



## Investor-State Disputes Under KORUS Chapter 11

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April 22, 2018



# Introduction

- Trade and investment go hand-in-hand
- What do recent events in the bilateral economic relationship between U.S. and Korea mean for Chapter 11 of KORUS?
- What is the significance of Chapter 11 of KORUS for Korean investors in the U.S.?



## **KORUS Chapter 11 establishes reciprocal protections for U.S. and Korean investors**

- National Treatment (Art. 11.3)
- Most-Favored Nation Treatment (Art. 11.4)
- Minimum Standard of Treatment (Art. 11.5)
- Protection against Expropriation (Art. 11.6)
- Protection against Performance Requirements (Art. 11.8)



## KORUS Chapter 11 protections are enforceable through investor-state arbitration

- Consent of the United States and Korea to arbitrate disputes arising under KORUS Chapter 11 with one another's investors (Art. 11.17)
- Arbitration to be final and binding, presumably before World Bank's International Centre for Settlement of Investment Disputes (ICSID)
  - Tribunal of 3 arbitrators, one arbitrator appointed by each of the disputing parties and the presiding arbitrator, appointed by agreement of the disputing parties (Art. 11.19)
  - Award enforceable in the courts of any ICSID Member State as though it were a final judgment of that State's courts (ICSID Convention Art. 54)



# KORUS renegotiation: implications for Chapter 11

- President Trump denounced a “horrible deal” in April of 2017
- “Agreement in Principle” on KORUS renegotiations announced by U.S. and Korean negotiators on March 28, 2018
  - Among other changes, “agreement in Principle” reportedly contains revisions to Chapter 11 intended to help prevent “abuse” of the arbitration system and better protect the “right to regulate”
  - *Will the U.S. and Korea retreat from their earlier commitment to investor-state arbitration?*
- Negotiations are ongoing



# KORUS renegotiation: U.S. attitude toward Chapter 11

- Current U.S. administration may be less committed to investment protection than predecessors
- U.S. recently proposed to strip investor-state arbitration provisions from NAFTA, resisted by Canada and Mexico
- In testimony to U.S. Congress, U.S. Trade Representative Lighthizer recently dismissed investor-state arbitration “as the United States ceding sovereignty in order to encourage people to outsource jobs”



# KORUS renegotiation: Korean concerns about Chapter 11

- Chapter 11 highly controversial in Korea during original negotiation of KORUS, prompting prolonged debate over ratification
  - Infringement on sovereignty
  - “Special rights” for foreign corporations?
  - Regulatory chill?
  - Perceived lack of “transparency”
  - Disproportionate benefit to U.S. investors?
- Chapter 11 may be perceived as an area where Korea feels able to “push back” in renegotiation with U.S.
  - *To what extent is this in Korea’s interests?*



## KORUS renegotiation: specific concerns addressed

- Sovereignty – identical consent to arbitration by U.S. and Korea
- Effect on regulation – Chapter 11 contains provisions protecting both government’s “right to regulate”
- “Special rights” for foreign corporations – Chapter 11 provides same rights to U.S. and Korean investors in either country
- Transparency? – Chapter 11 provides for public hearings and amicus participation





## KORUS renegotiation: economic context

- Korea is a net exporter of capital to the United States
  - Korean companies employ more than 75,000 Americans,
  - Korean direct investment into the U.S. in 2016 (US \$60 bn) was roughly **double** U.S. direct investment into Korea (US\$ 31 bn) according to the IMF
- Korean investment in the U.S. has doubled since KORUS



# KORUS renegotiation: do Korean investors need Chapter 11's protections?

- Chapter 11 is designed to protect investors from political risk.
- Korean investors in the U.S. likely now face increased political risk:
  - Protectionist measures may unfairly advantage U.S. competitors
  - “captive” investors may be subjected to measures designed to extract concessions on trade in goods
  - Danger of adverse policy swings that disrupt investment-backed expectations (e.g., non-renewal of steel tariff exemption, performance requirements)
  - There is no real knowing when or how “renegotiations” may end.
- Korean investors should be mindful of their rights under Chapter 11.



# THANK YOU