
Two Bites at the Same Apple? ‘Derivative’ ISDS Proceedings in the Revised Korea-US FTA

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The 2018 amendment of the KORUS has made an important stride in the investment chapter of the agreement. In particular, the amendment introduced new provisions to regulate multiple, subsequent or parallel ISDS proceedings involving the same governmental measures. The new provisions, however, arguably contain inherent limitations. They will be able to address only some of the multiple, subsequent or parallel proceedings. They then leave open a possibility where essentially the same investor raises a series of ISDS proceedings against essentially the same measures by an advance planning on the scope of ‘measures’ and/or form of ‘control.’ This means that the new provisions will not be able to fully prevent multiple, subsequent or parallel proceedings in the same context or circumstances from taking place, as was originally intended by the drafters. More detailed wordings and elaborations would have helped to achieve the objective. Future Joint Committee discussions or additional amendments should consider such clarification or elaboration.

Keywords

Investment Arbitration, ISDS Proceedings, ISDS Reform, Korea-US FTA, Parallel Proceedings, Multiple Proceedings, Abuse of Process.

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1. KORUS Amendment and the Investment Chapter

The Republic of Korea (“Korea”) and the United States of America (“US”) concluded a Free Trade Agreement (“FTA”) on March 15, 2012.¹ Among many features contained in the FTA, investment arbitration (Investor-State Dispute Settlement: “ISDS”) proceedings set forth in Chapter 11 of the Agreement turned out to be one of the stickiest and most controversial issues.² Since then, many observers have been closely watching how the ISDS mechanism in the Korea-US FTA (“KORUS”)³ is applied and implemented in practice. The level of interest and concern has further ratcheted up with the advent of the first ISDS proceeding initiated under the KORUS in 2018.⁴

In September 2017, at the request of the Trump Administration of the US, the two countries initiated negotiations to amend the KORUS.⁵ Agreed in March 2018, the amended KORUS was signed in September 2018. After completing the two countries’ domestic procedures, the amended KORUS went into effect on January 1, 2019.⁶ Major areas so amended are: (i) enhanced US access to the Korean automobile market⁷; (ii) improvement of procedures to verify countries of origin under the

¹ Office of the United States Trade Representative (USTR), US - Korea Free Trade Agreement, *available at* <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fla> (last visited on Mar. 16 2019).

² In many countries, the investment arbitration mechanism has become one of the most important issues in any BIT discussion and negotiation. *See* UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, Nov. 27-Dec. 1, 2017), U.N. Doc. A/CN.9/930/Add.1/Rev.1, 51st session (June 25-July 13, 2018). This mechanism began to draw global attention starting from late 1990s. *See* J. JACKSON, M. BRONCKERS & R. QUICK, *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: ESSAYS IN HONOUR OF JOHN H. JACKSON* 392-3 (2000).

³ The full text of the Korea-US FTA is *available at* <http://www.fta.go.kr/us/doc/1> (last visited on Mar. 16, 2019).

⁴ Since 2012, seven cases have been submitted for ISDS proceedings against the government of the Republic of Korea under various IIAs (as of Mar. 16 2019). Three of them are filed by the US investors under the KORUS. The three proceedings were all raised in 2018. They are *Elliott Associates, L.P. v. Republic of Korea*; *Mason Capital L.P. and Mason Management LLC v. Republic of Korea* (PCA Case No. 2018-55); and *Jin Hae Seo v. Republic of Korea*. *See* United Nations Conference on Trade and Development (“UNCTAD”), *Investment Dispute Navigator, Korea, Republic of – As Respondent*, *available at* <https://investmentpolicyhub.unctad.org/ISDS/CountryCases/111?partyRole=2> (last visited on Mar. 16, 2019).

⁵ USTR, *Statement on the Conclusion of US-Korea (KORUS) FTA Meetings in Seoul* (Jan. 2, 2018), *available at* <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/january/statement-conclusion-us-korea-korus-0>; For an overview of the renegotiation, *see* B. Williams et al., *US-South Korea (KORUS) FTA*, CRS REP.: IN FOCUS (Dec. 28, 2018), *available at* <https://fas.org/sgp/crs/row/IF10733.pdf> (last visited on Mar. 16, 2019).

⁶ Ministry of Trade, Industry and Energy, *Korea’s National Assembly Ratifies Revised KORUS FTA* (Dec. 7, 2018), *available at* http://english.motie.go.kr/en/pc/pressreleases/bbs/bbsView.do?bbs_cd_n=2&bbs_seq_n=685 (last visited on Mar. 16, 2019).

⁷ USTR, *Fact Sheet on US-Korea Free Trade Agreement Outcomes*, (Sept. 2018), *available at* <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2018/september/fact-sheet-us-korea-free-trade> (last visited on Mar. 16, 2019).

KORUS⁸; (iii) changes of Korea's pharmaceutical product pricing policies⁹; (iv) enhanced procedural due process in US trade remedy investigations against Korean exports¹⁰; and, most importantly, (v) updates of the investment chapter.¹¹

In terms of legal complexity and systemic implication, the fifth agenda—revision of the investment chapter—stood out from the pack. Year-long negotiations to amend the investment chapter received a significant amount of attention both in Korea and the US. There are two reasons for this heightened attention. First of all, ISDS reform has suddenly become a hot topic in the global community at present.¹² As such, how Korea and the US agree to amend their FTA investment chapter prompted keen attention from other countries trying to “test the water.” Secondly, because the investment chapter was the most controversial topic during the negotiation of the original KORUS in 2006–2007, how the chapter was to be amended this time naturally drew the attention of the watchers and the general public of the two countries.¹³

More than anything else, the on-going global discussion on the ISDS reform significantly affected the bilateral KORUS amendment negotiation. Both Korea and the US have been actively participating in the global ISDS reform discussion. Apparently, the two countries must have felt compelled to reflect recent developments in the amended KORUS investment chapter.¹⁴ This meant that the two countries also had to make a difficult decision as to which reform topic to include and which to leave out for now, since the level of consensus among the international community varies from topic to topic. As a result, only those issues with relatively clearer global support found their way into the amended KORUS investment chapter.

Newly added wordings and provisions have certainly modernized the original text of the investment chapter of the KORUS and clarified the meaning of some key provisions. They are: (i) clarification of the meaning of the Fair and Equitable

⁸ *Id.*

⁹ *Id.*

¹⁰ See Protocol between the Government of the Republic of Korea and the Government of the United States of America Amending the Free Trade Agreement between the Republic of Korea and the United States of America (Sept. 24, 2018), ¶ 3, available at <https://ustr.gov/sites/default/files/files/agreements/FTA/KORUS/KORUS%20Protocol%20Amending%20Agreement%20-%20Signed.pdf> (last visited on Mar. 16, 2019).

¹¹ *Id.* ¶ 4.

¹² See Chapter II of this article.

¹³ Kye-wan Cho, *Investor-state dispute system called “toxic provision” in KORUS FTA*, HANKYOREH DAILY, Dec. 18, 2017, available at http://english.hani.co.kr/arti/english_edition/e_business/824008.html. See also J. Schott, *Returning the KORUS FTA*, Peterson Institute for International Economics (July 10, 2017), available at <https://piie.com/blogs/trade-investment-policy-watch/retuning-korus-fta> (all last visited on Mar. 16, 2019).

¹⁴ For the amended text, see Protocol between the Government of the Republic of Korea and the Government of the United States of America Amending the Free Trade Agreement between the Republic of Korea and the United States of America, ¶ 4.

Treatment (“FET”) provision¹⁵; (ii) clarification of the meaning of the Most Favored Nation (“MFN”) treatment¹⁶; (iii) clarification of the meaning of the National Treatment (“NT”) ¹⁷; (iv) regulation of frivolous claims of investors¹⁸; and (v) suppression of parallel or multiple proceedings by related investors.¹⁹ Among these, items (i), (ii) and (iii) address substantive norms, while (iv) and (v) target ISDS proceedings in a way that protects host state governments in potentially ‘abusive’ ISDS proceedings. All in all, the items included in the amendment represent an evolution and development of international investment norms, both substantively and procedurally, so as to ensure a more balanced legal system codified in International Investment Agreements (“IIAs”).²⁰

That said, it seems that the amended KORUS still contains a critical loophole. Despite the addition of new provisions and further clarification, a ‘back door’ arguably still remains open for ‘multiple, subsequent or parallel’ ISDS proceedings to be initiated essentially by the same investor against the same measure. This article calls this situation a ‘derivative’ ISDS proceeding. The term “multiple, subsequent or parallel” proceedings is frequently used at the moment in the ISDS reform context, but it apparently covers a broad range of situations where simply a series of proceedings are constituted either simultaneously or consecutively against a host state government. It should be noted that some of these simultaneous or consecutive proceedings are permitted under the IIAs, mainly because of the fragmented nature of IIAs. Therefore, the problem here lies in the fundamental nature of IIAs’ fragmentation, with more than 3,300 IIAs globally. The cure for this problem is necessary and has been explored, but lies beyond the control of any one or two states. On the contrary, *certain* ‘multiple, subsequent or parallel’ proceedings arguably constitute abuse of process or illegitimate expansion of a treaty provision in a way that has not been envisaged by drafters or in a way that even goes against the basic design of the IIA at issue.

This research focuses on the latter category of multiple, subsequent or parallel proceedings. To distinguish the latter from the former, the term ‘derivative’ proceeding is used in this article to describe the latter situation. This term is chosen to convey the meaning that the simultaneous or consecutive proceedings are in fact ‘derived’ from the initial, original ISDS proceedings. It implies that the same (or related) investor

¹⁵ *Id.* ¶ 4(d).

¹⁶ *Id.* ¶ 4(a).

¹⁷ *Id.*

¹⁸ *Id.* ¶ 4(l).

¹⁹ *Id.* ¶ 4(i).

²⁰ The term IIAs refer to both Bilateral Investment Treaties (“BITs”) and investment chapters of FTAs.

constitutes yet another ISDS proceeding against the same (or virtually identical) governmental measure, in contravention of the original intent of the contracting parties. In short, the investor is attempting to have a second bite at the same apple.

To clarify, this is not the fault of the negotiators from Korea or the US. If anything, derivative proceedings have not been on the list of ISDS reforms in a clear manner. The current ISDS reform debates, while identifying many important concerns and suggesting alternatives to address those concerns, have apparently failed to address this very issue upfront. The current ISDS reform debates do include the topic of “cost and duration,” one of whose sub-categories relates to a situation of multiple, subsequent or parallel proceedings against the same governmental measure. Current discussion of “cost and duration,” however, does not include a situation where multiple, subsequent, or parallel proceedings are raised by essentially the same investor against essentially the same measure - a situation that is called “derivative” proceedings in this article. As such, broadly treated regulation of multiple proceedings may let this abusive tactic remain unregulated. The KORUS amended investment chapter showcases this phenomenon.

This article is composed of four parts including Introduction and Conclusion. Part II discusses derivative ISDS proceedings in the general architecture of the current ISDS reform discussions. Part III then looks into the provisions of the KORUS relating to this issue, followed by legal analyses of the provisions, where still remaining loopholes for and possibilities of derivative proceedings are explained.

2. Derivative ISDS Proceedings in the ISDS Reform Discussion

The present ISDS reform discussion in the global community was kick-started by the proposal of the European Union (“EU”) in September 2015.²¹ The EU proposal criticized the current IIAs and their ISDS system, which suggested a new scheme to overhaul change the present framework in a significant manner, including, most notably, including the creation of a new standing international court to resolve investment disputes.²²

²¹ C. Malmström, *Proposing an Investment Court System* (2015), available at http://ec.europa.eu/commission/2014-2019/malmstrom/blog/proposing-investment-court-system_en (last visited on Mar. 16, 2019).

²² See generally European Union, *Proposal for the Reform of the ISDS Mechanism for Working Group III Discussion* (Jan. 20, 2019), available at <http://www.uncitral.org>; European Commission, *Commission Proposes New Investment*

It is agreed that investment disputes tend to touch upon the issues of public concern. In the words of Cecilia Malmström, the EU Commissioner for Trade: “There is a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model. This has significantly affected the public’s acceptance of ISDS and of companies bringing such cases.”²³ The ISDS system’s ‘asymmetric structure,’ wherein only a foreign investor can initiate an action, is another source that further deepens public concern.²⁴ The concern is again amplified because it is an *ad hoc* arbitration, as opposed to an ordinary international adjudication, that is used to resolve these sensitive disputes.²⁵ Sometimes inconsistent and incorrect decisions,²⁶ a direct outcome of the fragmentation of international investment law and the absence of multilateral regime,²⁷ render the entire mechanism vulnerable to continuing criticism. In that respect, concerns over the ISDS mechanism are not just confined to capital importing developing countries, but have gradually expanded to capital exporting developed countries.²⁸

Against this backdrop, in late 2017, the United Nations Commission on International Trade Law (“UNCITRAL”) began a project to deliberate over possible ISDS reforms.²⁹

Court System for TTIP and Other EU Trade and Investment Negotiations, Press Release, Sept. 16, 2015, *available at* <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1364>; L. Woods, Fit for purposes? The EU’s Investment Court System (Mar. 23, 2016), Kluwer Arbitration Blog, *available at* <http://kluwerarbitrationblog.com/2016/03/23/to-be-decided> (all last visited on Mar. 16, 2019).

²³ Malmström, *supra* note 21.

²⁴ F. Garcia, Hyun Ju Cho, T. Santosuosso, R. Scarlett & R. Thrasher, The Case Against Third-Party Funding in ISDS: Executive Summary (Boston College Law School – PUC University of Chile, Working Group on Trade & Investment Law Reform, Third-Party Funding Task Force 2018), *available at* <https://lawdigitalcommons.bc.edu/lisfp/1126> (last visited on Mar. 16, 2019).

²⁵ For a different opinion, see M. Koskeniemi, *It’s not the Cases, It’s the System*, 18 J. WORLD INV. & TRADE 343-52 (2017).

²⁶ UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-fourth session (Vienna, Nov. 27-Dec. 1, 2017), U.N. Doc. A/CN.9/930/Add.1/Rev.1, 51st sess. (June 25-July 13, 2018), ¶¶ 26-30; Note by the Secretariat, Possible Reform of Investor-State Dispute Settlement (ISDS): Consistency and Related Matters (2018) (ISDS Reform Note), U.N. Doc. A/CN.9/WG.III/WP.150, ¶ 4. *Cf.* *SGS v. Pakistan Award* ¶ 170 (finding that the umbrella clause provision “was [not] meant to project a substantive obligation like those set out in Articles 3 to 7” of the Switzerland-Pakistan BIT) with Switzerland Note on Switzerland-Pakistan BIT (“the Swiss authorities are alarmed about the very narrow interpretation” of the applicable umbrella clause by the *SGS v. Pakistan* tribunal) and *SGS v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction (Jan. 29, 2004), ¶¶ 120 & 125 (reasons offered by *SGS v. Pakistan* tribunal in support of its “highly restrictive interpretation” of an umbrella clause provision were ‘unconvincing’).

²⁷ J. Pauwelyn, *At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System, How It Emerged And How It Can Be Reformed*, 29 ICSID REV. 372 (2014).

²⁸ L. Nottage, *Investor-State Arbitration Policy and Practice in Australia*, in *SECOND THOUGHTS: INVESTOR-STATE ARBITRATION BETWEEN DEVELOPED DEMOCRACIES* (A. de Mestral ed., 2017); Shotaro Hamamoto, *Recent Anti- ISDS Discourse in the Japanese Diet: A Dressed-Up But Glaring Hypocrisy*, 16 J. WORLD INV. & TRADE 931 (2015).

²⁹ UNCITRAL, 2017 to Present: Investor-State Dispute Settlement Reform (Working Group III Report), *available at*

While other fora such as the International Center for the Settlement of Investment Disputes (“ICSID”) and the Organisation of Economic Co-operation and Development (“OECD”) are also actively looking into the issue of ISDS reform, the UNCITRAL has been the most active and comprehensive venue for the discussion so far.

A. Identified Concerns and Suggested Course of Action

The UNCITRAL discussions have offered the states opportunities to register their concerns over the present ISDS mechanism and to propose various ideas to reform it. The discussions have been taking place at Working Group III, one of the six working groups of the UNCITRAL. States’ concerns as expressed during the UNCITRAL meetings are: (i) inconsistency in arbitral decisions; (ii) limited mechanisms to ensure the correctness of arbitral decisions; (iii) lack of predictability; (iv) appointment of arbitrators by parties; (v) the impact of party-appointment on the impartiality and independence of arbitrators; (vi) lack of transparency; and (vii) increasing duration and cost of the procedure.³⁰

The identified concerns and possible alternatives to address such the concerns are listed in the table attached as an annex to this article. As the discussions are still going on at the UNCITRAL as of this writing, it is still too early to offer definitive conclusions on these issues in the attached table. Nonetheless, the table offers an overview of the current concerns and emerging ideas to counter them.

Some issues in the attached table above relate to a structural flaw in the system. Other issues concern the perception of the general public toward the ISDS proceedings. Even if only perception is involved, it still matters. To borrow the famous words of a Chief Justice of the English Courts in this regard: “Justice should not only be done, but should manifestly and undoubtedly be seen to be done.”³¹ The statement applies to ISDS proceedings with equal force. Should justice not be seen to be done in the eyes of the general public, it is itself a problem.

Generally speaking, the current UNCITRAL discussion looks to a successful cousin in the international economic law, the World Trade Organization (“WTO”) and its dispute settlement body. Despite the surge of global protectionism and the lack of its leadership as the hub of multilateralism, the WTO is regarded as offering

http://www.uncitral.org/uncitral/en/commission/workinggroups/3Investor_State.html (last visited on Mar. 16, 2019). This initiative follows the publication of a paper by the UNCITRAL Secretariat. *See Possible Reform of Investor-State Dispute Settlement (ISDS)*, 34th sess. (Sept. 18, 2017), U.N. Doc. A/CN.9/WG.III/WP.142.

³⁰ UNCITRAL, *Possible future work in the field of dispute settlement: Reforms of investor-State dispute settlement (ISDS)*, U.N. Doc. A/CN.9/917, 50th sess. (July 3-21, 2017), ¶¶ 11-12.

³¹ Lord Chief Justice G. Hewart in *R v Sussex Justices, Ex Parte McCarty* [1924] 1KB 256.

a far more elaborated and systematic structure in terms of a global legal system. The WTO also tried to strike a balance between the two competing objectives: a government's right to regulate and treaty obligations.³² Regardless of the current setbacks of the WTO, the dispute settlement mechanism and the role of its Appellate Body may shed helpful light on the present discussion of ISDS reforms. As such, the WTO's experience, both good and bad, is being relied upon by countries for guidance in the ISDS reform discussion.

B. Cost and Duration

In practice, "cost and duration" is a real concern for states participating in ISDS proceedings. Strong consensus has been formed to introduce a new system where litigation costs can be reduced and the length of the proceedings shortened. "Cost and duration" gets more serious attention because ISDS disputes deal with sovereign states' authority to regulate.³³ Obviously, the problem of cost and duration raises a particular concern for developing states that have difficulty in defending themselves against foreign investors.³⁴

Firstly, litigation cost is a huge concern for a state.³⁵ A 2017 study illustrates the financial burden for parties participating in ISDS proceedings. According to the study, an average claimant-investor assumes a total litigation cost of USD 6,019,000, while an average respondent-state faces a total litigation cost of USD 4,855,000. In addition to these party costs, the organization and administration of an average arbitration tribunal requires additional cost of USD 933,000.³⁶ So, taken together, the total average cost for an ISDS proceeding stands at USD 11,807,000.³⁷ As a respondent state is supposed to take up a half of the tribunal cost, a state usually looks at a total spending of USD 5,321,500 on average, which is arguably a significant financial

³² M. Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36:1 U. PA. J. INT'L L. 1-87 (2014).

³³ A. Roberts, *Clash of paradigms: actors and analogies shaping the investment treaty system*, 107 AM. J. INT'L L. 45-94 & 58-63 (2013).

³⁴ D. Riesenber, *Fee Shifting In Investor-State Arbitration: Doctrine and Policy Justifying Application of the English Rule*, 60 DUKE L.J. 977-1013 (2011). See also UNCTAD, *Reform of Investor-State Dispute Settlement: In Search of a Roadmap*, International Investment Agreement Issues Note, No. 2 (June 2013), at 4.

³⁵ D. Gaukrodger & K. Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD Working Papers on International Investment 2012/03 at 19), available at file:///C:/Users/user/AppData/Local/Microsoft/Windows/INetCache/IE/4HUAGB07/WP-2012_3.pdf (last visited on Mar. 16, 2019).

³⁶ M. Hodgson & A. Campbell, *Damages and Costs in Investment Treaty Arbitration Revisited*, Allen & Overy (Dec. 14, 2017), available at http://www.allenoverly.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf (last visited on Mar. 16, 2019).

³⁷ *Id.*

burden for the state. Undeniably, the burden becomes more acute for a developing state. It should be also borne in mind that this is just the cost for one proceeding; in the case of multiple proceedings, the cost increases proportionately.

A surge of the cost has led to yet another new phenomenon of third-party funding, i.e., a financing method in which an outside private entity agrees to finance an ISDS proceeding for an investor in anticipation of remuneration once the investor prevails in the proceedings.³⁸ This funding scheme certainly helps destitute investors finance their ISDS litigation and ensure their access to justice.³⁹ At the same time, third party funding may also bring into question the very integrity of an ISDS proceeding by commercializing ISDS claims.⁴⁰

Secondly, duration of a case is also a major practical concern for a state. One recent study found that the average duration of ICSID ISDS proceedings is calculated as 3.75 years, or 1,370 days (with median of 1,266 days).⁴¹ For the UNCITRAL ISDS proceedings, the average duration stands at 3.96 years, or 1,446 days (with median of 1,246 days).⁴² In 2011, the Arbitration Institute of the Stockholm Chamber of Commerce (“SCC”) reported the average length of an investment case under its rules as 21 months.⁴³ The average four year duration for the ICSID and UNCITRAL proceedings, which take up a majority of ISDS proceedings, means that governmental agencies and officials of a respondent state should be involved in and follow up an ISDS proceeding for a lengthy period of time. This obviously causes a significant logistical burden for the state.

The issue of the increasing cost and duration should be put into perspective. That

³⁸ L. NIEUWVELD & V. SAHANI, *THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION* (1) (2d ed. 2017). See also D. Henriques, *Third-Party Funding: A Protected Investment?*, 30 *SPAIN ARB. REV.* 115 (2017).

³⁹ J. GOELER, *THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION AND ITS IMPACT ON PROCEDURE* 82-3 (2016); Henriques, *supra* note 38, at 127-8.

⁴⁰ M. Stoyanov & O. Owcarzek, *Third-Party Funding in International Arbitration: Is It Time for Some Soft Law Rules?*, 12 *BCDR INT’L ARB. REV.* 171 (2015). For details, see S. Seidel, *Third-Party Investing in International Arbitration Claims*, in *THIRD PARTY FUNDING IN INTERNATIONAL ARBITRATION* (ICC Publication No. 752E) (B. Cremades & A. Dimolitsa eds., 2013); N. Darwazeh & A. Leleu, *Disclosure and Security for Costs or How to Address Imbalances Created by Third Party Funding*, 33 *J. INV. ARB.* 127-9; Goeler, *supra* note 39, at 87-8; NIEUWVELD & SAHANI, *supra* note 38, at 16.

⁴¹ J. Commission, *How long is too long to wait for an award*, *GLOBAL ARB. REV.* (Feb. 18, 2016); *How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years*, *Kluwer Arbitration Blog* (Feb. 29, 2016); and *The Duration and Costs of ICSID and UNCITRAL Investment Treaty Arbitrations*, *Funding in Focus Report Three* (Vannin Capital, July 2016), available at <https://www.vannin.com/downloads/funding-in-focus-three.pdf> (last visited on Mar. 16, 2019). The study is based on an analysis of 138 ICSD arbitration between 2011 and 2015.

⁴² *Id.*

⁴³ SCC Statistics (2011), at 4, available at <https://sccinstitute.com/statistics/statistics-2008-2016> (last visited on Mar. 16, 2019).

is, the entire caseload continues to expand.⁴⁴ The number of known treaty-based ISDS disputes reached 855 by the end of 2017 including 65 cases initiated in that year.⁴⁵ In total as many as 109 states out of the 193 UN members have been drawn to the proceedings as respondents so far. In this context, ‘multiple, subsequent or parallel’ ISDS proceedings are causing a serious concern for states. The workload and financial burden would simply multiply if a state had to defend itself in many litigation proceedings at the same time or in sequence. It is true that multiple proceedings are sometimes inevitable because of the fragmented nature of the international investment law composed of more than 3,300 IIAs globally. Granted, many different investors could initiate multiple ISDS proceedings against the same host state government for the same government measure based on their respective IIAs. Likewise, it is legally and logistically possible for an investor to initiate multiple ISDS proceedings under multiple IIAs simultaneously against the same governmental measure of a respondent state, unless there is a provision explicitly prohibiting such a scheme. Not surprisingly, the respondent state would face a higher burden and increased pressure in a multiple proceeding scenario than an ordinary, single-case ISDS scenario. Financial and logistical burden would increase substantially in such circumstances. Therefore, it is critical to contemplate and introduce a system where the number of (unnecessary or illegitimate) disputes can be regulated or suppressed.

As “cost and duration” is one of the main concerns of the states as regards the ISDS system,⁴⁶ it is critical that future IIAs contain provisions that can help reduce the cost and duration of the proceedings. Many options are being contemplated in this regard. Early dismissal of frivolous claims, consolidation of related claims, creation of a legal advisory center, awarding legal fees and expenses for successful host states, and restriction of multiple, subsequent or parallel proceedings are such examples. These are vehicles that can help drive down the overall cost and duration of litigation from the perspective of a host state.⁴⁷ Some of these suggestions are now being accepted and implemented in recent IIAs.⁴⁸

⁴⁴ Roberts, *supra* note 33, at 76 (2013).

⁴⁵ UNCTAD, Investment Dispute Settlement Navigator, available at <http://investmentpolicyhub.unctad.org/ISDS> (last visited on Mar. 16, 2019).

⁴⁶ UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), U.N. Doc. A/CN.9/WG.III/WP.149, 37th sess. (Sept. 5, 2018), at 4.

⁴⁷ It should be noted that “cost and duration” is also an important consideration factor for an investor. Claimant investors usually purport to reduce the overall time for a proceeding by opposing ‘bifurcation’ so as to expedite the proceeding. They also consider finding sources of financing from third party funding mechanisms that reduce their financial burden during the proceeding.

⁴⁸ See, e.g., KORUS (Amended) art. 11.20.8, 11.25 & 11.26.2.

Thus, addressing multiple, subsequent or parallel ISDS proceedings is an important challenge for states within the context of “cost and duration.” Identifying and regulating such circumstances have become one of the key topics in the ISDS reform discussion and IIA negotiations at the moment. The original KORUS⁴⁹ and the amended KORUS⁵⁰ contain provisions to that effect as well. These provisions in KORUS and other IIAs help regulate multiple, subsequent or parallel proceedings. But, critically, they fail to fully identify and regulate the situation of ‘derivative’ proceedings.

C. Derivative Proceedings

The current discussions at the UNCITRAL regards the issue of “cost and duration” as one of the core items of the ISDS reform, in which the regulation of multiple, subsequent or parallel proceedings constitutes a key sub-item. Multiple, subsequent or parallel proceedings are not taking up the bulk of the ISDS proceedings yet, but they are turning out to be a real threat for a respondent state. *Ampal-American and others v. Egypt*⁵¹ offers an example in this regard, where four parallel ISDS proceedings went ahead with essentially the same factual matrix, the same witnesses and identical claims. The current intensity and frequency of ISDS proceedings highly indicate the likelihood of similar occurrences in the future. So, the approach taken in the current ISDS reform discussion is all the more appropriate.

In the present discussion, however, what is omitted is a situation where an investor purports to abuse the process, by repeating or duplicating ISDS proceedings against the same governmental measure.⁵² Increasingly, states are faced with such proceedings. Consider *CME Czech Republic (The Netherlands) B.V. v. Czech Republic*⁵³ and *Lauder v. Czech Republic*,⁵⁴ where the two cases had essentially the same facts: the latter involving Lauder himself submitting a claim to arbitration against the Czech Republic under the US-Czech Republic BIT, while the former involved

⁴⁹ *Id.* art. 11.18.2.

⁵⁰ *Id.*

⁵¹ *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, EGI-Series Investments LLC, BSS-EMG Investors LLC and, BSS-EMG Investors LLC and David Fischer v. Arab Republic of Egypt* (ICSID Case No. ARB/12/11), Division on Jurisdiction (Feb. 1, 2016), available at <https://www.italaw.com/cases/1926> (last visited on Mar. 16, 2019); UNCTAD, *Investor-State Dispute Settlements: Review of Developments in 2016*, International Investment Agreements Issues Note (May 2017), at 10.

⁵² UNCITRAL, *Possible reform of investor-State dispute settlement (ISDS)*, U.N. Doc. A/CN.9/WG.III/WP.149, 37th session (Oct. 29 - Nov. 2, 2018).

⁵³ UNCITRAL, *Award* (Mar. 14, 2003), available at <https://www.italaw.com/cases/281> (last visited on Mar. 16, 2019).

⁵⁴ *Id.* (Sept. 3, 2001).

Lauder's Dutch subsidiary submitting a claim to arbitration under the Netherlands-Czech Republic BIT. Similar undertakings also took place in *Orascom v. Algeria*.⁵⁵ They involve essentially the same investor against the same governmental measure. Although in a slightly different context, advance planning of ISDS proceedings using subsidiaries or affiliated entities located in multiple jurisdictions was also observed, and in fact presented as a contentious issue in *Philip Morris v. Australia*,⁵⁶ *Phoenix Action Ltd v Czech Republic*,⁵⁷ *Pac Rim v El Salvador*,⁵⁸ and *Aguas del Tunari v. Bolivia*.⁵⁹ Critics pinpoint the problem,⁶⁰ with structural advantages for multinational corporations being underscored.⁶¹

If the IIAs at issue do not contain provisions to prohibit these options and planning, it would be hard to close the avenue. On the other hand, if there is a provision in an IIA to that effect (i.e., to close such an avenue) and yet the provision is not tight or clear enough to prevent an investor from utilizing such a loophole, which would be a different story. The UNCITRAL discussions, and others for that matter, have not yet identified or taken up this issue, it would leave the host states in a vulnerable situation even with a (loosely worded) provision regulating multiple, subsequent or parallel proceedings. This problem has not received adequate attention yet. The reason may be that the discussion on "cost and duration" still remains in the early stage, so that states have not had time to contemplate all aspects of the issue.

The original and amended KORUS include provisions to identify and regulate

⁵⁵ *Orascom TMT Investments S.a.r.l. v. People's Democratic Republic of Algeria* (ICSID Case No. ARB/12/35), Award, May 31, 2017, available at <https://www.italaw.com/cases/2040> (last visited on Mar. 16, 2019); UNCTAD, "Investor-State Dispute Settlement: Review of Developments in 2017," International Investment Agreements Issues Note (June 2018), at 11 (discussing three arbitrations under different investment treaties by different companies controlled by the same shareholder).

⁵⁶ *Philip Morris Asia Limited v. The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12, available at <https://www.italaw.com/cases/851> (last visited on Mar. 16, 2019).

⁵⁷ *Phoenix Action, Ltd v Czech Republic*, ICSID Case No. ARB/06/5, Award (Apr. 15 2009), available at <https://www.italaw.com/cases/850> (last visited on Mar. 16, 2019).

⁵⁸ *Pac Rim Cayman LLC, v Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections (June 1, 2012), available at <https://www.italaw.com/cases/783> (last visited on Mar. 16, 2019).

⁵⁹ *Agua del Tunari, S.A. v. Republic of Bolivia*, ICSID Case No. ARB/02/3, available at <https://www.italaw.com/cases/57> (last visited on Mar. 16, 2019).

⁶⁰ H. Wehland, *The Regulation of Parallel Proceedings in Investor-State Disputes*, 31:3 ICSID REV. 579-580 (2016). See also M. Valasek & P. Dumberry, *Development in the Legal Standing of Stockholders and Holding Corporations*, 26 ICSID REV.-FOREIGN INV. L. J. 60-1 (2011).

⁶¹ J. Maupin, *Public and Private in International Investment Law: An Integrated Systems Approach*, 54 VA. J. INT'L L. 380 (2014). See also S. Puig, *The Merging of International Trade and Investment Law*, BERKELEY J. INT'L L. 36-8 (2015); J. Klett, *National Interest vs. Foreign Investment – Protecting Parties through ISDS*, 25 TULANE J. INT'L COMP. L. 228-9 (2016).

such multiple, subsequent or parallel proceedings by the same investor against the same government measure. In other words, derivative proceedings are marked up in the bilateral FTA. This is a reflection of the intention of the contracting parties to regulate such derivative proceedings. In that respect, the KORUS sets forth an updated version of text in this area. That said, however, the wording of the provisions of the KORUS still leaves open a possibility for an investor to still attempt to circumvent the provisions and pursue derivative proceedings. Clearer provisions and tighter regulation would have closed out this back-door avenue, as intended by negotiators of the two countries.

3. KORUS Provisions and Legal Issues

Prompted by the increasing concerns over the ISDS mechanism proceedings generally and the possibility of multiple, subsequent or parallel proceedings specifically, the KORUS contains provisions to address the problems. The original KORUS included provisions for this purpose, while the 2018 amended KORUS introduced further stipulation in that regard. The fortification notwithstanding, an avenue for derivative proceedings still remains unclosed.

A. Provisions in the Original KORUS

Multiple, subsequent or parallel proceedings were a major source of concern early on in the context of the KORUS. As such, the original KORUS investment chapter contained various provisions to address the problem. For instance, the KORUS contains a standard consolidation clause in Article 11.25.⁶² This is a legal wherewithal to collapse concurrent ISDS proceedings where common legal and/or factual issues are involved.⁶³ Obviously, a respondent state stands to benefit from such streamlined and converged proceedings in terms of efficiency and simplicity. These concurrent

⁶² The article provides, in pertinent part, the following:

Article 11.25: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 11.16.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties...

3. Unless the Secretary-General finds within 30 days after receiving a request ...that the request is manifestly unfounded, a tribunal shall be established under this Article.

⁶³ *Id.*

ISDS proceedings being contemplated in consolidation provisions, however, involve *different* investors against the same or similar government measures of a host state. In other words, it covers ‘multiple’ proceedings but not ‘derivative’ proceedings. [Emphasis added]

Likewise, the imposition of time limits within which to bring ISDS claims is another way to address the problem of multiple, subsequent or parallel proceedings. Article 11.18 of the KORUS stipulates this scheme.⁶⁴ Under the provision, a claim should be brought to an ISDS proceeding within three years from an investor’s knowledge of violation.⁶⁵ Multiple, subsequent or parallel proceedings will be suppressed to some extent due to this *de facto* statute of limitation.

A coordination provision also helps address the problem.⁶⁶ This is a provision which recommends that plural arbitration tribunals covering related issues coordinate among themselves. The KORUS also has a provisions to this effect in Articles 11.25.6 and 11.25.10. Albeit indirectly, these provisions also help states respond to multiple proceedings arising from the same events or occurrences. They foster efficiency of the related proceedings and deter potential abuse of process by investor-claimants.

Most notably, the original KORUS introduced a provision that stipulates a “fork in the road” in an ISDS proceeding. This provision was introduced during the original negotiation period of 2006-2007 as one of the critical safeguards for a host state’s government attempting to avoid or reduce multiple proceedings.⁶⁷ More specifically, Article 11.18 of the KORUS provides that a ‘waiver’ of other legal proceedings should be given by a claimant as a specific ‘condition’ to submit any claim to an ISDS proceeding under the agreement. Article 11.18 (Conditions and Limitations on Consent of Each Party) provides in pertinent part:

⁶⁴ The article provides:

Article 11.18: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 11.16.1 and knowledge that the claimant (for claims brought under Article 11.16.1(a)) or the enterprise (for claims brought under Article 11.16.1(b)) has incurred loss or damage

⁶⁵ *Id.*

⁶⁶ The EU-Vietnam FTA contains an interesting provision addressing the coordination between the settlement of an investor-State dispute under the permanent tribunal and a concurrent submission of a claim to State-to-State dispute settlement. *See* EU-Vietnam FTA art. 8.8 (providing that where claims “concerning the same treatment” are brought before the two fora, a division of the tribunal constituted to hear the investor-State dispute shall “take into account proceedings pursuant to [the FTA’s section on State-to-State settlement]” and “[t]o this end, it may also, if it considers necessary, stay its proceedings”).

⁶⁷ Hi-Taek Shin & Liz (Kyo-Hwa) Chung, *Korea’s Experience with International Investment Agreements and Investor-State Dispute Settlement*, 16 J. WORLD INV. & TRADE 976 (2015).

[...]

2. No claim may be submitted to arbitration under this Section unless: (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 11.16.1(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 11.16.1(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of either Party, *or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.*

[...] [Emphasis added]

Article 11.18 dictates that a claimant make a choice at the time of the initiation of an ISDS proceeding, between a the domestic court or tribunal of a host state and an ISDS path.⁶⁸ Once a decision is made, the investor cannot move backwards or change its decision. At the same time, the claimant-investor also promises to forego its right to proceed to “other dispute settlement procedures ... with respect to [the] measure” being alleged to be in violation under Article 11.16.⁶⁹ The term “other dispute settlement procedures” here plausibly includes other ISDS proceedings. In short, a foreign investor is precluded to proceed to any other ISDS proceeding once s/he initiates one under the KORUS. Thus, a strong “fork in the road” is stipulated in this provision. It should be noted, however, that the operating terms here are ‘investor’ and ‘measure.’ In other words, this waiver or attached condition applies to the same investor against the same measure. Assuming (either technically or legally) different investors come in against different measures, the strong “fork in the road” provision above may not be able to achieve its basic objective, even if the investors or the measures are to be regarded as virtually the same.

B. Provisions in the Amended KORUS

The 2018 amended KORUS makes a new attempt to further tighten the loose end of provisions relating to multiple, subsequent or parallel proceedings. Finally noting that, despite all the safeguards in the KORUS, *affiliated* entities are still able to file multiple, subsequent or parallel proceedings after an ISDS proceeding is initiated by a covered investor, Korea and the US agreed to include a new provision in the

⁶⁸ KORUS art 11.18, ¶ 2.

⁶⁹ *Id.*

agreement. [Emphasis added] Article 11.18.4 of the KORUS thus provides:

4. (a) An investor of a Party may not initiate or continue a claim under this Section if a claim involving *the same measure or measures* alleged to constitute a breach under Article 11.16 and *arising from the same events or circumstances* is initiated or continued pursuant to an agreement between the respondent and a non-Party by:
- (i) a person of a non-Party that owns or controls, directly or indirectly, the investor of a Party; or
 - (ii) a person of a non-Party that is owned or controlled, directly or indirectly, by the investor of a Party.
- (b) Notwithstanding subparagraph (a), the claim may proceed if the respondent agrees that the claim may proceed, or if the investor of a Party and the person of a non-Party agree to consolidate the claims under the respective agreements before a tribunal constituted under this Section. [Emphasis added]

The entire provision above is a new addition from the 2018 amendment. Basically, this provision prohibits a covered investor from resorting to an ISDS proceeding under the KORUS if one of its affiliated entities has initiated an ISDS proceeding under a different IIA or if such an ISDS proceeding remains pending. This provision has been touted as one of the critical updates of the amendment.⁷⁰ Indeed, this provision is supposed to fill a crucial loophole concerning derivative proceedings. Advance or subsequent planning using subsidiaries or affiliated entities is now to be regulated. On its surface, this provision offers a strong regulation. If an ISDS proceeding is ever initiated or continued under any other IIA, a Korean or an American investor may not initiate or continue an ISDS proceeding under the KORUS. In other words, a prior or subsequent initiation under other IIAs during the pendency of an ISDS proceeding under KORUS will lead to the termination of the KORUS ISDS proceeding due to the lack of jurisdiction by the KORUS ISDS tribunal.

This is an important addition. By way of comparison, this provision is not found in the Agreement between the United States of America, the United Mexican States, and Canada (“USMCA”), a successor to the North American Free Trade Agreement (“NAFTA”), signed by the three countries on November 30, 2018,⁷¹ although it was negotiated by the US roughly within the same timeframe with KORUS.⁷² The

⁷⁰ J. Schott & Euijin Jung, *KORUS Amendments: Minor Adjustments Fixed What Trump Called “Horrible Trade Deal,”* PIIIE POL’Y BRIEF 5 (Nov. 2018), available at <https://piie.com/publications/policy-briefs/korus-amendments-minor-adjustments-fixed-what-trump-called-horrible-trade> (last visited on Mar. 16, 2019).

⁷¹ The full text of the USMCA is available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> (last visited on Mar. 16, 2019).

⁷² USMCA, ch. 22.

above provision is an important stride in the right direction. And yet, this provision is still premised on the assumption of the existence of “the same measure” and of the identification of ‘control,’ subjects that arguably lend themselves to different meanings and interpretations.

C. Legal Issues relating to Derivative Proceedings

In essence, paragraphs 2 and 4 of Article 11.18 of the KORUS, taken together, set forth detailed rules to regulate and avoid derivative proceedings where an investor purports to have a second or third bite at the same apple through the ISDS mechanism. With a provision in the original investment chapter⁷³ and another one added in the 2018 amendment,⁷⁴ there seems to be an (erroneous and complacent) understanding that the current scheme restricting parallel proceedings is enough to counter identified problems of derivative proceedings. In fact, the two provisions of Article 11.18 still contain critical ambiguities.

Both provisions aim to identify and deter derivative proceedings by prohibiting the same investor claimant from pursuing duplicate ISDS proceedings for the same governmental measure. This scheme, however, is likely to be defeated because the current text of KORUS, along with most other IIAs for that matter, does not clearly circumscribe the meaning of (i) entities affiliated with an investor and (ii) challengeable governmental measures. Ambiguities left unattended have arguably opened a loophole of which an investor could attempt to take advantage. In other words, in essence, even under the amended KORUS an investor can essentially initiate derivative proceedings against the same measure, by either wearing the cloak of an ostensibly different investor, or coming up with a different measure through adjusting the scope of what is essentially the same government measure. To the extent that avoiding derivative proceedings is of the utmost concern for a respondent state under the KORUS, it is imperative that these loopholes be filled appropriately through future clarification.

1. The Amorphous Concept of a ‘Measure’

Both paragraphs 2 and 4 of Article 11.18 are based on an assumption that the same measure is implicated. The term used in paragraph 2, sub-paragraph (b), item (ii) of Article 11.18 reads “with respect to any measure alleged to constitute a breach referred

⁷³ KORUS art. 11.18, ¶ 2.

⁷⁴ *Id.* art. 11.18, ¶ 4.

to in Article 11.16.”⁷⁵ In contemplation, “measure ... referred to in Article 11.16” here means the measure being challenged under the present ISDS proceeding. In other words, what is being waived by an investor in accordance with paragraph 2 is the right to litigate a case regarding the same measure that is now being brought to the present ISDS proceeding. Future proceedings against the ‘same measure’ is then forfeited by dint of the waiver. Thus, if a measure to be challenged in future ISDS proceedings is not the same as the one being challenged at present, the foreign investor is still arguably free to initiate and continue the challenge through a prospective ISDS proceeding in the future. Given the fact that a governmental ‘measure’ is broadly defined, covering both action and inaction of a government agency that affects the interest of a foreign investor,⁷⁶ an investor may try to break down a dispute into different measures through planning in advance.⁷⁷ One batch of a dispute can be raised first in an ISDS proceeding, and afterwards a remaining batch can be taken to another ISDS proceeding either simultaneously or successively. This would defeat the very objective of paragraph 2 of Article 11.18. Stated differently, the perception that there will always be a single measure in the entire universe of a particular investment dispute is not always accurate. It may be too naive an assumption.

Suppose that a dispute between an investor and a host government contains three different governmental measures such as tax, licensing, and environmental regulation adopted roughly around the same time when the relationship between the investor and the government went sour. Suppose, furthermore, that a foreign investor has raised two measures in an investment dispute with respect to the dispute at issue at an ISDS proceeding. If the investor raises a remaining third measure for the first time in a separate, future ISDS proceeding, either concurrently or subsequently, should it be considered the ‘same measure’ within the meaning of paragraphs 2 and 4 (in which case such an attempt will be rejected by a tribunal) or a different measure? In other words, even if the underlying circumstances leading to the dispute are the same it is still possible that different sets of measures exist or co-exist. Current provisions in Article 11.18 are not detailed and sufficient enough to deal with these delicate situations. If so, the purported objective of identifying and rejecting derivative proceedings may not be realized as easily as is intended by the drafters.

More importantly, derivative proceeding provisions are distinct from consolidation

⁷⁵ *Id.* art. 11.18, ¶ 2(b)(ii).

⁷⁶ L. Johnson, L. Sachs & J. Sachs, *Investor-State Dispute Settlement, Public Interest and US Domestic Law*, CCSI Policy Paper (May 2015), at 2, available at <http://ccsi.columbia.edu/files/2015/05/Investor-State-Dispute-Settlement-Public-Interest-and-US-Domestic-Law-FINAL-May-19-8.pdf> (last visited on Mar. 16, 2019).

⁷⁷ In the KORUS Investment Chapter, no provision stipulates that entire measures involving the same investor at issue arising from the same circumstances should be brought to an ISDS proceeding in a single stroke.

provisions. Indeed, consolidation provisions also play an important role in ISDS proceedings, but they serve different purposes. They purport to address a situation where *bona fide* different investors are challenging the same government measure.⁷⁸ Examples would include regulatory measures affecting a number of different investors at the same time. As the challenged measure is the same, efficiency would dictate related cases be consolidated and reviewed together.⁷⁹ Again, the critical element here is the existence of different investors.⁸⁰ These different investors are entitled, in the first place, to pursue their own respective ISDS proceedings under applicable IIAs.⁸¹ At the request of parties, related proceedings can be consolidated to be reviewed by a single arbitral tribunal.⁸² This is merely an attempt to enhance efficiency and facilitate simultaneous resolution of a dispute.⁸³

On the other hand, derivative proceedings imply abuse of process. They envisage a situation where essentially the same investor challenges the same governmental measure twice or three times.⁸⁴ If the basic underlying idea is for an investor to have a single bite at the apple, such proceedings would render the idea futile. Doing so would almost constitute an illegitimate circumvention of the related provisions. The problem of the current IIAs is that various ‘multiple, subsequent or parallel proceeding’ provisions are not formulated so as to achieve the intended objectives, which is, at least, to identify and eliminate ‘derivative’ proceedings. As much as derivative proceeding provisions aim to deal with abuse of process, they stand to be distinguished from consolidation provisions which is mainly about efficiency. In short, consolidation provisions would not be able to address the problem of derivative proceedings either.

2. The Indeterminate Nature of ‘Control’

In the same vein, the newly added provision includes the critical term ‘control’ in determining the existence of the same investor.⁸⁵ Article 11.18, paragraph 4 stipulates “control or ownership” to assess the closeness or proximity of affiliation between the

⁷⁸ KORUS art. 11.25

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ See generally G. Kaufmann-Kohler, L. Chazournes, V. Bonnin & M. Mbengue, *Consolidation of Proceedings in Investment Arbitration: How can Multiple Proceedings Arising from the Same or Related Situations be Handled Efficiently*, 21 ICSID REV. - FOREIGN INV. L. J. 59-125 (2016).

⁸⁴ KORUS art. 11.18, ¶ 4.

⁸⁵ *Id.*

investor in a prior ISDS proceeding and the one in a subsequent ISDS proceeding.⁸⁶ Between the two, the term ‘ownership’ is relatively easy to determine: the ownership or holdings by an investor *vis-à-vis* the other can be objectively investigated and confirmed. But the term ‘control’ is arguably more malleable and flexible, requiring a case-by-case examination taking into account the totality of circumstances. The existence or the absence of control is a contentious source of disputes in many international litigation. Mere reference to control could thus invite controversies and ensuing disputes in the actual application.

Critically, it does not seem clear what ‘control’ means for the purpose of this provision. Multinational corporations own shares in various entities globally in various forms and quantities. They maintain a variety of arrangements for joint ventures and common undertakings. Identifying control from these webs of networks would be a difficult, if not entirely impossible, task. Given the importance of this provision, it is noteworthy that a definition or explanation of control is absent in the provision or in the chapter. Depending upon how control is understood, the scope of the new provision could oscillate between any two points widely apart probably a source of another concern and dispute.

3. Suggestions for Future Clarification

In retrospect, clearer wording should have been adopted in both the negotiations of the original KORUS and the recently amended one. For instance, at the end of paragraph 2 of Article 11.18, now ending with “breach referred to in Article 11.16,” the following wording could be inserted right after “in Article 11.16” in order to clarify: “whether or not it is raised in the present proceeding to the extent it arises from the same dispute under the totality of circumstances.” Arguably, the new addition would make clear that any measure, whether it is being raised in the present ISDS proceeding or saved, knowingly or unknowingly, for future proceedings, is to be precluded from any future ISDS proceeding if the measure is considered to be part of the universe of the dispute that has triggered the investment dispute in the first place. The absence of such clarification in the present text has apparently left the door open for an investor to pursue derivative proceedings in the future.

Likewise, the newly added paragraph 4 contains a similar problem. Certainly, paragraph 4 is an advance on paragraph 2 and contains the wording: “a claim involving the same measure or measures alleged to constitute a breach under Article 11.16 *and* arising from the same events or circumstances.” [Emphasis added] So,

⁸⁶ *Id.*

presumably, a more tightened approach is being taken here since not only the same measure, but also the same events or circumstances are attached as a condition. The meaning of these “same events or circumstances,” however, is not entirely clear. It is possible that a measure or measures stemming from the same events or circumstances have led to a ‘dispute’ between the investor and the host state. It is also possible, however, that a measure or measures stemming from many different events or circumstances have led to a dispute at hand. A more proper wording, therefore, would be “dispute” as opposed to “event” or “circumstance.” In light of this, a more accurate and safer insertion would read, to be added right after “under Article 11.16” of the present text, “to the extent it arises from the same dispute under the totality of circumstances, whether or not it is raised in the present proceeding.”

As can be seen in other agreements, more detailed guidelines would be necessary for the proper and effective application of the provisions in the future. By way of reference, similar attempts have been made in the renamed Comprehensive and Progressive Agreement for Trans-Pacific Partnership (“CPTPP”),⁸⁷ which entered into force on December 30, 2018, and USMCA although in a slightly different context.⁸⁸ The two agreements, while defining a State-Owned Enterprise (“SOEs”) as “an enterprise that is principally engaged in commercial activities” and “is owned or controlled by the state,” provides more detailed legal guidelines to determine “control”⁸⁹ in the context of free trade agreements. Those attempts and resulting implications can be borrowed for future clarification and elaboration of the above provisions in the KORUS.

These clarifications and elaborations do not necessarily require a further amendment

⁸⁷ See Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), New Zealand Foreign Affairs & Trade Ministry, available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/cptpp-2/>; *Who Needs America?*, ECONOMIST, Nov. 16, 2017, available at <https://www.economist.com/news/finance-and-economics/21731428-eleven-countries-resurrect-trans-pacific-partnership-who-needs-america>; S. Donnan, *Long Live the TPP-Pacific Trade Pact Survives Largely Intact*, FIN. TIMES, Nov. 14, 2017, available at <https://www.ft.com/content/c5cdd3aa-c82d-11e7-ab18-7a9fb7d6163e>; A. Mulgan, *Japan’s Rush to Conclude TPP-II*, DIPLOMAT, Nov. 14, 2017, available at <https://thediplomat.com/2017/11/japans-rush-to-conclude-tpp-11> (all last visited on Mar. 16, 2019).

⁸⁸ USTR, United States-Mexico-Canada Agreement, available at <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement>; J. Frankel, *Trump Hasn’t Improved on NAFTA – But at Least He Hasn’t Blown up Trade*, GUARDIAN, Oct. 9, 2018, available at <https://www.theguardian.com/business/2018/oct/09/donald-trump-nafta-trade-usmca> (all last visited on Mar. 16, 2019).

⁸⁹ CPTPP art. 17.1. It provides:

For the purposes of this Chapter: ... state-owned enterprise means an enterprise that is principally engaged in commercial activities in which a Party: (a) directly owns more than 50 per cent of the share capital; (b) controls, through ownership interests, the exercise of more than 50 per cent of the voting rights; or (c) holds the power to appoint a majority of members of the board of directors or any other equivalent management body.

USMCA contains essentially the same provision in Article 22.1.

of the Agreement. The KORUS establishes a Joint Committee in accordance with Article 22.2, which is co-chaired by the USTR and the Minister for Trade of Korea.⁹⁰ Critically, the Joint Committee is authorized to issue an interpretation of the provisions in the investment chapter that will ‘bind’ reviewing investment tribunals.⁹¹ Thus, if and when the two countries agree, the Joint Committee is able to issue an interpretation of related provisions of the KORUS so as to identify and deter derivative proceedings. Indeed, a missing part cannot be newly created because ‘creation’ this is not an area of ‘interpretation.’ However, vague terms can be clarified and loose wording can be elaborated, a situation which would arguably fall under the realm of interpretation, which may help address the prospective problem of derivative proceedings.

4. Conclusion

The 2018 amendment of the KORUS is a hybrid outcome of many different factors. Needless to say, the Trump Administration’s unilateralism on the trade front played an important role. It is also unusual, though not entirely unprecedented, for a treaty just five years old to be subject to an amendment negotiation. The overall score sheet is evaluated as largely reflecting the concerns and interests of the US, most notably with respect to the contentious auto trade.

That said, the amendment has made an important stride in the investment chapter of the KORUS. The two countries made efforts to incorporate new developments in the international community regarding the reform of the ISDS mechanism. The amendment introduced several components where strong global consensus has been confirmed thus far. The best example is a new provision to regulate multiple, subsequent or parallel ISDS proceedings involving the same measure of a respondent state. Such a phenomenon arises in the case of multinational corporations that have a plethora of IIA choices due to a number of subsidiaries and affiliated entities in many different countries. These multiple, subsequent or parallel proceedings exert a significant legal and logistical burden on a respondent state that is forced to defend a

⁹⁰ KORUS art. 22.2, ¶ 1.

⁹¹ *Id.* art. 11.22.3. It provides:

3. A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 22.2.3(d) (Joint Committee) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

series of proceedings simultaneously or consecutively. This realization has prompted the global community to include this topic as one of the key items in the currently ongoing ISDS reform discussion. The 2018 KORUS amendment incorporated this very issue in the investment chapter, which is regarded as an important update for the chapter.

At the same time, the new provisions in the chapter contain inherent limitations. They do not fully address a situation where different measures arising from the same dispute are involved. Given that the definition of a governmental measure is quite broad and flexible, a measure can be broken down into sub-measures or plural measures can be collapsed into a mega-measure, even if they are emanating from the same dispute between an investor and a host state. This means that the new provisions will not be able to fully prevent multiple, subsequent or parallel proceedings, arguably falling under an umbrella of the same dispute, from taking place. As a matter of fact, more detailed wording and elaborations would have been needed to achieve the intended objective of the drafters. Future tribunals may attempt to interpret the provisions in a tighter fashion, but there is no guarantee at this point. If anything, future Joint Committee decisions or additional amendment, when proper opportunities arise, will be able to face with the problem and to find a solution.

Likewise, the new introduction does not touch upon a more fundamental issue. Forum shopping creates a lopsided playing field in favor of investor claimants. Forum shopping does not take place just within the IIAs. It also takes place horizontally, crisscrossing the boundary of international investment law, international trade law and possibly other sectors of public international law. Once a decision to choose an ISDS proceeding is made, it should foreclose other avenues to proceed to dispute settlement proceedings under other branches of international law. This part is not yet clear under either the current IIAs or the amended KORUS. It all depends upon how the term “measure” or “dispute” is understood or interpreted.

As the current global discussion has the potential to bring a significant change to the current ISDS regime, it is not unthinkable that the two countries will have to meet again to incorporate further updates into the KORUS investment chapter in several years' time. In addition, Korea and the US will face amendments of other IIAs once the future course of the ISDS regime is mapped out as a result of the current discussion in various forums of the global community. These opportunities and experiences will enable Korea and the US to consider inserting new forms of wording and clarifying existing ones in the KORUS to address the increasingly contentious issue of multiple, subsequent or parallel ISDS proceedings.

Annex: ISDS Reform: Concerns, Options and Impacts⁹²

Reform Options for Various Concerns	Possible Implications on the System
Common Concern: Inconsistency and Lack of Predictability	
Option: enhancing states' control over IIAs	<ul style="list-style-type: none"> ■ Introduces new mechanisms for IIA interpretation ■ Strengthens and generalizes existing mechanisms for IIA interpretation
Option: strengthening state-state framework	<ul style="list-style-type: none"> ■ Strengthens the role of states regarding their own IIAs ■ Develops pre-dispute consultation mechanism between states
Option: appellate mechanism to review awards and decisions of arbitral tribunals or investment courts	<ul style="list-style-type: none"> ■ Introduces an appellate review mechanism(s): either a stand-alone appellate body or respective appellate mechanisms for IIAs ■ Affects provisions in ICSID Convention & New York Convention
Option: international investment court	<ul style="list-style-type: none"> ■ Needs to consider specifics such as functioning, composition, instruments, funding and judge selection of a new court ■ Needs to consider co-existence with the present ISDS regime or regional investment courts
Option: guidance to arbitral tribunals for such issues as consolidation, information exchange, stay of proceedings, preliminary rulings, etc.	<ul style="list-style-type: none"> ■ Develops new legal standards and includes them in IIAs ■ Addresses abuse of process, judicial economy, and cost ■ Affects arbitral institutions, their rules, practices and role
Common Concern: Arbitrators/Decision-makers	
Option: development of a code of conduct for arbitrators, decision makers, counsel and experts	<ul style="list-style-type: none"> ■ Introduces a new legal standard, enforcement mechanism and soft law to supplement and harmonize with existing ones ■ Requires changes in IIAs and rules and codes of arbitral institutions
Option: development of rules and procedures to strengthen existing challenge mechanisms	<ul style="list-style-type: none"> ■ Introduces a new legal standard and soft law guidance to strengthen and harmonize with the existing ones ■ Affects arbitral institution's practice and rules and domestic legislation
Options: enhances diversification of arbitrators and decision makers	<ul style="list-style-type: none"> ■ Establishes a new framework (either IIA, soft law, guidance or arbitration rules) to ensure participation of arbitrators, judges and decision makers with diverse backgrounds

⁹² Compiled by the author referring to UNCITRAL document concerning the ISDS reform by the UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), 36th sess., Possible Reform of Investor-State Dispute Settlement (ISDS), Note by the Secretariat, U.N. Doc. A/CN.9/WG.III/WP.149 (Sept. 5, 2018), at Annex.

Common Concern: Cost and Duration	
Option: dispute prevention	<ul style="list-style-type: none"> ■ Develops good practices and institutional information ■ Addresses excessive financial burden on respondent States and SMEs
Option: promotion of dispute settlement methods other than arbitration	<ul style="list-style-type: none"> ■ Introduces and facilitates non-binding dispute settlement mechanism such as mediation or ombudsman
Option: expedited procedures for smaller claims and non-complex cases	<ul style="list-style-type: none"> ■ Develops rules and practice for expedited proceedings minding due process concerns ■ Amends IIAs and arbitration rules
Option: establishment of advisory centers	<ul style="list-style-type: none"> ■ Forms a convention-based entity that provide support to developing states and SMEs, similar to ACWL of the WTO ■ Considers logistics about funding, formulation, recruits, etc.
Option: regulation of third-party funding (TPF)	<ul style="list-style-type: none"> ■ Introduces rules in IIAs & arbitration rules to regulate TPF ■ Causes impact (positive & negative) on the overall ISDS proceedings
Option: replacement of ad hoc arbitrators by full-time judges	<ul style="list-style-type: none"> ■ Contemplates a permanent mechanism or body with full-time judges ■ Explores a new conventions or instruments to establish a standing body which may help reduce the overall litigation cost and time
Option: streamlined procedure and cost management	<ul style="list-style-type: none"> ■ Introduces stricter timelines and compliance mechanisms ■ Formulates an effective cost management system in IIAs and rules
Option: an effective early dismissal mechanism	<ul style="list-style-type: none"> ■ Ensures states to avoid unnecessary litigation and related costs ■ Amends IIAs and arbitration rules to reflect the objectives
Option: allocation of cost and security for costs	<ul style="list-style-type: none"> ■ Develops principles and rules to offer guidance to tribunals in allocating costs and ordering security for costs ■ Amends IIAs and arbitration rules to reflect these changes