This paper examines critical issues in the current dispute between Lone Star and South Korea regarding Lone Star’s investment in the Korea Exchange Bank that has culminated in an investor-State dispute claim against Korea before an International Centre for Settlement of Investment Disputes arbitration panel. It further evaluates the merits and potential outcomes of each issue through careful analogy to preexisting international investor-State dispute awards, textual analysis of the bilateral tax and investment treaties between South Korea and Belgium, and publically available information regarding events during the course of Lone Star’s investments in Korea. In particular, it will address well-covered topics in international investment law such as nationality of corporations, fair and equitable treatment, and discriminatory treatment. It will also investigate burgeoning topics on breach of domestic law by third parties, breach of domestic law in the course of an investment, and the rights of an investor to raise tax-based investment claims.

Keywords
ISD, Korea, Lone Star, KEB, ICSID, BIT, BTT, FET

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I. Introduction

The investor-state dispute ("ISD") between South Korea and Lone Star came to a head in May 2015 when a hearing on the merits was held before an arbitration tribunal at the International Centre for Settlement of Investment Disputes ("ICSID"). Lone Star accused the Korean government of engaging “in a continuing pattern of arbitrary and discriminatory conduct” impairing the formers’ ability to dispose its investment in the Korea Exchange Bank ("KEB"). Lone Star also claimed that the government “subjected [it] and its personnel to repeated acts of harassment, and imposed arbitrary and contradictory tax assessments on [it] and its affiliates in contravention of bilateral tax treaties entered into by Korea.”¹

This case is particularly noteworthy because it is the first time Korea has been involved in an ICSID investor-State dispute settlement and the claimed damages of USD 4.68 billion are among the largest seen to date.²

This ISD poses many interesting questions that, when answered, will contribute to well-covered topics in international investment law such as nationality of corporations, fair and equitable treatment, and discriminatory treatment. They will also contribute to burgeoning topics on breach of domestic law by third parties, breach of domestic law in the course of an investment, and the rights of an investor to raise tax-based investment claims.

This research will explore these issues through analysis of the text in the Korea-Belgium bilateral investment treaty ("BIT") and Korea-Belgium bilateral tax treaty ("BTT"). Through careful analogy to investor-State dispute precedent, the author will review events during the course of the investment, evaluate the merits of each issue, and ascertain potential outcomes of the current arbitration.

This paper is composed of six parts including a short Introduction and Conclusion. Part two will review the factual background of the research including the Asian Financial Crisis and the KEB investment dispute. Part three will discuss the delayed regulatory approval for the sale of KEB. Part four will examine tax assessments on the sale of KEB. Part five will analyze tax-based investment claims under FET.