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A Bellwether to Korea's New Frontier in Investor-State Dispute Settlement?: The Moscow Convention and *Lee Jong Baek v. Kyrgyz Republic*

Joongi Kim

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A Bellwether to Korea's New Frontier
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A Bellwether to Korea's New Frontier in Investor-State Dispute Settlement?

The Moscow Convention and Lee Jong Baek v. Kyrgyz Republic

Joongi Kim*

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I. INTRODUCTION

In November 2013, an investor-State arbitration award was rendered with special significance to Korea under a little known investment treaty through a relatively unknown arbitration institution. Under the auspices of the Moscow Chamber of Commerce and Industry (MCCI), an arbitral tribunal seated in Moscow rendered the first investment treaty arbitration award under the 1997 Convention on Protection of the Rights of the Investor (Moscow Convention) that consists of six member countries from the

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Commonwealth of Independent States (CIS).¹ Furthermore, the decision represents the first investment arbitration award related to Korea. The case of *Lee Jong Baek and Central Asia FEZ Development Corporation v. Kyrgyz Republic* not only marks a historic juncture in terms of the future of Korea's investor-State dispute settlement (ISDS) regime, but it also sheds light on the application of a mostly unknown investment treaty with unique provisions.²

With ninety-nine international investment agreements (IIAs) dating back to 1967, Korea has one of the oldest and most extensive IIA regimes. Only recently, however, have Korea-related ISDS cases emerged, involving both Korea as a sovereign respondent and Korean investors as claimants. Long considered unaffected by investment arbitration like Japan, Korea became

* Professor, Yonsei Law School. The author acknowledges the grateful assistance of Alexander Korobeinikov, Alexander Muranov, Mikhail Samoylov, Valikhan Shaikenov, Luke Nottage, and Jeongwoo Lee in the preparation of this article. The author would also like to thank Professors Jack Coe, Peter Robinson, and Thomas Stipanowich for organizing the Dispute Resolution in the Korean Community Symposium that was held on March 6, 2015, at which an earlier version of this paper was presented. All references to Korea represent the Republic of Korea.

1. For general information on arbitration at the MCCI, see *Arbitration*, MOSCOW CHAMBER OF COMMERCE AND INDUSTRY, <https://www.mostpp.ru/arb-1> (last visited May 9, 2015). For an unofficial English translation of the Moscow Convention, see NATIONAL LEGAL INTERNET PORTAL OF THE REPUBLIC OF BELARUS, <http://law.by/main.aspx?guid=3871&p0=H19700078e> (last visited May 9, 2015). Among the original members to the Convention, Armenia has a reservation, and Russia signed it but withdrew in 2007. According to the ICSID website and the United Nations Conference on Trade and Development (UNCTAD) ISDS database, other than the two other cases filed through the MCCI discussed below, the only other known case under the Convention was also against the Kyrgyz Republic and was registered through the Additional Facility in April 2013 but remains pending. *Consolidated Exploration Holdings Ltd. & others v. Kyrgyz Republic*, ICSID Case No. ARB(AF)/13/1. According to the Russian counsel representing the Korean claimant, they believe they are first firm to represent investors in bringing investment claims under the treaty. Email Interview with Igor Zenkin, Senior Partner, Interlex (Mar. 31, 2015) (on file with author).

2. *Lee Jong Baek & Cent. Asian Dev. Corp. v. Kyrgyz Republic*, MCCI Case No. A-2013/08 (Nov. 13, 2013), available at <http://www.italaw.com/cases/2637> [hereinafter *Lee Jong Baek Award*]. Other sources transliterated the claimant's name from Cyrillic as "Lee John Beck," "Lee John Bek," or "John Lee Beck," instead of using the English version of the claimant's name that appears in the award itself. The claimant's family name is "Lee."

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the subject of its first investment treaty claim in 2012 and, in quick succession, its second and potentially third in 2015.³ Around the same time, starting in 2013, Korean investors began bringing investment treaty claims—notably, the second action against China and a massive claim against Oman.⁴

This article will first seek to provide an overview of the state of play of Korea's ISDS regime. It will discuss the historic nature of the recent cases that have contributed to a critical mass of ISDS actions involving the Korean state as the respondent and Korean investors as claimants. The article will then provide analysis of the Moscow Convention with particular focus concerning its special provisions. After examining the Lee Jong Baek Award, it then explores the potential ramification of the recent cases to Korea's ISDS policy. It suggests that these cases may represent a tipping point in Korea-related ISDS.⁵

II. THE NEW FRONTIER IN KOREA-RELATED ISDS

Over the course of its unprecedented economic growth during the past half century, Korea not only transformed from post-war devastation to a developed OECD country, but also from capital importer to capital

3. The first known ISDS against Korea involved a contract-claim that was brought in 1984 but was eventually settled. *Colt Indus. Operating Corp., Firearms Div. v. Republic of Korea*, ICSID Case No. ARB/84/2 (Feb. 21, 1984). Japan remains one of the few major developed economies that has yet to face an ISDS claim.

4. *Ansung Housing Co. v. People's Republic of China*, ICSID Case No. ARB/14/25; Kang-Su Jo & Ji-Eun Seo, *Firm Blames Beijing for its Losses*, JOONGANG DAILY, Nov. 8, 2014, <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2997069>; *Samsung Engineering Co., Ltd. v. Sultanate of Oman*, ICSID Case No. ARB/15/30.

5. William Thomas Worster, *The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law*, 31 B.U. INT'L L.J. 1 (2013); MALCOLM GLADWELL, *THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE* (2000); Leon Trakman, "Legal Traditions" and *International Commercial Arbitration*, 17 AM. REV. INT'L ARB. 1 (2006) (discussing how the "African Continent in general lacks a critical mass of established international commercial lawyers who practice as counsel or arbitrators in arbitration proceedings").

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exporter.⁶ The geographic complexion of its IIA regime reflects this transition, with Korea first entering into treaties with developed countries that could provide investment, to later seeking to expand its relations with countries where Koreans could invest.⁷ At the same time, ISDS against the Korean government or by Korean investors remained virtually unknown. With a burst of cases, a new frontier in Korea-related ISDS appears to have emerged.

As of August 2015, Korea's ninety-nine IIAs consisted of 87 bilateral investment treaties (BIT), one trilateral investment treaty with China and Japan, and eleven free trade agreements involving Chile (2004), Singapore (2006), EFTA (2006), ASEAN (2007), India (2010), E.U. (2011), Peru (2011), U.S. (2012), Turkey (2013), Australia (2014), and Canada (2015).⁸ In addition, Korea recently signed free trade agreements with China, New Zealand, Vietnam, and Colombia that will soon enter into force.⁹ After China, Korea has the most extensive IIA network in Asia and one of the most wide-ranging in the world. Korea underwent intense debates over the

6. Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT'L L. & COM. REG. 151, 210-12 (2012) (“[O]f the largest capital-exporting EMEs [emerging market economies], all but one have numerous BITs and FTAs in force. . . . [A]n emerging factor behind EME activity, with respect to BITs and FTAs, is the significant and recent increase of OFDI by EME investors, and consequently, the growing interest on the part of EME governments in protecting their investors abroad.”). The OECD countries consist of the most developed economies in the world. See OECD, <http://www.oecd.org> (last visited May 10, 2015).

7. Katherine Wang, *The Korea-U.S. Free Trade Agreement: Motivations for Investor-State Dispute Settlement Provisions*, 18 U.C. DAVIS J. INT'L L. & POL'Y 505 (2012); Ministry of Foreign Affairs and Trade of the Republic of Korea, “ISD – Fair Global Standards,” Nov. 2011, <http://www.ftahub.go.kr/us/data/1>

8. Joongi Kim, *The Evolution of Korea's Investment Treaties and Investor-State Dispute Settlement Provisions*, in FOREIGN INVESTMENT AND DISPUTE RESOLUTION LAW AND PRACTICE IN ASIA (Vivienne Bath & Luke Nottage eds., 2011). The Ministry of Trade, Industry & Energy maintains a comprehensive site concerning the state of Korea's FTAs. See FTA KOREA, <http://www.fta.go.kr>.

9. Agreement Among the Government of the Republic of Korea, the Government of the People's Republic of China and the Government of Japan for the Promotion, Facilitation and Protection of Investment, S.Kor.-China-Japan, May 7, 2014, Treaty No. 2183.

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ISDS during the ratification of its FTA with the United States, similar to the ones presently involving the Transatlantic Trade and Investment Partnership and the Transpacific Partnership.¹⁰ The ISDS remains firmly embedded in the country's IIA policy, with all of its FTAs, excluding the one with the E.U., containing ISDS provisions.

In terms of ISDS, the first known case against Korea occurred in 1984, when Colt Industries, a U.S.-based company, filed a claim.¹¹ Registered at the International Center for the Settlement of Investment Disputes (ICSID), the claim was based on a defense industry contract and not an investment treaty, and the proceedings were first stayed after constitution of the tribunal and then closed in 1990 by agreement of the parties. Hence, other than becoming a historic footnote, the dispute did not have any notable impact on Korea's IIA regime or ISDS policy.

Thereafter, for almost 30 years, Korea did not face any investment arbitration.¹² Several recent cases, however, are reshaping the landscape.¹³ Two of the cases arose out of the restructuring that occurred in the 1997 Asian Financial Crisis aftermath. The first known investment treaty case against Korea occurred in 2012 when a consortium of Belgian and Luxembourg-based investors led by the U.S.-based private equity fund Lone

10. Katherine Wang, *The Korea-U.S. Free Trade Agreement: Motivations for Investor-State Dispute Settlement Provisions*, 18 U.C. DAVIS J. INT'L L. & POL'Y 505, 513-17 (2012); Leon E. Trakman, *Investment Dispute Resolution Under the Proposed Transpacific Partnership Agreement: Prelude to a Slippery Slope?*, 5 GEO. MASON J. INT'L COM. L. 1 (2013).

11. *Colt Indus. Operating Corp., Firearms Div. v. Republic of Korea*, ICSID Case No. ARB/84/2 (Feb. 21, 1984).

12. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435 (2009).

13. For a study that explores the effects that the first ISDS claim has on developing states, see Lauge N. Skovgaard Poulsen & Emma Aisbett, *When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning*, 65 WORLD POL. 273 (2013). Reports briefly surfaced that Japanese companies were considering investor-State arbitration against Korea in response to Korean court rulings in several forced labor cases but nothing yet has transpired. INV. ARB. REP. Vol. 7, No. 2, Jan. 13, 2014, <https://www.iareporter.com/pdf-editions/>.

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Star filed a \$4.7 billion (USD) claim at ICSID relating to the sale of a commercial bank.¹⁴ The case was notable not only for its size, being among the largest ever filed at ICSID, but also because it was filed under a recently amended Belgium-Luxembourg BIT.¹⁵ It is currently proceeding with a third hearing scheduled in the Hague in January 2016, and two of Korea's leading law firms are involved.¹⁶

Then, in May 2015, the Dutch subsidiaries of a UAE investor brought a case at ICSID under the Netherlands –Korea BIT.¹⁷ The case reportedly centers on \$170 million (USD) in tax on capital gains that the Korean tax authorities levied on the investor arising from the sale of their shares in Hyundai Oilbank, a major Korean oil company.¹⁸ The Korean Supreme Court recently dismissed the investor's argument that the tax should be exempt under the double taxation avoidance treaty between Korea and the Netherlands. It found the investor did not qualify as a Dutch entity under the treaty and instead should be treated as an Abu Dhabi entity since it was owned and controlled by Abu Dhabi-based International Petroleum Investment Company.¹⁹

Finally, another case remains pending, after an Iranian investor filed a trigger letter for arbitration in February 2015. According to reports, the investor filed a notice of dispute under the Korea-Iran BIT surrounding "the

14. LSF-KEB Holdings SCA & others v. Republic of Korea, ICSID Case No. ARB/12/37.

15. Agreement Between the Government of the Republic of Korea and the Belgium-Luxembourg Economic Union for the Reciprocal Promotion and Protection of Investments, S.Kor.-Bel.-Lux., Mar. 24 2011, Treaty No. 2038.

16. *South Korea Claim Gallops Ahead*, GLOBAL ARB. REV. (Nov. 23, 2012), <http://globalarbitrationreview.com/b/30999/> (The claim is "said to be the largest ever brought against an Asian state."). *Second Lone Star hearing takes place in Washington, D.C.*, KOREA JOONGANG DAILY (July 9, 2015), <http://koreajoongangdaily.joins.com/news/article/Article.aspx?aid=3006387>.

17. Hanocal Holding B.V. & IPIC Int'l B.V. v. Republic of Korea, ICSID Case No. ARB/15/17.

18. Ji-young Sohn, *Hanocal May Sue Korean Government Over Sale of Hyundai Oilbank*, KOREA HERALD, May 3, 2015, <http://www.koreaherald.com/view.php?ud=20150503000391>.

19. Supreme Court [S. Ct] 2013Du21373, July 23, 2012 2015 (S. Kor.).

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failed attempt to buy a subsidiary of the bankrupt Daewoo Group.”²⁰ Under the Korea-Iran BIT, a six-month waiting period must expire before arbitration proceedings can commence.²¹ Also, because Iran is not a member of ICSID, the claim would likely proceed as an *ad hoc* arbitration subject to limited disclosure.

Although not an investment treaty claim and although the claimant included Korean investors, an arbitral award rendered in 2012 should be noted because it involved many features similar to ISDS. A consortium of Canadian and Korean investors prevailed in a \$700 million (USD) claim against a regional government that was filed at the International Chamber of Commerce concerning refusal to approve completion of a railway construction project.²² The arbitral award stands as among the largest ever against a Korean government entity and involved two leading Korean law firms on either side.

In contrast to the claims against Korea, starting in 2013, Korean investors have begun to use ISDS to seek redress for infringement of investment protections. In February 2013, apparently for the first time, a Korean investor filed a treaty claim against a sovereign country. Reportedly filed under the Korea-Libya BIT, the *ad hoc* case against Libya arose out of

20. Lacey Yong, *South Korea Faces Rare Claim from Iranian Investor*, GLOBAL ARB. REV. (Feb. 23, 2015), <http://globalarbitrationreview.com/news/article/33572/south-korea-faces-rare-claim-iranian-investor/>.

21. Agreement Between the Government of the Republic of Korea and the Government of the Islamic Republic of Iran for the Promotion and Protection of Investments, S.Kor.-Iran., Mar. 31, 2006, Treaty No. 1772, Art. 12.2, available at <http://investmentpolicyhub.unctad.org/Download/TreatyFile/1652>.

22. *Prevailing in an Arbitration Involving All Disputes Related to Yongin Light Rail Transit Private Investment Project in Short Period of Time*, KIM & CHANG (Dec. 14, 2012), http://www.kimchang.com/frame2.jsp?lang=2&b_id=88&m_id=79&mode=view&idx=14015; Clemmie Spalton, *Korean Rail Dispute Reaches End of the Line*, GLOBAL ARB. REV. Jan 23, 2013, available at <http://globalarbitrationreview.com/news/article/31114/korean-rail-dispute-reaches-end-line>.

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alleged expropriation of a Korean investor's assets.²³ A Korean law firm is representing the Korean investor. Due to the *ad hoc* nature of the proceedings, exact details of the case are undisclosed, but the matter remains pending. Then in May 2013, although unknown at the time, the Lee Jong Baek case, discussed in detail in Section IV, was filed and the first award related to Korea was rendered in November 2013.

The first public treaty claim came to light when a Korean investor, Ansung Housing, registered a claim at ICSID against China in August 2014.²⁴ Filed under the Korea-China BIT, Ansung Housing's claim represents only the second known investor claim against China.²⁵ The investor's action concerns a regional government's cancellation of a project to construct a golf course in southeast China.

In November 2014, reports surfaced that a Korean investor filed a trigger letter against Viet Nam for denial of justice under the Korea-Vietnam BIT relating to alleged interference of recognition and enforcement of a commercial arbitration award.²⁶ The investor discontinued the case after the Vietnam courts allowed the recognition and enforcement of the commercial award. Notably, the same Korean law firm represented the Korean investors in all three of these cases, apparently without foreign co-counsel.

23. Agreement Between the Republic of Korea and the Great Socialist People's Libyan Arab Jamahiriya for the Promotion and Protection of Investments, S.Kor.-Libya, Mar. 23, 2007, Treaty No. 1839; *United Kingdom: Pinsent Masons Targets Arabic Disputes with Partner Hire*, MENA REPORT, Nov. 22, 2014.

24. Ansung Housing Co. v. People's Republic of China, ICSID Case No. ARB/14/25.

25. Agreement Between the Government of the Republic of Korea and the Government of the People's Republic of China on the Promotion and Protection of Investments, S.Kor.-China, Nov. 22 2007, Treaty No. 1872. The first publicly disclosed case against China was brought by a Malaysian investor but was settled in 2011. Ekran Berhad v. People's Republic of China, ICSID Case No. ARB/11/15. Joongi Kim, *A Pivot to Asia in Investor-State Arbitration: The Coming Emergence of Asian Claimants*, 27 ICISD Rev. 399, 402 (2012).

26. Agreement Between the Government of the Republic of Korea and the Government of the Socialist Republic of Vietnam for the Promotion and Protection of Investments, S.Kor.-V.N., Aug. 14, 1993, Treaty No. 1181; Kang-Su Jo, *SK E&C Damaged from Suspension of Vietnam Harbor Construction Project...Wins Lawsuit Due to ISD*, JOONGANG DAILY, Nov. 19, 2014.

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Finally, in July 2015, the largest known claim to date by a Korean investor occurred, when Samsung Engineering filed a \$1 billion (USD) case at ICSID against Oman.²⁷ The case concerns construction of an oil refinery improvement project that was commissioned by the state-owned Oman Oil Refineries and Petroleum Industries Company. Samsung Engineering was initially declared the preferred bidder in the project, but brought the claim based upon circumstances that lead to the final bid being ultimately awarded to another consortium. It has not been disclosed whether Korean counsel are involved.

Based upon a confluence of cases, both against the Korean government and by Korean investors, a new frontier in Korea-related ISDS has emerged. Foreign investors no longer appear hesitant to bring cases against Korea when they believe their investor protections have been infringed with the same willingness to assert their rights applying to Korean investors as well. Not only have these actions come from both ends of the ISDS spectrum, against the state, and by investors, but they have also occurred within the same span of time. The Lee Jong Baek award represents a symbolic bellwether for the future in Korea ISDS.

III. THE MOSCOW CONVENTION

The Moscow Convention that entered into force in 1997 remained an unknown and dormant treaty until several investors led by a Russian law firm began to utilize its provisions against alleged protection violations.²⁸ Signatories to the treaty include Armenia, Belarus, Kazakhstan, Kyrgyz

27. Samsung Engineering Co., Ltd. v. Sultanate of Oman, ICSID Case No. ARB/15/30; Jaewon Kim, *Samsung Engineering files for arbitration with Oman*, KOREA TIMES, July 23, 2015, http://www.koreatimes.co.kr/www/news/biz/2015/07/488_183399.html.

28. For an unofficial English translation of the Moscow Convention, see Convention on the Protection of the Rights of the Investor, Mar. 28, 1997, <http://law.by/main.aspx?guid=3871&p0=H19700078e> [hereinafter Moscow Convention (unofficial translation)].

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Republic, Moldova, and Tajikistan. Among its members, only the Kyrgyz Republic and Tajikistan are not also members of ICSID.²⁹

One of the most unique provisions in the treaty is Article 3, which provides that “[i]nvestors may be states or legal and physical persons both of the Parties and of third countries, unless the national legislation of the Parties stipulates otherwise.”³⁰ Unlike standard investment treaties that limit actions to investors from countries that are members of the treaty, Article 3 expands the concept of arbitration without privity in investment treaty arbitration by allowing investors from non-members to have standing to sue.³¹ It resembles a domestic investment protection law that grants investors from any country the ability to utilize investment arbitration to settle a dispute. This allowed the Canadian investor Stans Energy and the Korean investor Lee Jong Baek to bring their respective cases against the Kyrgyz Republic even though both Canada and Korea were not members of the Convention.³² At present, all four known cases that have been brought under the Convention have been against the Kyrgyz Republic.³³

29. Kyrgyz Republic signed the ICSID Convention on June 9, 1995, but has not yet ratified it. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 17 U.S.T. 1270, 575 U.N.T.S. 159. All of the Moscow Convention countries are members of the New York Convention. Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 251, 7330 U.N.T.S. 38. Origins of the treaty can be possibly traced to the 1972 Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation that previously required disputes between nine former Eastern Bloc countries be settled by compulsory arbitration. Petra Butler & Campbell Herbert, *Access to Justice vs Access to Justice for Small and Medium-Sized Enterprises: The Case for a Bilateral Arbitration Treaty*, 26 N.Z. U. L. REV. 186, 193-94 (2014). The treaty has apparently lost most of its relevance because, out of the original nine signatories, it now only applies to Russia, Mongolia, and Cuba. William R. Spiegelberger, *The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, and Cases*, 16 AM. REV. INT'L ARB. 261 (2005).

30. Moscow Convention (unofficial translation), *supra* note 28, art. 3 (emphasis added).

31. Jan Paulsson, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

32. A Moscow arbitral tribunal found that Stans Energy prevailed in its claim and that Kyrgyz should compensate them \$118 million (USD) in damages. *Stans Energy v. Kyrgyz Republic*, MCCI Case No. A-2013/29 (June 30, 2014), available at <http://www.stansenergy.com/blog/wp->

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The more controversial provision of the treaty that has been at the center of annulment proceedings and challenges is Article 11: “Disputes as regards implementation of investments within the framework of this Convention shall be considered by courts or courts of arbitration of the countries that are participants in disputes, the Economic Court of the Commonwealth of Independent States and/or other international courts or international courts of arbitration.”³⁴ All three arbitral awards rendered under the Convention, including the Lee Jong Baek Award, agreed with the investor’s argument that, under Article 11, the member states of the Convention consented to settle investment disputes by arbitration in any arbitration venue that the investor chose. As provided under Article 28, the Kyrgyz Republic challenged this interpretation of Article 11 at the Economic Court of the CIS that was designated to settle “[d]isputable issues connected with interpretation of the Convention.”³⁵ The Kyrgyz Republic sought to set aside the three awards, arguing that Article 11 did not amount to an agreement to settle investment disputes by arbitration.³⁶

content/uploads/2014/08/International-Arbitration-Ruling-Moscow-Chamber-of-Commerce-and-Industry-2014.pdf.

33. OKKV v. Kyrgyz Republic, MAC Case No. A40-25942 (June 23, 2014), *stay granted*, Nov. 19, 2014, available at <http://www.italaw.com/cases/2640>. According to one study of investment award between 2011 and 2014, at six months, the OKKV tribunal was the fastest to reach an award on the merits. Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 40 GEO. J. INT’L L. 363, 377-78 (2015).

34. Moscow Convention (unofficial translation), *supra* note 28, art. 11.

35. Charter of the Commonwealth of Independent States (1993) art 32, 1819 U.N.T.S. 31139; see Gennady M. Danilenko, *The Economic Court of the Commonwealth of Independent States*, 31 N.Y.U. J. INT’L L. & POL. 893 (1999); On Interpretation of Article 11 of the Convention for the Protection of Investor’s Rights dated March 28, 1997, Economic Court of the Commonwealth of Independent States, Case No. 01-1/1-14, Sept. 23, 2014, available at <http://www.stansenergy.com/blog/wp-content/uploads/2014/10/Advisory-Opinion-of-the-SIC-EC-dated-September-23-2014-ENG.pdf> [hereinafter Article 11 Case].

36. Douglas Thomson, *Kyrgyzstan Quashes CIS Treaty Award in Russia*, GLOBAL ARB. REV. (Nov. 25, 2014), <http://globalarbitrationreview.com/news/article/33203/kyrgyzstan-quashes-cis-treaty-award-russia/>.

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The Economic Court found that the language in Article 11 only amounted to an agreement to arbitration as a potential means to resolve a dispute and not consent by Moscow Convention members for arbitration.³⁷ The Court ruled that “[t]he provisions of Article 11 cannot be regarded as an arbitration agreement to examine a dispute related to making investments.”³⁸ Commentators who agree with the Court’s interpretation point out that Article 11 lacked sufficient consent to arbitrate on behalf of the members states because it did not stipulate a specific arbitral institution or arbitral rules.³⁹ The counsel for the investor instead argues that even under the Court’s interpretation, an investor filing a statement of claim at an arbitral institution would consummate the arbitration agreement with the state.⁴⁰ The Court also stated that its interpretation is “final and not subject to appeal.”⁴¹ In the process of seeking to enforce its arbitral award, the investor Stans Energy has been arguing that the Court’s decision is an advisory opinion that other courts are not bound to follow.⁴²

37. Article 11 Case, No. 01-1/1-14, para. 4.

38. *Id.*

39. Dmitry Davydenko, *Russian Courts Reject Overly Broad Interpretation of Investment Treaty Arbitration Clause* (Nov 25, 2014), <http://www.cisarbitration.com/2014/11/25/courts-reject-overbroad-interpretation-of-investment-treaty-arbitration-clause>; Kyriaki Karadelis, *Moscow Convention Claim Goes Against Kyrgyzstan*, GLOBAL ARB. REV. (July 4, 2014), <http://globalarbitrationreview.com/news/article/32789/moscow-convention-claim-goes-against-kyrgyzstan> (One observer characterized that it would “allow investors to file a claim before any tribunal they choose, including, say, one set up by Madonna, Julia Roberts and David Beckham a week ago, with procedural rules which they invented over a cocktail.”).

40. *Stans Opinion on Advisory Opinion*, STANS ENERGY CORP., <http://www.stansenergy.com/blog/wp-content/uploads/2014/10/Stans-Opinion-on-Advisory-Opinion.pdf> (last visited May 10, 2015).

41. Article 11 Case, No. 01-1/1-14, para. 5.

42. Sebastian Perry, *CIS Court Sides with Kyrgyzstan on Treaty Meaning*, GLOBAL ARB. REV., <http://globalarbitrationreview.com/news/article/32997/cis-court-sides-kyrgyzstan-treaty-meaning/> (Sept. 24, 2014); *Stans Energy Legal Update*, STANS ENERGY CORP. (Sept. 24, 2014), <http://www.stansenergy.com/press-releases/stans-energy-legal-update-2/>.

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IV. THE FIRST KOREA-RELATED INVESTMENT TREATY AWARD:
LEE JONG BAEK AWARD

In November 2013, a Moscow tribunal rendered the first investment treaty award brought by a Korean investor and the first case under the Moscow Convention. The case arose out of a ninety-three-year lease that was granted to the Korean investor Lee Jong Baek to develop property in a foreign investment free economic zone established in the Kyrgyzstan city of Bishkek that later encountered multiple issues.⁴³ The co-claimant, the Central Asia Development Corporation, was a wholly foreign-owned company registered as a legal entity in the Kyrgyz Republic. Unlike other recent investment treaty cases involving Korean investors, the case does not appear to involve any Korean counsel.⁴⁴

As with the Stans Energy and OKKV claims, the tribunal found that the claimant fulfilled the standing requirements and qualified as the type of investments protected under the Convention and the Investment Law of the Kyrgyz Republic (Kyrgyz Investment Law).⁴⁵ The award particularly noted that under the Convention Kyrgyzstan “committed themselves to . . . protect the rights of all foreign investors, regardless of their place of origin.”⁴⁶

The award subsequently discussed the difference between the method of dispute resolution provided under the Moscow Convention and the Kyrgyz

43. Lee Jong Baek Award, MCCI Case No. A-2013/08, at 2.

44. Kyrgyzstan and Korea concluded a bilateral investment treaty in 2008, and while Kyrgyzstan is a member of the Energy Charter Treaty, Korea only remains an observer. Agreement Between the Republic of Korea and the Kyrgyz Republic for the Promotion and Protection of Investments, S.Kor-Kyrgyz Rep., July 15, 2008, Treaty No. 1901.

45. Lee Jong Baek Award, MCCI Case No. A-2013/08, at 33-4; Law of the Kyrgyz Republic No. 66 “On Investments in the Kyrgyz Republic”, March 27, 2003, available at [http://www.invest.gov.kg/upload/file/LawOnInvestmentsintheKR\(NotTheLatestVersion\).pdf](http://www.invest.gov.kg/upload/file/LawOnInvestmentsintheKR(NotTheLatestVersion).pdf) [hereinafter Kyrgyz Investment Law]; see generally Keith Molker, *A Comparison of the Legal Regimes for Foreign Investment In Russia, Kazakhstan, and Kyrgyzstan*, 11 BERKELEY J. INT’L L. 71 (1993).

46. Lee Jong Baek Award, MCCI Case No. A-2013/08, at 35.

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Investment Law and held that the investor's claim could proceed under the Convention.⁴⁷ Notably, the Convention does not specify any arbitral institutions or rules, but Article 18 of the Kyrgyz Investment Law provides that an investor may choose to refer the dispute to either ICSID, or "arbitration or international ad hoc arbitration under UNCITRAL arbitration rules."⁴⁸

In terms of substantive rights, the tribunal agreed that the investor suffered creeping expropriation due to the government's adverse changes in legislation, undue interference by tax and customs authorities, failure to ensure safety of the investments, and termination of the lease.⁴⁹ The tribunal also found that the actions taken by the head of the Bishkek free trade zone could be attributed to the Kyrgyz Republic.⁵⁰ In the end, the tribunal ordered that the Kyrgyz Republic pay the investor \$22.7 million (USD) that included costs and attorney fees.⁵¹

In the Kyrgyz Republic's court action challenging the Lee Jong Baek arbitral award, the Moscow Arbitration Court (MAC) denied the motion to stay the award pending the Economic Court decision and later dismissed the challenge to vacate the award.⁵² In denying annulment, the MAC applied a

47. Kyrgyz Investment Law, *supra* note 45.

48. *Id.*; U.N. Commission on International Trade Law, UNCITRAL Arbitration Rules (2010), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>.

49. Lee Jong Baek Award, MCCI Case No. A-2013/08, at 36-37.

50. Lee Jong Baek Award, MCCI Case No. A-2013/08, 38-39. In Stans Energy, the tribunal referenced Article 11(a) of the 1985 Convention Establishing the Multilateral Investment Guarantee Agency that Kyrgyz was a member state in determining the definition of expropriation under international law. 1985 Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 1508 U.N.T.S. 99.

51. Lee Jong Baek Award, MCCI Case No. A-2013/08, at 41.

52. Kyrgyz Republic v. Lee Jong Baek, MAC Case No. 40-19518/14 (June 24, 2014); Mikhail Samoylov, *Russia: The Competence of Arbitral Tribunals under the Moscow Convention on Protection of the Rights of the Investor* (Sept. 1, 2014), <http://blogs.lexisnexis.co.uk/dr/russia-competence-and-the-convention-on-protection-of-the-rights-of-the-investor/>. In contrast, the Moscow court hearing the challenge in the OKKV case stayed its decision pending the Economic Court's review and also annulled the award afterward. OKKV v. Kyrgyz Republic, MAC Case No.

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strict interpretation of Article 34 of the Russian Federation Law on International Commercial Arbitration, which follows Article 34 of the UNCITRAL Model Law, and found that none of the grounds for vacation existed, such as being contrary to public policy.⁵³ The MAC also agreed with the tribunal's interpretation of Article 11 of the Convention that the investor could bring an investment arbitration. Russia's Court of Cassation, however, later remanded the Lee Jong Baek and Stans Energy cases back to the respective lower Moscow courts, and both cases remain pending.⁵⁴

In the end, a medium-sized Korean investor was able to use ISDS through foreign counsel under a mostly unknown IIA to receive an arbitral award for expropriation against the Kyrgyz Republic. It marks a milestone as the first time a Korea-related investment treaty award was rendered.

V. CONCLUSION

With a comprehensive IIA regime and extensive inbound and outbound investments, it has been perplexing as to why Korea-related ISDS has not

A40-25942 (June 23, 2014), *stay granted*, Nov. 19, 2014, available at <http://www.italaw.com/cases/2640>.

53. Kyrgyz Republic v. Lee Jong Baek, MAC Case No. 40-19518/14, at 2-3. The Russian arbitration law is based on the UNCITRAL Model Law. See Law of the Russian Federation, On International Commercial Arbitration, No. 5338-1, available at <http://www.newyorkconvention1958.org/wp-content/uploads/2012/06/1993-07-07-RF-Law-on-Internaitonal-Commercial-Arbitraiton-en.pdf>; U.N. Commission on International Trade Law, UNCITRAL, U.N. Sales No. E08.V.4 (2008), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

54. *Moscow City Arbitrazh Court Recessed to April 16, 2015 in Stans Case* (Mar. 11, 2015), <http://www.stansenergy.com/press-releases/moscow-city-arbitrazh-court-recessed-to-april-16-2015-in-stans-case/>. Despite the ongoing challenges in the Russian courts, the investor in Stans Energy, which is represented by the same legal counsel under the same treaty has succeeded in obtaining interim measures in a Canadian court and is seeking recognition of their award. *Ontario Court Sets First Date for Enforcement of Stans' US\$118 Million International Arbitration Award*, STANS ENERGY CORP. (Mar.9, 2015), <http://www.stansenergy.com/press-releases/ontario-court-sets-first-date-for-enforcement-of-stans-us118-million-international-arbitration-award>.

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existed. Despite its efforts, the Korean government undoubtedly has not had an irreproachable record when dealing with foreign investors. Korean companies must have encountered violations of their rights as investors over the years. Meanwhile, they have become among the most active international commercial arbitration users in Asia to resolve disputes with foreign parties. Investment arbitration nevertheless remained dormant. The recent investment treaty cases brought by Korean investors and against Korea suggest that the ISDS landscape has permanently changed. In particular, as the first investment treaty award, the Lee Jong Baek award represents a symbolic bellwether in Korea's ISDS regime.

While Korea continues to attract inbound investment, the potential for foreign investors challenging government action has become a reality. The government must abide by its treaty commitments to ensure investor protections since, as recent events attest, it is no longer immune from ISDS. Reluctant foreign investors who may have feared repercussions now bring claims. At the same time, Korean investors have becoming increasingly assertive when their foreign investments have suffered violations of guaranteed protections. They have begun to file trigger letters and requests for arbitration based on investment treaties not only at leading arbitral institutions such as ICSID but also through *ad hoc* claims.⁵⁵ While the initial claims were comparatively smaller in size and brought by relatively smaller Korean investors, it appears that a threshold has been crossed, particularly with the size and prominence of the Samsung Engineering case. Korea already boasts a sophisticated international commercial arbitration system that consists of a UNCITRAL Model Law regime, specialized and arbitration-friendly courts, capable arbitral institution, state-of-the-art facilities, experienced in-house and external counsel and arbitrators, and a

55. For a prediction that Korean investors would begin to assert their rights, see Kim, *supra* note 25, at 415 ("Within Asia, Chinese, Korean and possibly Japanese investors in particular appear most likely to be the candidates to lead this trend, given their considerable overseas foreign investment, vast number of investment treaties and experience with international commercial arbitration.").

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solid jurisprudence and academic foundation. Among key actors, Korean government prosecutors and attorneys, and corporate in-house and external legal counsel, in particular, have been gaining significant experience as this new frontier in ISDS has unfolded.

