the securities market as part of the effort to boost the economy.

FIPA is designed to facilitate foreign investment by increasing investor convenience and providing support to foreign investors. FIPA serves as the foundational law for foreign investment, and its subordinate statutes include the Enforcement Decree of the Foreign Investment Promotion Act, the Enforcement Rule of the Foreign Investment Promotion Act and the Regulations on Foreign Investment and Technology Introduction. The subordinate statutes prescribe the matters delegated in FIPA and any necessary matters for the enforcement of FIPA, including clarifying restrictions on foreign investments, laying out reporting and permission-seeking procedures for foreign investments and outlining necessary licensing agreements and other procedures.

Further, the Foreign Exchange Transaction Act governs matters concerning those Korea-bound transactions that are not covered by FIPA. For foreign investments, taxes may be abated or exempted



under conditions as prescribed by the Restriction of Special Taxation Act, Enforcement Decree of the Restriction of Special Taxation Act, Enforcement Rule of the Restriction of Special Taxation Act, and Regulations on Tax Abatement or Exemption on Foreign Investment.

In addition to the above, the following acts and statutes apply to foreign investments:

- Consolidated Public Notice for Foreign Investment (notified by the Ministry of Trade, Industry and Energy);
- FSCMA and Enforcement Decree of the FSCMA (notified by the Financial Services Commission); and
- Regulation on Financial Investment Business (RFIB) and Detailed Rules of RFIB (notified by the Financial Supervisory Service).

#### Domestic requirements for foreign investment

Pertinent procedures and regulations for foreign investors consist of foreign investment notification, registration of incorporation or business, registration of a foreign-invested company and remittance of investment funds. The procedures applied to foreign nationals are basically the same procedures that Koreans and Korean business entities are expected to follow, with the exception of two additional steps: reporting of foreign investment notification, and registration of a foreign-invested company. When a foreign investor registers a privately owned business, a registration of incorporation is not required.

The process of reporting a foreign investment requires:

- designating a reporting person, who may be a foreign investor or a domestic agent;
- selecting a delegated agency, such as the headquarters or branches of domestic banks, domestic branches of delegated foreign banks, KOTRA or Korea Business Centres of KOTRA; and
- obtaining the certificate of completion of foreign investment notification, which is issued immediately as FIPA calls for no delay in the processing period.

Registration of foreign investors and reporting for foreign investments must be timely. Reporting for most foreign-direct investments is required prior to the investment, including the acquisition of new or existing stocks of 10 per cent or more equity share per foreign investor, long-term loans or procurement contracts and joint research and development agreements. In certain circumstances, reporting can be done within 30 days of the investment, such as an acquisition of stocks following a merger or via a transfer of stocks, reduction in the number of stocks and when there is a change or cancellation in registration of a foreign-invested business. Registration of foreign investors should generally be done 30 days from the date of the investment.

#### 15 Identify the state agency that regulates and promotes inbound foreign investment.

KOTRA is the overarching agency, under which Invest Korea (IK), Korea's national investment promotion agency, was established with the purpose of supporting the entry and successful establishment of foreign businesses into Korea. With assistance extending to comprehensive post-establishment services, IK helps foreign corporations to maximise the benefits of the Korean investment environment to ensure their rapid settlement in Korea.

#### Korea's foreign direct investment promotion regime

IK implements government policies on foreign investment that have been formulated by the MOTIE and is coordinated by the Foreign Investment Committee, which is chaired by the Minister of Strategy and Finance.

In addition, the MOTIE is the agency that oversees the administration of FIPA, which regulates certain reporting and registration procedures and restrictions on foreign investments in Korea. For inbound investments into the securities markets, the Financial Services Commission (FSC) and Financial Supervisory Services (FSS) are agencies that administer certain reporting and registration processes and regulate foreign investments. Foreign investors are required to register with and report any over-the-counter trading that is selectively permitted to foreign nationals under the RFIB to the FSS. The FSC may have the power to restrict foreign investors' ownership of debt, equity securities or derivatives of a certain issuer, a specific class of securities or holdings in a specific business sector, if such restrictions are deemed necessary for the stability of the Korean financial market or for investor

protection. The class of securities or business sectors subject to restrictions are noted in the FSCMA.

Foreign investors are required to:

- report investments to the MOTIE;
- transfer funds to the Korean company or organisation;
- register the corporation or private company with the MOTIE, along with information about the business, which is also a requirement for Korean investors; and
- register the corporation or business as a foreign-invested company.

In practice, the MOTIE has delegated relevant authorities and responsibilities to other institutions including foreign exchange banks as well as KOTRA, which is in charge of day-to-day operations related to the foreign investments.

#### 16 Identify the state agency that must be served with process in a dispute with a foreign investor.

Article 2 of the Act On Litigation to which the State Is a Party provides that, in cases of domestic litigation in which the state is a party or an intervenor, the Minister of Justice shall represent the state. Therefore, in principle, the Minister of Justice is the proper party to be served in disputes where the state is a party. In practice, however, in at least some of Korea's investment treaty cases to date, notice of a dispute has been sent to the Korean President and the ambassador of the country in which the investor claims rights under an investment treaty with Korea.

#### Investment treaty practice

##### 17 Does the state have a model BIT?

Korea has a model BIT; however, it is not set in stone. It is not disclosed to the public in its entirety and is not a comprehensive treaty document. Therefore, it serves the purpose of an internal guideline for government officials when entering into a new BIT or FTA, rather than a form treaty that has been pre-approved by the legislature.

##### 18 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

In principle, treaty preparatory materials are not disclosed to the public, and treaties themselves are not disclosed until after they take effect. However, since 1994, the Ministry of Foreign Affairs has regularly made public disclosure of historic documents related to diplomatic activities under the Rules on Preservation and Disclosure of Diplomatic Documents promulgated by the Ministry of Foreign Affairs on 28 July 1993.

Diplomatic documents are eligible for disclosure as historical records 30 years after their preparation. Also, pursuant to the Official Information Disclosure Act, which has been in force since January 1998, a diplomatic document may be disclosed in certain forms prior to the lapse of 30 years from its preparation if there is a specific request for disclosure of such document by an individual.

Unlike diplomatic documents, parliamentary records are disclosed and can be found at the National Assembly's website ([www.assembly.go.kr/main.acl](http://www.assembly.go.kr/main.acl)). If the National Assembly requests the examination and inspection of the relevant materials prior to the execution of a treaty as an exception, such materials are subject to a 'non-disclosure' inspection, and the relevant lawmakers should not disclose matters examined through such inspection to the public.

The MOTIE runs a separate website for FTAs, where one can easily find at least the status of the execution of certain FTAs; for example, whether it is at the negotiation stage or the research stage ([www.fta.go.kr](http://www.fta.go.kr)).

While extensive preparatory materials may be available on Korean-language websites of the government agencies and branches, translated versions of the materials or databases may not be as readily available on English-language websites. Additionally, as the preparatory materials or guidelines are most likely created in the Korean language, many English translations of such materials carry a disclaimer of potential unintended errors or inaccuracies in translation.

##### 19 What is the typical scope of coverage of investment treaties?

Investment treaties typically define who is considered an investor, and include specific requirements of affiliation to the party states, as well as

what qualifies as an investment and the types of protections afforded the contracting parties.

Generally, an investment is defined as the investment of an investor who is a national or registered entity of the territory of the party states, which existed as of the date of effectuation of the treaty or was established, acquired or expanded thereafter. For example, article 11.28 of the ROK-United States FTA provides that:

*the investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.*

Similar language is used in the majority of bilateral investment treaties Korea has entered into to describe the qualifications of an investor.

The definition of an investment, as used in BITs, is generally defined broadly. Most of the earlier treaties are less descriptive in defining what qualifies as an investment yet are encompassing of any asset that may carry monetary value. Those treaties more recently entered into in the past two to three decades, and those that have been amended in recent years, are slightly more descriptive yet use general terms to include both tangible and intangible properties and rights, both moveable and immovable, and for intellectual property rights and trade secrets.

Treaties delve into the types of protections available to investors from the contracting states, in extensive detail.

## 20 What substantive protections are typically available?

National treatment is generally included. In this regard, whether investments made prior to the execution of the treaty can also be protected is debated, and depends on whether the matter is specifically addressed in the BIT or relevant treaty. However, most of the FTAs that Korea has entered into are drafted to include pre-treaty investments by including the language 'with respect to establishment and acquisition'. Yet it is important to review the specific language of each treaty, for in relation to the ROK-China BIT, investments with respect to the 'establishment and acquisition' are excluded from the covered investment, excluding investments made prior to the treaty.

Most-favoured-nation treatment, minimum standard of treatment, losses and compensation thereof, subrogation, expropriation and compensation, full protection and security and fair and equitable treatment are the commonly allotted protections. There are often provisions for settlement of disputes among foreign investors into Korea in addition to provisions for dispute settlement between the contracting state and the investor. Additionally, provisions for repatriation or transfer of profits and proceeds from the investment out of the state where the investment was made are clearly stated.

The umbrella clause is also typically included in Korea's investment treaties. However, based on the disclosed excerpts of the Korean model BIT, there is a provision that the BIT shall be applicable only to agreements entered into with a central government, under the influence of the ROK-United States FTA:

*Each contracting party shall observe the provisions of this Agreement as well as any specific investment agreement between an authority at the central level of government of a party and investors of the other contracting party that may have entered into force.*

## 21 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

Until recently, the only investor-state dispute arbitration brought against the government of Korea (in 1984) was filed under the rules of ICSID. In 2012, Lone Star launched the first-ever investment treaty arbitration against the Korean government, under the ICSID rules (ICSID Case No. ARB/12/37). In recent years, two more investment treaty arbitrations have been filed against Korea: one under the ICSID rules (ICSID Case No. ARB/15/17) and one under UNCITRAL rules.

## 22 Does the state have an established practice of requiring confidentiality in investment arbitration?

No, due to the lack of past investment arbitrations, no established practice pertaining to confidentiality exists. Further, most of the BITs (and FTAs) contain no specific confidentiality provisions and therefore the confidentiality requirement should be subject to the rules governing the procedure that the parties choose; for example, ICSID rules, UNCITRAL rules, ICC rules. However, despite these provisions, there is a high demand from the Korean public for transparency and disclosure of the procedure in the *Lone Star* dispute.

## 23 Does the state have an investment insurance agency or programme?

Yes, Korea has a state-affiliated investment insurance agency called the Korea Trade Insurance Corporation (K-sure), formerly known as the Korea Export Insurance Corporation. State-backed investment insurance is not contingent on the existence of an investment treaty.

## Investment arbitration history

### 24 How many known investment treaty arbitrations has the state been involved in?

Before 2012, there was only one investor-state dispute claim against the Korean government. In 1984, Colt Industries Operating Corporation filed an arbitration claim before ICSID against the Korean government (ICSID Case No. ARB/84/2) that was eventually settled by the parties, and the order noting the discontinuance was issued on 3 August 1990. However, this case was a dispute arising out of licensing agreements on the production of weapons, and, thus, was not an investor-state dispute based on an investment treaty.

Since 2012, three investment arbitration cases have been filed against the Korean government. The first case (ICSID Case No. ARB/12/37) was brought by private equity fund Lone Star and other claimants on the grounds that the Korean government's treatment of Lone Star's investment in the Korea Exchange Bank violated the terms of the ROK-Belgium/Luxembourg Economic Union BIT. The second case (ICSID Case No. ARB/15/17) was a dispute about the tax treatment of an investment made by subsidiaries of the International Petroleum Investment Company under the ROK-Netherlands BIT. (In this case, the arbitral tribunal issued an order taking note of the discontinuance of the proceeding in October 2016.) The third case was filed under UNCITRAL rules by Iranian investors who claim that shareholders with state ties aborted a sale to the investors of their stake in a Korean company in violation of the ROK-Iran BIT.

### 25 Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

Because only a few investment treaty disputes have been filed, there is no clear trend as to which particular industries or investment sectors attract investment arbitrations more often than others. One case involves a private equity fund's investment in a bank, another involves an oil and gas company's investment in a petroleum and refinery company and the last case involves Iranian investors' investment in an electronics company with state ties.

### 26 Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

There is no precedent yet with regard to default mechanisms, although this is an area to be observed as disputes arise in the future. So far, the only state-appointed arbitrators are Brigitte Stern (in ICSID Case No. ARB12/37), William W Park (in ICSID Case No. ARB15/17) and Gavan Griffith (in the UNCITRAL case filed by Iranian investors).

### 27 Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Outside counsel has been appointed in all three cases mentioned in question 26. Internally, the Ministry of Justice has represented Korea in close coordination with relevant agencies such as the National Tax Service and Financial Services Commission.

**Enforcement of awards against the state****28 Is the state party to any international agreements regarding enforcement, such as the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?**

Korea has been a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) since May 1973. While there have been no arbitral awards against the Korean government to date, it is expected that the enforcement of any future awards to which the provisions of the New York Convention apply would be enforced in accordance with such provisions.

**29 Does the state usually comply voluntarily with investment treaty awards rendered against it?**

There is no precedent as to this issue.

**30 If not, does the state appeal to its domestic courts or the courts where the arbitration was seated against unfavourable awards?**

There is no precedent as to this issue.

**31 Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.**

As Korea is a party to the New York Convention, a Korean court may refuse to enforce foreign arbitral awards based on public policy, which is one of the grounds set forth in the Convention to set aside an arbitral

award. The Korean courts have, although not often, refused to enforce commercial arbitral awards based on violation of Korea's public policies.

As for an award rendered under the ICSID Convention, although article 54(3) of the Convention states that the enforcement of an award should be made pursuant to the national law of the state in which such enforcement is sought, the Convention will not allow any refusal of enforcement based on domestic provisions. Therefore, no domestic law, such as the Korean Arbitration Act, can provide grounds to refuse enforcement of an ICSID award.

There is no general provision under Korean law governing sovereign immunity, and sovereign immunity is not a ground for resisting arbitral awards under the Korean Arbitration Act or under the New York Convention. A number of cases decided by the Supreme Court have involved the Republic of Korea or Korean government entities as parties in arbitration cases without any issue being raised as to their capacity to enter into arbitration agreements, per se; however, there are no clear court precedents regarding the issue of sovereign immunity with respect to investor-state disputes. In Korea, there are developing debates about whether the state agreeing to an arbitration agreement implies that it has waived its sovereign immunity rights. The prevailing opinion is that if the state's action is in the field of a private sector, such waiver can be easily implied. However, there is no clear court or statutory precedent as to this point.

On the other hand, according to article 192 of the Korean Civil Execution Act, compulsory execution against the state shall be effected by seizure of national funds. The effect of this law is to limit the object to be seized to national funds only and not to other assets of the state.

# SHIN & KIM

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