Global Collaborative Research 2016:

Financial Regulation / Society, Safety & Health / Trade & Investment

KLRI
KOREA LEGISLATION RESEARCH INSTITUTE

Australian National University RegNet

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P·R·E·F·A·C·E

In the rapidly changing global landscape of today, governments, universities, laboratories, and international institutions around the world continue to try to come up with policies and legislation that can facilitate responses to globally relevant issues.

Korea Legislation Research Institute (KLRI) is a government-funded national policy research institute, established in July 1990, to systematically collect and manage legal information and conduct professional research on legislation, with the aim of providing advice and assistance in the formulation of national legislative policies and for improving legal services.

As Korea's only policy research institute specializing in legislation, KLRI produces effective legislative proposals for contemporary policy issues, based on high-quality research achievements. By gathering and providing information on legislative systems of various foreign countries and providing English translation of current statutes of the Republic of Korea, KLRI is contributing to the advancement and globalization of the Korean legislative system.

KLRI's Global Legislation Research Team proactively locates and analyzes legislative trends at the global level and thereby provides information that can be used to help the Korean government establish relevant policies and legislation.

As is well known, globally relevant issues are wide-ranging, and among them, issues regarding financial regulation, society, safety & health, and trade & investment are commanding particular attention in global society today. And accordingly, continuous and systematic research on those issues is required.

For that, over the last few years, KLRI's Global Legislation Research Team has built research cooperation networks with international research institutions dealing with global policies and legislative issues and has subsequently made efforts to hold seminars and launch cooperative research projects with those institutions.

Among them, the Australian National University's Regulatory Institutions Network (RegNet) is an institution notable for its systematic research on globally relevant issues, and for many years, KLRI's Global Legislation Research Team has undertaken various research cooperation activities with the institution.

KLRI's Global Legislation Research Team believes that our collaborative research with RegNet in 2016 was a great opportunity to conduct wide-ranging research on global issues through cooperation between researchers at the two institutions, and we are very happy to share excellent results yielded from the research.

Now in its third year, the research program is a cooperative research program launched as part of our research cooperation with RegNet. In this year's installment, which follows last year's research, experts from both institutions will participate in writing a paper on the latest global issues with the aim of providing information that can be used by the Korean government in responding to global issues.

In this research paper, for the financial regulation sector, excerpts from "Responsive Risk-Based IT Financial Regulations in Korea (Joungmee Han, KLRI)" and "Responsive Risk-based Regulation in Australia (Seunghun Hong, RegNet)" have been included; for the society, safety & health sector, excerpts from "Functional Equivalence Principle in Mutual Recognition Agreement on Food Safety (Seunghye Wang, KLRI)" and "The Regulation and Governance of Psychosocial Risks at Work: A Comparative Analysis Across Countries (Elizabeth Bluff, RegNet)" have been included; and for the trade & investment sector, excerpts from "Harmonisation or Proliferation? The impact of regional FTAs on investor protection (Richard Braddock, RegNet)" has been included.

We wish to say a hearty 'thank you' to the ANU RegNet Research Team and KLRI Research Team, who participated in this research, and we hope that the cooperative research project between KLRI and ANU's RegNet will be carried out even more actively going forward.

Rhee, Ik Hyeon

President,

Korea Legislation Research Institute

C·O·N·T·E·N·T·S

Part 1.

Introduction

1. Introduction

Global Collaborative Research 2016 is a collaborative research between the Office of Global Law Research, Korea Legislation Research Institute (KLRI) and Regulatory Institutions Network (RegNet), Australia National University (ANU).

The Office of Global Law Research, Korea Legislation Research Institute (KLRI) established the research collaborative network with overseas research institutions dealing global policy and legal issues, carried forward collaborative researches and seminar.

Regulatory Institutions Network (RegNet), Australia National University (ANU) is an outstanding institution conducting wide range of researches among global legal issues, advancing various research collaborative exchanges for many years with the Office of Global Law Research.

This research is one of the collaborative research exchanges with RegNet over the last three years, professional research fellows from both have conducted researches and wrote papers on selected recent global joint issues from last year.

Looking at the accomplishments of previous collaborative research exchanges, we published 'Issue Paper' in 2014.

In 2014, "*Investment and Investor-State Dispute Settlement*" by Kyla Tienhaara, "*From KAFKA To KAFTA : Intellectual Property, and The Korea-Australia Free Trade Agreement*" by Matthew Rimmer, and "*South Korea's Asian trade strategy*" by Shiro Armstrong, were published.

As for 'Issue Paper' in 2015, "*Trans-Pacific Partnership: the good, the bad and the unfinished*" by Shiro Armstrong, "*Transparency & Trade Negotiations:*

A Tale of Two Treaties" by Kyla Tienhaara, "*The Rule of Law in ASEAN: Implications of Regional Integration for Judicial Collaboration and Training*" by Christoph Sperfeldt, "*Beyond Adversarialism: Safety Regulation, Worker Participation and High Performance Workplaces*" by Neil A Gunningham were published.

In 2016, a Professional research fellow workshop was held in April to improve mutual understandings of each institutions and to adopt joint topic and discussed the methods and scopes of research.

In this year, the topics of research between two institutions were selected through a research discussion as three sectors - *finance regulation, society, safety and health, trade·investment* - and performed research by setting detail research topics between two.

In the research performance process, two institutions shared opinions through a deliberative council meeting of KLRI and reflected opinions in the research paper by researchers of two institutions.

This research, aims to provide basis of government policy and legislative system by understanding related global policy and legal trends in the field of *finance regulation, society·safety and health, trade·investment.*

Part 2. Financial Regulation

2-1

Responsive Risk-based Regulation in Australia

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Ⅰ. Introduction

In the aftermath of the Global Financial Crisis (GFC), many countries have strengthened their financial supervisory framework to promote responsibility of financial sectors. Many proposals demand greater regulation, rearranging the supervisory system, putting a restraint on financial industry's incentive systems (Eisenbeis 2009; Moschella and Tsingou 2013). It is also of interests to researchers and policy makers whether macro-prudential policies, structure of supervisory governance and global frameworks ensure that domestic international supervisory arrangements work to identify systemic risks to financial stability (Moshirian 2011; Baker 2013; Goodhart 2015). But we still have little understanding on how domestic-level financial supervisory frameworks actually work to promote responsibility of financial institutions. This requires us to focus more on interactions between supervisory authorities and regulated institutions.

This report aims to provide comprehensive understanding on financial regulation of Australia, one of rare developed economies that withstood the impacts of the GFC. What can we learn from Australia's experience that came through the GFC relatively unscathed compared to most other developed countries? Australia has maintained strong economic fundamentals such as sound monetary and fiscal policy settings, backed up by a resource-hungry Chinese economy, and also had risk-averse big banks-though not always productive-that supported the nation's economy (Lewis 2013; IMF 2012).[1] However, these two factors do not fully explain Australia's unscathed breakthrough of the GFC. One large factor is ascribed to Australia's sound financial

1) Australian banks were among the most profitable in the world from 2005 through 2012, according to IMF (IMF 2012).

supervision. The recent IMF's Financial System Stability Assessment (FSSA) of Australia points out, "sound economic management, a proactive approach to supervision and a well-coordinated crisis response have helped maintain financial system soundness and stability" (IMF 2012, 9). This report focuses on this factor.

In order to better understand the Australian financial supervisory system, this report focuses on risk-based regulatory approaches of Australian financial regulators: the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investment Commission (ASIC). In Korea, the Financial Supervisory Service (FSS) is an integrated financial regulator that oversees both financial conduct and prudential regulation, while in Australia the authority is divided to two separate agencies: APRA is responsible for prudential regulation of Australian financial markets and ASIC takes care of the nation's financial conduct regulation. Under this twin peak system, Australian financial industries have been well supervised without major failures since the collapse of the insurance giant HIH in 2001. Even during the GFC in 2009, Australia was not much affected by the successive collapse of financial institutions in major Western countries.

This report examines the reasons of success in the two regulators' risk-based approach, by focusing on how these two financial regulators have developed risk-based approaches responsively to the performance and attitudes of regulated entities. So the risk-based regulatory approaches of the two financial regulators are analysed through the lens of responsive regulation. Of particular interests is how they have constructed the supervisory framework and enforcement approaches flexibly and responsively to elicit regulated entities' compliance with the end of financial regulation, not just compliance with the law.

II. Methods

This report is a qualitative research on the development of risk-based regulatory approaches adapted by APRA and ASIC. As the report primarily aims at better understanding those two regulators' approaches, it is based on an extensive document analysis of public documents produced by both regulators, external performance reviews, Financial System Inquiries reports, and media reports. Public documents of both regulators are useful sources that enable us to understand the "official" regulatory approaches taken up by the regulators. Financial System Inquiries reports, produced once in approximately every fifteen years by independent reviewers, are important in showing ways in which those regulators' approaches are understood and assessed by the government, financial consumers, industries, other experts and industries.[2] I also analysed the regulators' responses to various requests for accountability, including Financial System Inquiries reports and letters of expectations from the Treasurer and the Parliament. Those responses are all publicly available on the regulators' website. Assessment reports produced by international bodies such as International Monetary Fund (IMF) are also valuable sources that enable us to identify strengths and drawbacks of Australia's financial system. Last sort of documents I analysed was data on "undertakings": a financial entity agrees to end its wrongful or non-compliant practices in exchange for leniency for alleged criminal or civil violations of the financial laws (Ford and Hess 2008, 2011). So called enforceable undertakings are mostly used by ASIC, and by APRA in a limited way, as a responsive enforcement tool. Data acquired

2) To date, three Financial System Inquiries have been conducted in Australia: the Campbell inquiry (1981), Wallis inquiry (1997) and most recently Murray inquiry (2014). These reports triggered major changes in Australia's financial system.

through a series of in-depth interviews with supervisors in both regulatory agencies and financial industries in early 2013 were also analysed in conjunction with the documentary data.

Ⅲ. Theories of Regulation: An Overview

A. Risk-based Regulation

Risk-based regulation or risk-based approaches to regulation is what is adapted by most financial regulators in the world. Even the Korean Financial Supervisory Commission (FSC) acknowledged the importance of introducing risk-based or risk-focused supervision to Korea in the wake of the Asian Financial Crisis (AFC):

> Advanced supervisory agencies, such as OCC of the US or FSA of the UK, transformed their supervisory system to risk-focused supervision, that is to mobilize its resources to supervision of financial institutions' risk management. Many other countries have taken up this system as well. International organizations such as BIS, IOSCO, and IAIS set up international standards involving financial institutions' prudential risk management. … Meanwhile, the soundness of Korean financial institutions has been exacerbated as the once favorable environment was in transition to a more competitive market. They strived to adjust themselves to this market shift, but their overall risk management system is still premature. Therefore there is a strong need to strengthen risk-focused prudential supervision (FSC 1998).[3]

According to Julia Black (2005), risk-based regulation has two distinct

3) The English translation is excerpted from Hong (2016).

meanings. The first refers to *the regulation of risks to society*, such as risks to public health, safety, transportation, the environment, or financial well-being. In this sense, "risk-based" regulation has long been used "to determine whether or not an activity should be regulated, or what level of preventative measures firms should take" (Black 2005, 516). A deregulated polity which the late twentieth-century regulatory reform promised was a call for managing such risks of contemporary society more efficient and effective ways (Short 2011; see also Beck 1992).

The second, more recently emerging meaning of risk-based regulation refers to *regulatory* or *institutional risk*, such as risks to the agency itself that it will not achieve its objectives. In this newer sense, risk-based regulation involves "the development of decision-making frameworks and procedures to prioritize regulatory activities and the deployment of resources, principally inspection and enforcement activities, organized around an assessment of the risks that regulated firms pose to the regulator's objectives" (Black 2005, 516). Here risks mean any obstacles to fulfilling the objectives of a given regulation.

Among these two meanings, what is normally taken in the field of financial regulation is the latter. Scholars, when analysing financial regulation, adopt the conception of risk-based regulation that "stands for a set of strategies in which the regulator seeks to allocate resources at sites and activities that present threats to its ability to achieve the regulatory objectives" (Hong 2016; see also Black 2005; Black and Baldwin 2010, 2012; Hutter 2005). It is also this latter meaning that is adopted as the conception of risk-based regulation in this report. If we follow this sense, then the process of risk-based regulation should be like: i) to identify risks; ii) assess their significance; iii) develop a remediation strategy; and iv) prioritize the allocation of resources (Lewis 2013, 12).

B. Responsive Regulation: A Theory

Ian Ayres and John Braithwaite's *responsive regulation* (1992) is regarded one of the greatest contributions to the theory of regulation, as exemplified that two prominent academic journals in law and governance have special issues celebrating its 20 years of publication.[4] Responsive Regulation was suggested as a discretionary intervention in favor of a "third alternative" (Ayres and Braithwaite 1992, 3) to the free market "deregulation" and state regulation in an environment where "the notion of regulation had come under threat from the neoliberal policies of Thatcherism, Reagonomics, and the Washington Consensus" (Parker 2013). As Parker describes (2013), its purpose was "to propose, evidence, and advocate a method for creating regulatory policy solutions that transcend both public interest oriented calls for effective regulation of business and business oriented calls for the dismantling of state based regulation." Traditional state-centred regulation regarded deterrence as a major enforcement tool to induce compliance from law subjects while more economic centred deregulation camp considered deregulation, or cooperation with regulatees, as a tool for efficient regulation. In observing stalemate in both academic and practical debates, Ayres and Braithwaite suggested that there is a third way of doing regulation, which satisfies the desiderata for both effective and efficient regulation: regulatory agency employs enforcement strategies as a response to the compliance performance of regulatees. What they proposed was neither pure deterrence strategy nor a unilateral cooperative strategy. They insisted to mix both, and deploy them conditional to the regulatee' compliance performance in a tit-for-tat way.[5] This means that the regulator coop-

4) See *UBC Law Review* Volume 44 No 2 (2011) and *Regulation & Governance* Volume 7 No 1 (2013).

5) Tit-for-tat works in a way that you cooperate first and from then on replicate your opponent's move at the previous round.

erates first, and escalate to take a more punitive sanction if the regulatee does not cooperate in return. This is articulated as a famous enforcement pyramid, as shown in Figure 1.

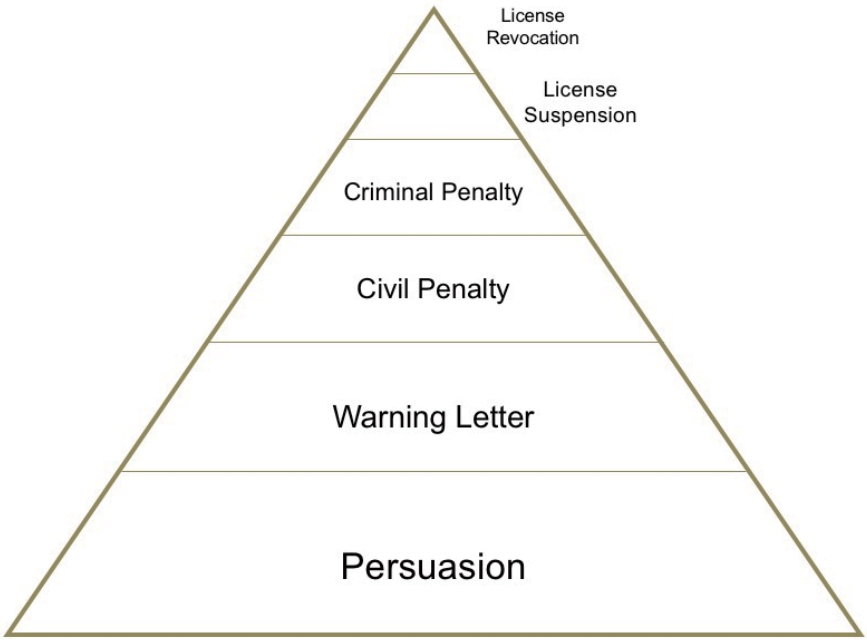

Figure 1 Enforcement Pyramid in Responsive Regulation

Source: Ayres and Braithwaite (1992, 35)

Figure 1 is the original enforcement pyramid Ayres and Braithwaite suggested in their 2002 book. For the last 20 years this pyramid has evolved into many different forms as it is adaptably applied to different regulatory fields (Ivec and Braithwaite 2015). This pyramid suggests that the regulator starts from the bottom of the pyramid, from the most lenient form of enforcement, such as persuasion or education. And escalate to a more punitive sanction if the regulatee fails to comply. So the regulator starts from persuasion, and if the regulatee does not comply, then send a warning letter, saying that, for ex-

ample, "I notice this or that problem, and warning you that if you don't fix this by that day, then we will impose you some penalty." The regulator can further escalate to civil and criminal penalty, license suspension and all the way up to license revocation, which is capital punishment for business firms. What is important is that the regulator is always willing to forgive and de-escalate the pyramid if the regulatee shows compliance.

There are several important aspects to notice in this pyramidal approach. First, its focus is on compliers rather than non-compliers: in other words, this is a complier-focused enforcement rather than a deviant-focused strategy (Hong and You 2016; Pettit 1997). The underlying assumption is that all regulatees have different motivations to law and regulation. Some may try to maximize their profit by intentionally violating the law, but this may not be true for many other citizens, who are rather motivated by goodwill to be a law-abiding citizen. Even the same individual or firm can have plural motivations for compliance and non-compliance. In other words, human beings have multiple selves (Ayres and Braithwaite 1992; Braithwaite 2002). Responsive regulation presumes the possibility that all regulatees *can be* motivated by such goodwill. That is why it asks regulators to start from the very bottom of the pyramid, assuming all regulatees are compliers. But it does not presume that all regulatees *are* so virtuously disposed to restrain their egoistic desires for the sake of common good. Responsive regulation recognizes the presence of gaming players who are trying to deceive the regulator, chronic and habitual law-breakers, and incapacitates who are unable to meet the legal or regulatory objectives. In the face of these actors, responsive regulation asks to stay firm by escalating up to take a more punitive sanction as a response. In this regard, responsive regulation is descried as a strategy of "benign big gun" (Ayres and Braithwaite 1992) or "speaking softly while carrying a big stick"

(Braithwaite 1997; Scott 2003). What is important is that the regulator hides the big stick behind the scene of regulatory encounters so that the regulatees are not explicitly threatened by regulator's accessibility to harsher punishments. The regulator is rather asked to stay cooperative as long as the regulatee shows compliance.

Second, the pyramidal application is not a pure tit-for-tat application. A pure tit-for-tat application means that a regulator becomes reactive after the first round of encounter. At first, the regulator is supposed to cooperate, but the cooperation will last as long as the regulatee also cooperates. As soon as the regulatee defects, no matter what the reason is, a pure tit-for-tat asks the regulators to switch to a non-cooperative strategy. But the theory of responsive regulation, especially as it evolved into a more restorative form later on (Braithwaite 2002), takes up a more forgiving form of reciprocity: escalate only if it is the last resort. Regulators are asked to seek to involve other actors, i.e. networked cooperation, to cope with the regulatee's non-compliance rather than to escalate to a more punitive sanction. Braithwaite suggests this as a way of minimizing domination by public power:

> A problem is that if we leave ourselves with access to escalation to violence, we are likely to do so more often than best serves minimization of domination. We are especially at risk of that if we are part of a Great Power system. Give even a good president access to a button he can push to exterminate an enemy from a drone, and he is likely to push that button more often than can be justified by the objective of tyranny reduction. All pyramids need special barriers, checks, and balances against escalation to violence (Braithwaite 2014, 449).

Hong (2016) describes this as empathic reciprocity, by which an actor returns help or evil based on empathy towards the original giver. Behaviorally empathic reciprocity occurs when an actor forgives and gives a second chance to a person who failed to return the help he or she had received from the actor on an unintentional ground. This presumes that regulatees care for their own interests, yet seeking to pursue it in consideration of others' interests, rather than trying to maximize them. What this empathic reciprocity takes into account is an intention to reciprocate, rather than an act of reciprocation. So what is more important is not the fact that the regulatee shows non-compliance but the fact that the regulatee does it intentionally or not. Hong (2016) draws his case for empathic reciprocity on a series of studies in psychology (Van Lange et al. 2002; Rumble et al. 2010; Klapwijk and Van Lange 2009; Batson and Ahmad 2001). These researchers consider noisy situations in which an actor's intentions become uncertain or miscommunicated. Noisy situation also occurs occasionally in regulation as the intention of both sides of regulator and regulatee is unclearly communicated. Those psychologists argue that a generous, forgiving strategy is effective to induce cooperation from an unintentionally non-cooperating agent while this effect diminishes in the face of an intentional defector. If applying this lesson to responsive regulation, this means that the regulator should stop deploying empathic engagement when facing intentionally defying regulatees and start taking up a more stringent tit-for-tat strategy. In this ground, responsive regulation is an effective strategy in that exercising state power is seen reasonable to the eyes of regulatees (Hong and You 2016).

Third, responsive regulation is not just deemed an effective strategy. Ayres and Braithwaite argued that it is also an efficient strategy in that regulators invest their resources in less punitive and cheap solutions (Ayres and

Braithwaite 1992). This is why they came up with a "pyramidal" idea. Figure 1 shows the portion of each sanctioning strategy in the enforcement pyramid. The portion of pyramid is biggest at the bottom of the pyramid: persuasion. And the second lenient sanction, warning letter, takes the second biggest portion of the pyramid and the option that stays on the top of the pyramid, license revocation, takes the smallest portion of the pyramid. Of course the portion of each sanction should be different case by case, as there are more rational game players in one regulatory domain while more virtuous actors in other domains. The key is that responsive regulation enables regulators to invest a large portion of their human resources in cheaper options down at the pyramid while concentrating their legal power on dealing with a relatively small number of defiant business firms and individuals.

Fourth, the enforcement pyramid is not fixed. Responsive regulatory principles have to be implemented in a way to suit context (Ivec and Braithwaite 2015). The essence of responsive regulation is listening and adapting in response to the problem we are trying to fix and to the people who can fix it. Responsive regulation is bespoke regulation, where the regulators listen to those they are regulating and choose a course of action to correct the deficiency that they are observing (see also Black 1998; Silbey 2011). The first challenge is to get those being regulated to share the concern. Once achieved, regulator and regulatee work out a plan to solve the problem. Included in this phase is explicit recognition and acceptance that the regulator will apply sanctions and use coercive means according to the law if all else fails. Because of its context sensitive nature, evaluating responsive regulation involves doing the evaluation in situation, while it is happening, and adjusting responses to achieve the outcome required (Ivec and Braithwaite 2015). So there is no such thing as a fixed enforcement pyramid. Different regulators in different regu-

latory fields, and even the same sort of regulators in different jurisdictions, can design their own pyramid to suit their context. Dorf and Sabel (1998) would call this democratic experimentalism. If the responsive regulatory pyramid works in one regulatory domain, ideas and methods may be transferred other domains and jurisdictions, but not without the basic process of listening and adaptation that is necessary to support the regulatory intervention. This is what Christine Parker (2002) argues that triple loop learning can take place where regulatory lessons about what works can be shared across organizations for experimentation.

In sum, we can think of a range of different applications of responsive regulation: the most stringent tit-for-tat application throughout the enforcement process to fully forgiving, restorative justice type of application. With this theoretical framework in mind, I will analyze the two Australian financial regulators' enforcement approaches.

Ⅳ. Prudential Regulation by APRA

A. APRA's Risk Assessment

One aspect to which we should bring our concern is independence of Australia's financial regulators. Both APRA and ASIC have their own statutory charter. Though ASIC is funded by the Commonwealth Government, APRA is funded by industry levy. Both agencies are subject to government direction, in such a way that the relevant Minister has the power to give a direction in writing to APRA or ASIC about policies they should pursue or priorities they should follow, except a direction about a particular case (Murray et al. 2014). But Australia's financial regulators, in practice, have enjoyed a great degree of in-

dependence, as the recent Financial System Inquiry report reveals that to date only one example of such ministerial intervention exists. While political intervention is minimal, both regulators are subject to a range of accountability mechanisms including Parliament, courts and tribunals, public media reporting and freedom of information, and reviews by international bodies, such as the IMF (Murray et al. 2014). This independent structure enables both regulators to pursue their own mission in a responsible way.

Improving financial sector responsibility is APRA's key objective. It is also reflected in the way APRA organizes its frontline around what it calls "responsible supervisors," who are designated to be in charge of prudential oversight over a set of financial entities. This means that all APRA-regulated entities-authorized deposit-taking institutions (ADIs), general insurers, life insurers and registrable superannuation entities (RSEs) and their licensees, small APRA superannuation funds (SAFs) and single member approved deposit funds (ADFs)-have their frontline supervisors designated and devouted to oversee their risk management. APRA divides its frontline supervisory resource into two major divisions.[6] The Diversified Institutions Division (DID) deals with complex and large entities or those with a high impact on the market. The Specialized Institutions Division (SID) oversees smaller and less complex institutions. This reflects APRA's risk assessment tool, the Probability and Impact Rating System (PAIRS), in which it identifies regulated entities with probability and impact of failure.

Introduced originally in October 2002, PAIRS incorporates two dimensions as the title implies: the *Probability* that a regulated entity will fail and measure the *Impact* of the potential consequences of that failure. PAIRS considers four

6) For the general development of APRA organizational structure in its early stages, see Black (2006).

key factors-inherent risk, management and control, net risk and capital support-in twelve risk categories-board, management, risk governance, strategy and planning, liquidity risk, operational risk, credit risk, market and investment risk, insurance risk, capital coverage/surplus, earnings, and access to additional capital (APRA 2012a, 5-9). PAIRS focuses on the probability and impact of the risks a particular institution poses to APRA's objectives, to ensure that financial institutions meet their obligations to beneficiaries in the context of an efficient and competitive financial system.

APRA's designated supervisors are required to assess the likelihood according to PAIRS that certain risks inherent to a financial institution will be contained by its management, and to the extent they will not be, the likelihood that the capital which the institution has available to it will be sufficient to prevent it from meeting its obligations to APRA's beneficiaries, and the impact on beneficiaries as whole should it fail. The outputs of the PAIRS process are a risk score, which is translated into a probability index rating, and an impact score (Black 2006, 8; APRA 2012a). The probability of failure and impact of failure are indexed as follows (APRA 2012a, 20-2):

The *probability of failure* incorporates two elements:

- The probability rating – a descriptive assessment of the likelihood that a regulated entity could fail. The descriptive probability scale consists of five ratings – *Low, Lower Medium, Upper Medium, High and Extreme*.
- The probability index – a quantitative measure of the approximate relative likelihood that a regulated entity could fail. It is a continuous curve whose function is the fourth power of the overall risk of failure.

The *impact of failure* incorporates two elements:

- The impact rating – a descriptive assessment of the potential adverse consequences that could ensue from the failure of a regulated entity. The descriptive impact scale consists of four ratings – *Low, Medium, High* and *Extreme.*
- The impact index – except for general insurance, it is derived with reference to each entity's total resident Australian assets.

With PAIRS, APRA confirms "the objective that the prudential regulation regime maintain a low incidence of failure of regulated entities while not impeding continued improvement in efficiency or hindering competition. APRA intends to achieve this objective through the setting of prudential requirements and its approach to the supervision of individual entities" (APRA 2012a, 7). This means that APRA does not pursue zero failure of its regulated entities. APRA would admit and allow some entities, for example, to be liquidated if they, at the end of the day, turned out to curb efficient and effective market competition.

B. APRA's Supervisory Approach

PAIRS allows APRA to allocate its limited resources according to the significance financial institutions represent in the nation's financial industry. For the supervision of a large conglomerate, for example, DID assigns a team of multiple analysts and a manager. SID may designate one analyst to oversee a handful of small superannuation funds and credit unions, although risk management of smaller entities is inclined to be poor (Hong 2015). So a core element of PAIRS, as APRA suggests, is "to identify regulated entities that

have a higher risk of failure, or will have a large impact if they do fail, and hence require more intensive supervision" (APRA 2012a, 8). This is closely related to APRA's responsive supervisory system, the Supervisory Oversight and Response System (SOARS). SOARS is used to "determine how supervisory concerns based on PAIRS risk assessments should be acted upon" (APRA 2012b, 4). All APRA-regulated entities that are subject to PARIS assessment are assigned a SOARS stance.

While PAIRS is APRA's risk assessment system, SOARS is its main tool to achieve consistent application of supervisory intervention. SOARS comprises four stances: *Normal, Oversight, Mandate Improvement*, and *Restructure*. SOARS stance is basically derived from the combination of the PAIRS *probability rating* and *impact rating*. The four stances mean that entities with a higher SOARS stance will get more intervention. So among the four elements of risk-based regulation discussed above, PAIRS constitutes the first two process, identification of risks and assessment of their significance, while SOARS involves the latter two process, development of a remediation strategy and prioritization of the resource allocation. Risk profile and following supervisory activities required in each stance is summarized in Table 1 below.

Table 1. Risk Profile and Supervisory Activities by SOARS Stance

SOARS Stance	Risk Profile	Typical supervisory activities
Normal	• Not expected to fail in any reasonably foreseeable circumstance. • Have robust governance and control frameworks. • Have the ability to absorb unexpected losses within existing resources.	• Prudential review; • Analysis of data received on a monthly, quarterly and/or annual basis; • Other supervision activities as required or at the discretion of the responsible supervision team
Oversight	• Not expected to fail, but there are aspects that may create vulnerabilities in extremely adverse circumstances. • Two sorts: entities that reside naturally in this stance; entities that should be in Normal but have some identifiable but non-fatal weakness. • To the former entities, APRA tolerates if their business plan or risk appetite remains appropriate. • To the latter sort of entities, APRA usually adopts a suasion approach to ensure improvement in vulnerable areas.	• More frequent and/or more targeted prudential reviews; • More frequent and more detailed collection and analysis of data an reports; • Communication with auditors and actuaries; • Special investigations by external experts; • Requests for revised business plans; • Assessing the rectification plans put in place by the entity; • Expressing concerns to the responsible persons of the entity; • Expressing views/concerns to relevant overseas regulators where applicable

SOARS Stance	Risk Profile	Typical supervisory activities
Mandated Improvement	• Entities' operation puts beneficiaries at risk, so improvements are needed. • Those entities are unlikely to fail in the short term, but supervisory intervention will be necessary to help avert any failure. • Those entities will either shift to Oversight, move to Restructure or exit the industry.	• Requiring rectification plans and monitoring milestones; • Requiring revised business plans; • Increasing capital requirements; • Issuing directions; • Accepting enforceable undertakings, often undertakings to exit the business by finding a new and sound owner; • Engaging external resources to report to APRA; • Consideration of fitness and propriety issues; • Placing prohibitions on acquisitions
Restructure	• APRA lost confidence that financial promises to beneficiaries will be met in the absence of vigorous intervention. • Entities do not have the ability, or the willingness, to rectify the serious weakness(es) identified. • Entities are at material risk of failure, or may even have failed. • APRA will apply its full enforcement powers to protect beneficiary interests.	• Withdraw licenses; • Replace persons and/or service providers; • Merge entities; • Run-off existing business; • Restrict business activities; • Quarantine assets; • Appoint an inspector, judicial manager or provisional liquidator; • Issue directions or sanctions; • Place the company into receivership/liquidation

Source: APRA (2012b, 6-9)

What this table indicates is that SOARS is a form of responsive regulation. It allows APRA to take a pyramidal and phased enforcement approach from Normal, Oversight, Mandated Improvement all the way up to Restructure. This approach is to response to the risk management performance of regulated entity, especially its senior management. And the pyramid, here, means the level of intervention APRA focuses on each entity. The amount of APRA intervention in each stage is not fixed in advance: it is responsive to the regulated entity's risk management performance, which is represented by the SOARS stance. But there is an APRA-wide guidance on baseline supervision, as described in Table 2 below.[7]

Table 2 Baseline Supervision of APRA

	Impact Rating					
	Extreme	High	Medium	Low	Other	Tolerance
Risk identification						
Quarterly Risk Review	Quarterly (annual for super <$50m)					
Information lodged with APRA	As submitted or in next QRR					
Prudential Consultation (excluding Superannuation)	12 months	24 months	36 months			3 months
For Foreign owned entities: Contact with Home Regulator	12 months					3 months
Risk-based						
Prudential Review	12 months	24 months	36 months		nil	3 months
Risk assessment						
PAIRS	12 months					
Supervisory action plan	12 months					

Source: Personal Correspondence with APRA (2014)

7) Specific application of this guidance is subject tot he discretion of APRA supervisors. Many APRA supervisors perceived that they were not given discretion in deciding how many contacts they have with regulated entities, because their decision was restrained in many different ways. Ways in which APRA supervisors' discretion is contested is discussed in Hong (2015).

This table indicates that an entity with a high impact rating get more frequent visits by its designated supervisors. An interview with a senior manager at APRA conducted in 2014 indicates that APRA supervisors have more frequent and additional meetings with larger and high impact entities. They often go on-site and have meetings or other activities sometimes once a week. This means that they make between fifty and sixty on-site engagements over a year. If an entity's SOARS stance is Normal, APRA keeps the minimum level of risk-based interventions in addition to the baseline supervision, the *absolute minimum* supervision needed to be conducted by responsible supervisors in a given period no matter what the entity's SOARS stance is. APRA's risk-based resourcing is summarized in Figure 2 below. Each SOARS stance except Restructure involves baseline supervision because APRA does "not believe that it is possible to be 'risk-based' without first having some reliable view of what the risks are" (Lewis 2013, 13).

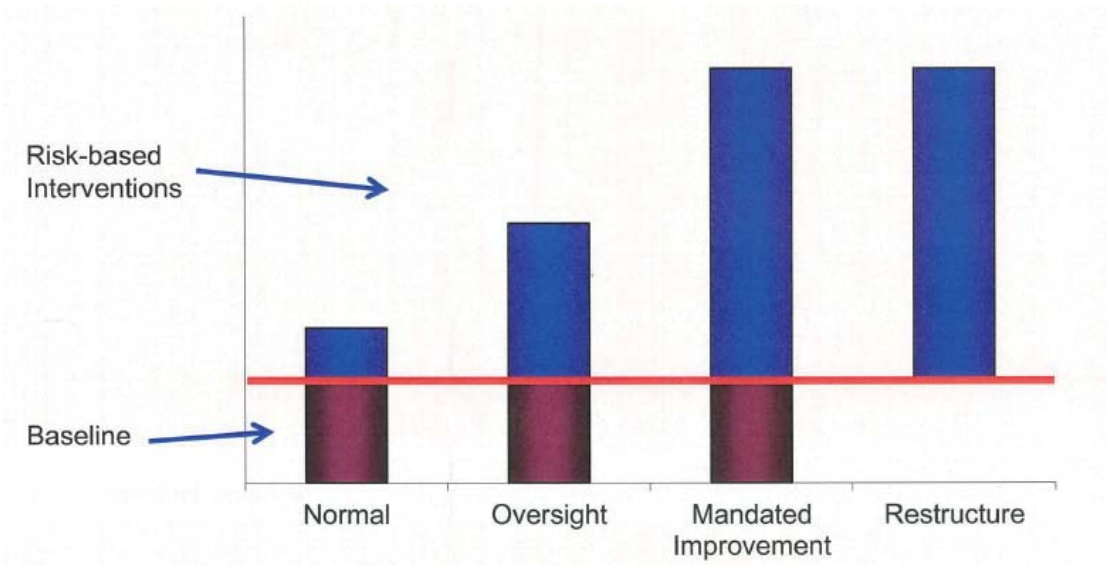

Figure 2 APRA's Risk-based Resourcing

Source: Lewis (2013, 13)

Supervisors will mount more risk-based interventions as the entity's risk-stance goes up. Mandated Improvement is where the improvement of risk stance is mandated to APRA to engage in the entity's risk *management*. If an entity is in Restructure, this means that the entity is deemed incapable or inappropriate to run a business in the Australian financial markets. The entity's license is revoked or should be taken over by a third party. This sort of responsive engagement is possible as APRA supervisors can have frequent contacts with regulated entities to get the entity to be responsibly manage its sound risk stance.

One important principle that is maintained throughout the implementation of SOARS is that an entity's SOARS stance is not subject to disclosure. APRA does not publicly disclose whether an entity is in, for example, Oversight or Mandated Improvement. This may seem unreasonable in some jurisdictions because the regulator does not provide transparently financial beneficiaries with necessary information that enables them to work for their best interests. The risk would be bigger when the regulator was in a corrosive relationship with the regulated entity.[8] APRA's answer to this concern is early engagement, according to an APRA senior frontline supervisor. APRA's frontline supervisors gather information and analyse risks according to PAIRS as early as possible. This enables them to start engaging in regulated entities' risk management far earlier than risks are materialized. And it is why individual entity's SOARS stance should not be publicly disclosed, as it may give wrong signs to the markets and jeopardize deliberative problem-solving processes. It is true that APRA's early engagement policy may involve some costs to entities, as

8) APRA's methods of preventing regulatory capture, or corrosive regulator-regulatee relationship, stays beyond the scope of this report. Recently Hong (2015) examines APRA's intra-organizational structure to gauge its methods to address this issue, articulating them as "internal transparency."

supervisors sometimes ask those entities to, for example, provide APRA with a report that their approach can meet the APRA objectives. Nevertheless, this conservative approach by APRA is what is touted exemplary by international financial organizations such as IMF.

V. Financial Conduct Regulation by ASIC

A. ASIC's Approach to Risk-based Regulation

One mechanism that holds Australia's financial regulators accountable for their conduct is exchange of statements. Ministers in Australia are recommended to communicate government's expectations of regulators in a public written Statement of Expectations (SOE). Regulators respond to SOEs in a public written Statement of Intent (SOI), which outlines how the authority will meet the government's expectations (Murray et al. 2014). Statement of Expectations the Treasurer sent to both APRA and ASIC in 2007 asked that both regulators fulfill the government expectation of outcome-based regulation.[9] Both SOE demonstrate:

> "The Government's preference is for regulation to identify the outcomes that are desired rather than prescribe how to achieve those outcomes. An outcomes-based approach avoids unnecessarily prescriptive regulation and allows regulated entities to determine the lowest cost way of meeting regulatory objectives."

9) Both SOEs and SOIs can be viewed and downloaded online at http://asic.gov.au/about-asic/what-we-do/our-role/statements-of-expectations-and-intent/and ttp://www.apra.gov.au/AboutAPRA/Pages/Expectations-and-Intent.aspx.

In case of APRA, this outcome-based approach was already a common practice, as it has endorsed principles-based regulation since 2001.[10] And its principles-based regulation is implemented as APRA supervisors maintain iterated contacts with regulated entities. Kingsford-Smith (2011) points out ASIC's limit in this respect: ASIC makes sparse on-site regulatory inspections. This may be involved in the proportion of the number of entities and each regulator is entitled to regulate to the number of staffs in each agency. ASIC has almost triple more staffs (1,785 in 2014) than APRA (602 in 2014), but its portfolio covers not just financial institutions but also numerous other corporations (including emerging mining and resources companies), financial services consumers and many others. Unlike APRA who operates frontline teams designated to all its regulated entities, it is simply impossible for ASIC to keep such matching human resources. ASIC takes complaints from industry participants and allied professionals, from consumer credit and legal aid centres, from investor action groups, and from referrals of intelligence from other government and law reform agencies (Kingsford-Smith 2011, 721). In 2014-2015 ASIC received more than 9,000 online complaints (ASIC 2015). Not all of those complaints are brought to ASIC's investigation: a large portion would be either no contravention of the law or resolved between the complainant and the financial institution. But this still constitutes a critical difference from the country's prudential regulator, APRA. APRA does not take stakeholder complaints.

ASIC's resort when information collection via direct contacts is limited is

10) Black et al. (2007, 191-3) draw out three features of principles-based regulation from the UK Financial Services Authority: preference of general principles over prescriptive rules; outcome-based regulation; and promoting senior management responsibility. APRA also takes up a similar approach to improve regulatory outcomes rather than to yield mere compliance with the law. For APRA's principles-based regulation, see Black (2006) and Hong (2015).

collecting such information from a wide range of sources. Indeed ASIC needs to obtain documents, information, and explanations "sufficient to establish a picture of what is going on, and if it is going wrong, in any financial services firm" (Kingsford-Smith 2011, 720). One example that represents ASIC's information-seeking powers is the legislation that imposes obligations on people-trustees for debenture holders, auditors, receivers, administrators, compliance plan auditors, compliance committee members and liquidators-who discover breaches in the course of their statutory duties to report them to ASIC.[11]

The difference between APRA and ASIC in the methods of information collection results in the difference between their approach to outcome-based regulation. APRA can obtain and verify the contents of information from the regulated entity itself, and in the course of information collection, more importantly, discuss how to meet the regulatory objectives with the entity in a proactive way. But once a regulator entirely relies on information from other sources, such as reports on legal breach or complaints from stakeholders, then the regulatory engagement can only become retrospective. Once identified as significant contraventions of the securities laws, for example, consumer complaints-about twenty percents-would trigger ASIC's formal investigation by being directed to ASIC's deterrence teams (Kingsford-Smith 2011).

This eventually puts ASIC's risk-based approach to be implemented at a distance. Apart from undertaking traditional reactive surveillance where ASIC see possible misconduct, it also attempts to focus its proactive risk-based surveillance on areas of high risks to investors and financial consumers, markets and market participants and on those entities and activities that have the

11) See *Corporations Act* 2001.

greatest market impact. However, ASIC's proactive risk-based approach is still limited while its role in identifying legal contraventions takes significant portion of the organization's mandate. As Kingsford-Smith (2011, 722) reasonably points out, "the investigatory process is not instigated until there is a breach or breaches so serious or numerous that the firm is on the verge of collapse, and the opportunity for low-level intervention and remediation is well past." This inevitably leads that "the only regulatory options left are prosecution or civil penalty proceedings … and the life of the regulated firms is over without any chance for responsiveness or restoration and rehabilitation" (2011, 722). This means that ASIC's regulatory approach is inevitably rules-based, in which compliance with prescriptive rules is the major regulatory objective, rather than principles- or outcome-based regulation. This is a dominant method adopted by many financial services regulators, including the Securities and Exchange Commission of the United States, and the Financial Supervisory Service in South Korea. Karmel (1982) once called it as "regulation by prosecution."

B. ASIC's Responsive Enforcement Approach

Under this limited circumstance for responsiveness, responsive regulation has been implemented in a form of formal enforcement. Especially in the operation of the Australian Continuous Disclosure Regime (CDR), the purpose of which is "to enhance the integrity and efficiency of Australian capital markets by ensuring that the market is fully informed" (Choi et al. 2016, 3), ASIC introduced civil penalty provisions-a reduced penalty compared to criminal sanction-through passage of the Financial Services Reform Act 2001 (Cth) in 2002. Before 2002, CDR was only enforced with criminal sanctions, a great portion of which is occupied by criminal prosecution on continuous disclosure

violations. And since 2004, administrative sanctions were added as another enforcement tool. This means that since 2004, ASIC has equipped with various tools at its disposal to flexibly deploy to induce effective regulatory compliance. ASIC's deployment of responsive regulation is also evidenced by its Chairman's speech made in 2004. In August 2004, the ASIC Chairman Jeffrey Lucy addressed that ASIC would introduce a pyramidal approach that is applied responsively to different types of regulatees: against compliers ASIC uses persuasion and education; to opportunists it uses targeted surveillances and voluntary or enforceable undertakings; and to incompetent or irrational actors APRA uses its full enforcement strength to deter (Lucy 2004, 3). An enforcement pyramid constructed by reflecting on these developments is shown in Figure 3 below.

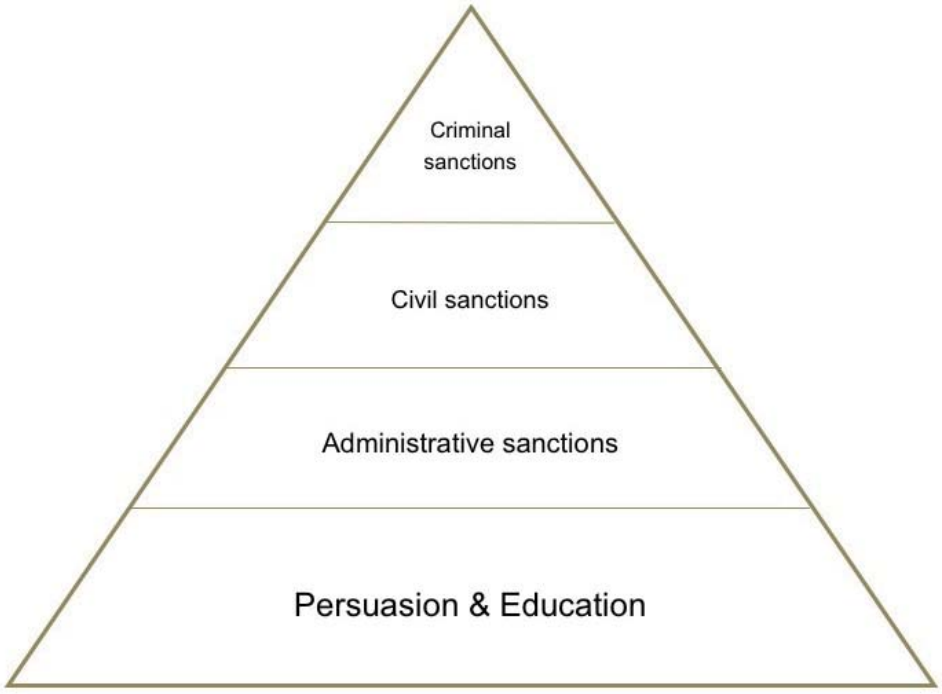

Figure 3 ASIC's enforcement pyramid constructed

As discussed before, ASIC may not be able to engage in persuasion and education of all its regulated entities in a direct manner, as APRA does. ASIC also depends on retrospective information on entities' contravention of securities laws rather than engaging in a proactive manner. Given these limits, ASIC's commitment to outcome-based regulation can rely on its adaptation of responsive regulation. ASIC, according to severity and intention of contravention, may flexibly opt for administrative sanctions or more severe civil or criminal sanctions. One instance that shows ASIC's commitment to outcome-based regulation is its use of enforseable undertakings. An enforceable undertaking is an administrative settlement deployed by ASIC as an alternative to civil or administrative action to improve and enforce compliance with the law under s93A and 93 AA of the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Enforceable undertakings work in a way, for example, that it sets out payment of compensation for affected third parties that may not otherwise be readily and cost-effectively obtained. In such cases, an enforceable undertaking may be a valid alternative to a compensation order.

Many scholars have assessed that enforceable undertakings are an effective responsive regulatory, and particularly restorative justice, tool that enhances regulatory compliance, by exploring them in other field of business regulation, such as market competition (Parker 2003, 2004), occupational health and safety (Johnstone and King 2008). A more empirically rigorous testing of the effectiveness of ASIC's responsive approach has been also conducted, though rarely. Based on an extensive quantitiative analysis of Australian firms' corporate compliance in four distinct periods: the pre-sanction period (before 1994), the criminal sanction period (between 1994 and 2002), the civil sanction period (between 2002 and 2004), and the administrative sanction period (from 2004),

Choi et al. (2016) conclude that adoption of a responsive enforcement strategy in a regulated disclosure regime improves compliance and strengthens markets.

Ⅵ. Conclusion

This report has shown that both APRA and ASIC have adopted responsive regulatory frameworks but the content shows some differences, especially when it comes to enforcement strategies: while APRA uses principles-based approaches prioritizing dialogues and persuasion for problem solving, ASIC uses more prescriptive, prosecutorial approaches. But the report showed that both regulators employ a responsive regulatory approach to fulfill the government expectation of outcome-based regulation.

The difference in the form of responsive regulation between the two regulators lies in most of all the nature of regulation: prudential regulation vs. conduct regulation. A prudential regulator has relatively a small number of entities to regulate compared to a financial conduct regulator. This gives APRA room for developing a designated supervisory system through which it seeks to enhance principles-based regulation, aiming compliance with the spirit of the law, rather than the letter of the law. ASIC also attempts to put its regulatory focuses on enhancement of regulatory outcomes rather than mere compliance with the letter of the law. But its attempts are still on-going and rather limited due to the large number of entities it has to oversee. The form of responsive regulation ASIC has been developing might be different from what APRA is advancing. What is important is that both regulators recognize the importance and effectiveness of responsive regulation in achieving the objectives of risk-based regulation.

Responsive regulation has been employed by regulators overseeing a wide range of fields, such as food, workplace health and safety, patient safety, youth protection, environment, media, transport, taxation and finance (Ivec and Braithwaite 2015). Especially the recent empirical research conducted by Choi et al. (2016) proves the effectiveness of responsive regulation in financial domain. It may be still early to conclude that the responsive approaches of the two Australian financial regulators serve the critical success factor for Australia to withstand the impacts of the GFC. But as Ivec and Braithwaite (2015) point out, responsive regulation is kind of a democratic experimentalism in which practitioners and policy makers are encouraged to transfer ideas and methods to other domains and jurisdiction, if the responsive regulatory pyramid works in one regulatory domain. As this report has shown in the Australian cases, regulators may employ the pyramidal idea in a different way, in the same jurisdiction in similar domains.

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2-2

Responsive Risk-based IT Financial Regulation in Korea

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Ⅰ. Overview

Korea's electronic financial industry is undergoing unprecedented change in the wake of rapid fintech industry growth, partly owing to active government support.

Electronic finance generally refers to the practice by financial institutions such as banks, securities companies, and insurance companies of computerizing systems related to electronic financial affairs using computer and information and communication technology and processing financial and related ancillary affairs using electronic means, such as sales of financial products, provision of financial service channels, and payments.[12]

In addition, 'Electronic Financial Transactions Act,' which is considered Korea's general law for electronic finance, defines an electronic financial transaction as the provision by a financial institution or an electronic financial business entity of financial products and services to consumers who use them in automated ways without physical contact or direct communication with an employee of the financial institution or the electronic financial business entity.

As electronic finance comprises non-face-to-face, non-paper transactions that overcome the temporal and spatial constraints of traditional financial transactions, it benefits from increased convenience in using financial services

12) Sectional Committee on Financial Informationalization Promotion (Bureau: Payment and Settlement Systems Department, The Bank of Korea.), 「Electronic Financial Overview」, 2009. 5, p3. Meanwhile, the Bank for International Settlements (BIS) defines electronic finance as the provision of financial products and services through electronic channels, including products and services such as deposits, loans, account management, provision of financial advice, electronic payment services, and electronic money (Risk Management for Electronic Banking and Electronic money activities, 1998. 3, BIS, p3).

on the customer's part, while also allowing the financial institution to reduce the management and processing costs for each transaction owing to decreased use of papers.[13]

However, for reasons such as electronic finance's non-face-to-face nature, the use of public networks, and increasing dependence on IT vis-a-vis third-parties, the overall risk situation and risk levels have considerably changed from the pre-fintech operating environment. Consequently, stakeholders in electronic finance, including individual users, financial institutions, and financial regulators, are required to assess various risks associated with electronic finance and to respond appropriately.[14]

Financial services are undergoing a period of constant innovation through the merging of the financial and the information and communications technology sectors, as can be observed from amendments to Electronic Financial Transactions Act, the establishment of the Fintech Support Center, the launch of open API platforms, and the founding of Internet-specialized so-called "challenger" banks.

Such changes indicate an advance in financial regulatory systems from a technology-centered ex-ante, meticulous regulatory approach to one that emphasizes the post-transaction liabilities of the financial industry so that a variety of electronic financial services can be provided under a self-regulatory environment.

This trend has led to the abolishment of the mandatory use of specific se-

13) Sectional Committee on Financial Informationalization Promotion (Bureau: Payment and Settlement Systems Department, The Bank of Korea.), the aforementioned book, p4.

14) Sectional Committee on Financial Informationalization Promotion (Bureau: Payment and Settlement Systems Department, The Bank of Korea.), the aforementioned book, p5.

curity techniques and ex-ante regulations such as security reviews of electronic financial tasks. At the same time, by increasing liabilities for electronic financial accidents, it has also encouraged autonomous security screening and efforts to prevent financial accidents.

However, despite such variegated efforts, cyber-attacks and hacking techniques targeting financial information are constantly evolving, requiring financial institutions to respond appropriately to actual infringement accidents through autonomously tightening internal controls and enhanced security systems.[15]

With the recent launch of Internet-specialized banks, there is an acute need to enhance the safety and reliability of electronic finance through the preemptive identification of potential risk types in the IT sector.[16]

With financial institutions, electronic financial business entities, and fintech startups pushing the boundaries of innovative electronic financial services employing a variety of IT technologies, it is necessary to resolve the issues of as-yet-not-relaxed laws and regulations such as the separation of bank capital and industry capital and the relaxation of the real-name financial system for the long-lasting advancement of the fintech industry.

With regard finance that matter, Korea has enacted and enforced laws regarding electronic finance and the protection of personal information, but some argue that it is necessary to strengthen the security of financial institutions in regard to the IT sector, as well as strengthen risk management

15) Of particular note is that the rate of large-scale financial security accidents resulting from DDoS attacks, personal Information extrusion, hacking-induced computerized system failures has been rising recently.

16) Glossary of Financial Supervisory, 2011. 2. Financial Supervisory Service (FSS) (http://terms.naver.com/entry.nhn?docId=1987982andcid=42088andcategoryId=42088, last accessed on 2016. 9. 23.)

in the IT sector and tighten up participating institutions' obligation to maintain security.

The electronic financial sector is particularly susceptible to drastic change as usage increases. As such, IT risk management and information security are deemed the most crucial issues necessitating the establishment of a pre-emptive response system.

The aim of this study is to examine supervision systems with regard to responding to electronic financial transactions and financial accidents given the rise in the levels of electronic financial transactions and information technology in the financial sector.

II. Overview of IT Risk in the Financial Sector

A. Current Status of IT Risk in the Financial Sector

1. IT Risk and Responsive Risk-based

IT risk is closely related to legal and reputation risks. The IT sector refers to the manpower, organization and facilities of financial company that collects, stores, and retrieves information, or otherwise sends/receives it using devices capable of information processing, such as computers. A financial company's IT department constitutes the basis for the financial company's electronic financial tasks. Financial Supervisory Service (FSS) evaluates the IT sector of a financial company in four areas: ① IT audit, ② IT management, ③ system development, adoption, and maintenance, and ④ IT service provision and support. Through these evaluations, FSS guides the financial company to secure the security and soundness of its IT sector.

Consequently, IT risk in electronic finance means the risk of sustaining unexpected damage or losses as a result of system crashes or e-finance related accidents due to failures, negligence, or hacking.

In that context, the phrase "Responsive Risk-Based" in the title of this report should be interpreted as suggesting a study of regulation systems capable of immediate response in the event of an accident for the purpose of monitoring dangers that can occur in the process of IT-based electronic finance.

2. Potential Risk in the IT Sector of a Financial Company

A financial company's risks can largely be categorized into credit risk, market risk, liquidity risk, and operational risk. Of these, IT risk belongs to operational risk. IT risk needs to be divided into three risk areas: task development, task operation, and system security. In addition, IT risk must be systematized with the limitation of access to the computerized system, separation of duties, double checking systems such as manager-approved transaction systems, and constantly monitored transactions.[17]

The rise in cases of fraudsters posing as internal staffers has also seen a gradual rise in the risk of financial accidents caused either intentionally or negligently by third parties pretending to be customers or partner company employees. Moreover, there have been cases of task development failure due to insufficient understanding of IT on the part of the company's board or management.[18] Therefore, it is necessary to intensify monitoring of new IT risks.

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17) Lee Jong-se, "Effective Ways to Manage a Financial Company's IT Risk", Financial Supervisory Service, 2008. p3. (http://www.fss.or.kr/fss/konan/kn/search/search.jsp, last accessed on 2016. 10. 5. l)

18) Lee Jong-se, the aforementioned paper, p3.

Considering that a financial company's IT department plays an important role in maintaining the security and soundness of the financial company, and the share of investment in the IT sector in a financial company's total budget is high, efforts to evaluate risks in the IT sector and reduce recognized risks according to evaluation results are in greater demand than ever.[19]

As the security and soundness of a financial company's IT department have an enormous effect on the security and soundness of its whole business, it is necessary for a financial company to establish a suitable internal control system for its IT sector taking into consideration factors such as system risk, its computerization level, and its IT organization and operating scale.[20]

After the massive leak of personal information held by Korean credit card companies that occurred several years ago, people's awareness of risk management in the IT sector began in earnest, which led to setting permissions for internal access control, reorganization, and enhancing information protection. As a result, the importance of financial institutions' IT risk governance[21] is growing.

Despite all that, there has been an unending stream of financial security accidents, such as cyber terror-induced system crashes at financial institutions, and fraudulent transactions resulting from personal information leakage. It is

19) Lee Jong-se, the aforementioned paper, p4.

20) Lee Jong-se, the aforementioned paper, p4.

21) With regard to IT risk governance, the following six countermeasures have been presented in 'Financial IT Conference 2014 - IT Risk Governance Strategies for Financial Institutions,' which was hosted by the Bank of Korea: a countermeasure for IT operational risk, a countermeasure for IT personnel aging, a countermeasure for information leakage, a countermeasure for outsourcing risk, a countermeasure for IT budget reduction risk, and a countermeasure for compliance strengthening risk. (http://www.boannews.com/media/view.asp?idx=43752andkind=2, last accessed on 2016. 10. 5.)

thus deemed imperative to devise measures to strengthen IT risk management against information leakages caused by insiders, Internet banking failures and errors.

3. Outsourcing Risk in the IT Sector

Most financial companies use outsourcing to take advantage of external expertise, enhance service efficacy, secure organizational flexibility, and adopt new technologies as they come.

An examination of financial companies' security risks reveals that information leakage by internal staffers, including partner company employees, is predominant. Although the majority of companies use outsourcing for cost reduction purposes, the practice is not very cost-effective.

That outsourcing of the workforces of financial institutions for cost reduction purposes is one reason for insufficient internal expertise.

As you can see from the credit card company information leakage incident, a higher share of outsourcing implies a greater likelihood of insufficient work transparency and an inadequate sense of responsibility on the part of managers. The practice itself has not revealed adequate levels of cost-effectiveness, either.

In addition, not only is it necessary to devise measures that enable the prevention of financial information leakage and secure the storage of users' financial information, such as their account information and passwords, but also implement security measures against hacking and personal information leakage. Furthermore, important terms - such as penalties, confidentiality of financial information, accountability in the event of a financial information leak or a system crash, and supervisory authorities' right of inspection -must be

specified in documents such as contracts and agreements so as to minimize the likelihood of future disputes.[22]

When making a service level agreement with an outsourcing company, a financial company must carefully decide on a plan to evaluate the quality of services to be provided, as well as a plan to manage the services. The financial company must establish and enforce internal control plans for maintaining security in various areas, as well as regularly evaluating the financial soundness of the outsourcing company and monitoring its major management activities.

B. Legal Definition of an Electronic Financial Accident

After understanding the necessity of clear criteria for legally interpreting the definition and scope of accidents resulting from electronic financial transaction, Article 9 of 'Electronic Financial Transactions Act' was amended on May 22nd, 2013 to present new interpretation criteria for 'accidents resulting from electronic financial transactions'.

Article 9, paragraph 1 of the Act specifies that the financial company or electronic financial business entity shall be liable for indemnifying a user for any loss resulting from ① an incident caused by the forgery or alteration of the means of access, ② an incident occurring in the course of electronically transmitting or processing the conclusion of a contract or a transaction request, and ③ an incident caused by the use of a means of access acquired by fraudulent or other illegal means by invading electronic apparatus for electronic financial transactions or an information and communication network defined in Article 2 (1) 1 of 'The Act on Promotion of Information and Communications Network Utilization and Information Protection, Etc.'.

22) Lee Jong-se, the aforementioned paper, pp9-10.

In addition to that, a judicial precedent pertinent to the provision has recently been established. The precedent is thought to become a good reference for interpreting the definition of electronic financial accidents under Korean law.

[Supreme Court Decision, May 14th, 2015] Damages Event Related to Electronic Financial Transactions

According to Article 2, paragraphs 1 and 18, Article 8, paragraph 1, and Article 9, paragraphs 1, 2, and 3 of former 'Electronic Financial Transactions Act' (the one prior to Act No. 11814, amended on May 22nd, 2013), and Article 8 of former 'Enforcement Decree Of The Electronic Financial Transactions Act' (the one prior to Presidential Decree No. 24880, amended on November 22nd, 2013), the purpose of Article 9 of former 'Electronic Financial Transactions Act' is to ensure the security and reliability of electronic financial transactions and protect the user in the event of the user sustaining damage due to inconsistency between the transaction results and the transaction orders or unauthorized third party-mediated transactions that could not have occurred in an ordinary face-to-face environment by making the financial institution or electronic financial business entity liable for any such damages, taking into account the nature of electronic financial transactions which are made in automated ways through electronic devices without physical contact or communication. However, in exceptional cases where the user lent or disclosed access media used to secure the truthfulness and accuracy of the transaction order, user, or transaction itself, if the financial institution or electronic financial business entity is judged to have adequately fulfilled their duty of care, such as the establishment and observance of security procedures, it

is possible for the user to be liable for all or part of the damages.

In other words, according to Article 9, paragraph 1 of former 'Electronic Financial Transactions Act', accidents for which the financial institution or electronic financial business entity is financially liable refer to accidents resulting from electronic financial transactions made by unauthorized third parties or from those made without the user's transaction order or from those made not in accordance with the user's transaction order. Therefore, according to Article 9, paragraph 1 of former 'Electronic Financial Transactions Act', cases where the user made a transaction order, and an electronic financial transaction was made as per the transaction order as the user originally intended do not constitute accidents for which the financial institution or electronic financial business entity is financially liable, unless there are special mitigating circumstances.

Supreme Court Decision 2013Da86489 decided Jan 29th, 2014 declared that "when judging whether there has been willful or gross negligence on the user's part as defined in Article 9 of 'Electronic Financial Transactions Act' and Article 8 of 'Enforcement Decree Of The Electronic Financial Transactions Act', a judgement shall be made taking into account specific circumstances under which the financial accident took place (e.g. forgery of the means of access), the intrusion method itself (e.g. forgery), the public's awareness of the intrusion method, the occupation and financial transaction history of the user, and other relevant factors.

III. Current Regulations Regarding Financial IT Supervision

A. Regulations Regarding Terms and Conditions of Electronic Financial Transactions

1. Overview

"Terms and conditions" refer to the binding content of a contract that a party to a contract prepares in a specific form to enter into a contract with multiple other parties, regardless of their name, type, or scope (Article 2, paragraph 1 of 'Act on the Regulation of Terms and Conditions').

Korean Acts pertinent to the regulation of the terms and conditions of electronic financial transactions include 'Act on the Regulation of Terms and Conditions', 'Banking Act', 'Financial Investment Services and Capital Markets Act (hereinafter referred to as "Capital Markets Act")', 'Insurance Business Act', 'Electronic Financial Transactions Act', and 'Specialized Credit Finance Business Act'.

According to the Acts, the authority to regulate the terms and conditions of electronic financial transactions belongs to the Financial Services Commission and the Fair Trade Commission. However, a considerable amount of the Financial Services Commission's authority has been delegated to the head of Financial Supervisory Service (FSS) pursuant to the delegation provisions of the statutes.

2. Act on the Regulation of Terms and Conditions

a. Overview

'Act on the Regulation of Terms and Conditions' was enacted on December 31st, 1986 with the aim of preventing business people from establishing a fair trading environment whereby consumers are protected and the lives of people can be improved through abuse of their positions in trading, writing and using terms and conditions that include unfair clauses and to regulate such terms and conditions. This Act consists of 34 chapters, including Chapter 1 General Provisions, Chapter 2 Unfair Clauses in Terms and Conditions, Chapter 3 Regulation of Terms and Conditions, Chapter 4 Mediation of Disputes, Chapter 5 Supplementary Provisions, and Chapter 6 Penalty Provisions.[23]

b. Key Points of the Act

A business person shall provide terms and conditions of a contract in Korean and use standardized and systemized terms so that customers can easily understand the details of the terms and conditions, and explicitly indicate important details thereof with signs, color, bold and large letters so that customers can easily recognize them (Article 3, paragraph 1). When entering into a contract, a business person shall clearly state to his/her customers the details of the relevant terms and conditions in a way that is generally expected for the type of contract in question and shall, upon the request of the customer, and deliver a copy of the terms and conditions to the customer to help the customer understand them (Article 3, paragraph 2). A business person shall

23) Article 3, paragraph 2 of Act on the Regulation of Terms and Conditions states that except as otherwise provided for in any other Act with respect to terms and conditions for specific business transactions, this Act shall govern.," indicating that the Act serves as sort of a basic, general, and supplementary law regarding terms and conditions.

clearly explain important details provided in the terms and conditions of a contract so that customers can understand them (Article 3, paragraph 3). If a business person enters into a contract, in violation of paragraphs (2) and (3), he/she may not claim that the relevant terms and conditions constitute the content of the contact (Article 3, paragraph 4).

Term and conditions shall be construed impartially in accordance with the principle of trust and good faith, and shall not be construed differently depending on the customer (Article 5).

Any clause in terms and conditions which is not fair and which runs counter to the principle of trust and good faith shall be null and void. In addition, any clause which is unreasonably unfavorable to customers, any clause which customers would have difficulty anticipating in light of various circumstances, including the type of transaction the contract represents, and any clause which is so restrictive of essential rights under a contract that the purpose of the contract may not be achieved shall also be presumed to be unfair (Article 6).

With regard to individual invalid clauses, the Act specifies exemption clauses (Article 7), predetermination of amount of indemnification clauses that cancel the contract (Article 8), clauses that exclude the right of customers to cancel or terminate the contract (Article 9), clauses that give a business person power to unilaterally determine or change the details of performance of obligations (Article 10), clauses that exclude or limit a customer's rights of defense, offset of damages, (Article 12), clauses which provide that once a certain act of malfeasance or omission has occurred, customers shall be deemed to have expressed or to not have expressed a certain intent, and clauses that impose unreasonably strict restrictions on the requirements for or the way in which customers may express their intent (Article 12), clauses that impose on the agent an obligation to carry out the customer's obligations in whole or in part

(Article 13), and clauses that prohibit customers from filing a lawsuit. All the aforementioned clauses will be declared null and void.

No business person shall include in a contract any of the unfair clauses referred to in Articles 6 through 14 (Article 17). If a business person violates the aforementioned, the Fair Trade Commission shall recommend the business person to take measures necessary to correct the violation, including a deletion, revision of the relevant unfair terms and conditions. In addition, if the violator is a market-dominating business person, a business person in a dominant position, or another specific type of business person, the Fair Trade Commission may order him/her to publicly notify the fact of receiving an order to delete, revise, or correct the relevant unfair terms and conditions (Article 17-2).

If the Fair Trade Commission deems that the terms and conditions of a bank constitute unfair clauses under the 'Banking Act', the Fair Trade Commission may inform the Financial Supervisory Service of such fact and recommend that it take measures necessary to correct the violation (Article 18, paragraph 2).

3. Electronic Financial Transactions Act

a. Overview

It has been pointed out that due to their technical characteristics (non-paper-based, non-customer facing), electronic financial transactions allow indefinite liability for losses caused by forgery or alteration of financial information and that, according to 'Civil Act' and 'Commercial Act', the burden of proof is predominantly borne by users.

For example, because users are not versed in information and communica-

tion technology, and the actual providers of services are financial institutions, it is natural for the system provider to provide causal evidence in the event of an electronic financial accident. However, according to the principles specified in relevant Acts, users normally have to shoulder the burden of proof in such cases, which fact demands changes to such principles.[24] Furthermore, due to the nature of electronic financial transactions, incidents unprecedented in offline transactions have occurred, making it necessary to devise new standards regarding the safety of information technology.[25]

In addition, non-financial institutions such as communication companies making forays into the electronic payment sector and increasing numbers of business partnerships entered into between financial institutions and IT companies concerning electronic financial transactions lead to various blind spots unreachable with the current regulatory systems - such as 'Civil Act', 'Commercial Act', and 'Banking Act' - along with numerous complaints due to insufficiency of such systems, highlighting the need to systemically establish regulations regarding electronic financial transactions and to revamp the relevant systems.[26]

Consequently, to secure the safety and security of the IT sector with regard to electronic financial services provided by financial companies or electronic financial business entities, to monitor the financial soundness of non-financial companies with regard to their electronic financial services, and to protect consumers in the event of electronic financial accidents, the Korean govern-

24) Kang Jun-mo, "Korean Laws and Regulations about Electronic Financial Transactions and Proposals for Their Improvement," Korea Legislation Research Institute Source Book, 2010. 10. 27, p13.

25) Financial Supervisory Service, 「Financial Consumer Protection White Paper」, 2011. p4, 204.

26) Kang Jun-mo, the aforementioned source book, p13.

ment enacted the 'Electronic Financial Transactions Act' in April, 2006 which provides basic principles for electronic financial transactions, criteria for non-financial companies' participation in payment services, IT standards for electronic financial affairs. The Act was enforced from January 1st, 2007.[27]

In the following subsubsection, we examine 'Electronic Financial Transactions Act' broken down into two parts, general provisions unrelated to terms and conditions, and provisions related to terms and conditions.

b. Key Points

Any financial company or electronic financial business entity shall ensure that a user can confirm the transaction details through an electronic apparatus such as PC or smartphone (Article 1, paragraph 1), and any financial company or electronic financial business entity shall, upon a user's request to deliver relevant transaction details in writing (excluding any electronic document), deliver to him/her a document stating the details of his/her transaction within two weeks after receipt of such request (Article 7, paragraph 2).

A financial company or an electronic financial business is obliged to bear the liability for any loss from an accident caused by the forgery or alteration of the means of access or in the course of electronically transmitting or processing the conclusion of a contract or a transaction request (Article 9, para-

27) Electronic Financial Transactions Act serves not only as a transaction act that governs legal relationships such as the basic procedures and elements of electronic financial transactions, user protection, and liability but also as a business act (regulation act) that governs affairs relating to the business scopes, entry regulation, examination, and supervision of electronic financial business entities. In addition, Electronic Financial Transactions Act is the world's first act to govern affairs in the whole area of electronic finance as a single act (Sectional Committee on Financial Informationalization Promotion (Bureau: Payment and Settlement Systems Department, The Bank of Korea.), 「Electronic Financial Overview」, p5.)

graph 1). However, the financial company or electronic financial business entity may require a user to fully or partially bear the liability for loss in any of the following cases: ① where, with respect to any incident caused by the intention or gross negligence of the user, a prior agreement is made with the user to the effect that all or part of the loss may be borne by the user; ② where a corporate user (excluding any small enterprise defined in Article 2 (2) of the Framework Act on Small and Medium Enterprises) suffers any loss although the financial company or electronic financial business entity fulfills the duty of due care reasonably required to prevent incidents, such as the establishment and strict observance of security procedures (Article 9, paragraph 2).

Upon receipt of a user's notification of the loss or theft of the means of access, the relevant financial company or electronic financial business entity shall be liable for compensating the user for any loss he/she might suffer due to the use of such means of access by a third party from the time such notification is received; however, the same shall not apply to cases prescribed by Presidential Decree where any damage is caused by the loss, theft of electronic prepayment means or electronic currency. (Article 10, paragraph 1).

Any financial company or electronic financial business entity shall make a payment by transmitting the amount requested by a payer or payee on a transaction request to the payee or his/her financial company or electronic financial business entity, pursuant to an agreement made with the payer or payee to facilitate electronic payment transactions (Article 12, paragraph 1), and when any financial company or electronic financial business entity becomes unable to transmit the amount requested, it or he/she shall return to the payer the amount received for electronic payment transactions. In such cases, when the failure to transmit the amount is caused by the negligence of the payer, the expenses incurred in relation to such transmission may be deducted (Article

12, paragraph 2).

A financial company or an electronic financial business entity and its or his/her subsidiary electronic financial business entity shall perform its or his/her duties of a good manager to ensure the safe processing of electronic financial transactions (Article 21, paragraph 1). To ensure the safety and reliability of electronic financial transactions, a financial company shall comply with the standards determined by the Financial Services Commission with respect to the IT sector, such as human resources, facilities, electronic apparatus for conducting electronic transmissions, and the electronic financial affairs.

Any financial company or electronic financial business entity shall prepare procedures to reflect reasonable opinion or complaints presented by users in relation to electronic financial transactions and to compensate for any loss sustained by users in the course of conducting electronic financial transactions, as prescribed by Presidential Decree (Article 27, paragraph 1). When a user expresses an objection to the processing of electronic financial transactions, he/she may demand the settlement of dispute, such as compensation for losses, pursuant to the procedures determined under paragraph (1) or file an application for mediation of dispute with the Financial Supervisory Service of the Korea Consumer Agency (Article 27, paragraph 2).

Any person who intends to engage in a business issuing and managing electronic currencies shall obtain permission for the same from the Financial Services Commission (excluding the banks provided for in the Banking Act and other financial companies prescribed by Presidential Decree, Article 28, paragraph 1), and any person who intends to provide any of the following services shall register himself/herself with the Financial Services Commission (excluding the banks provided for in the 'Banking Act' and other financial companies prescribed by Presidential Decree, Article 28, paragraph 2).

The Financial Supervisory Service shall supervise whether financial companies and electronic financial business entities abide by this Act or orders issued under this Act, following instructions from the Financial Services Commission (Article 39, paragraph 1), and the Governor of the Financial Supervisory Service may require a financial company or an electronic financial business entity to report on its or his/her business operations and financial conditions if necessary to conduct supervision (Article 39, paragraph 2). The Governor of the Financial Supervisory Service may inspect the electronic financial business and other related financial conditions of a financial company and electronic financial business entity and, if deemed necessary to conduct such inspection, request the financial company and the electronic financial business entity to submit data relating to its or his/her business operations and financial conditions or to order the attendance of all relevant persons (Article 39, paragraph 3).

When the Monetary Policy Committee deems it necessary for implementing monetary credit policies and facilitating the smooth operation of payment and settlement systems in relation to electronic payment transactions, the Bank of Korea may request a financial company or an electronic financial business entity to submit data (Article 41, paragraph 1), and when the Monetary Policy Committee deems it necessary for implementing monetary credit policies, the Bank of Korea may request that the Financial Supervisory Service inspects the electronic currency issuer and the financial company and electronic financial business entity registered or conduct a joint inspection thereof with the Bank of Korea (Article 41, paragraph 2).

A financial company and an electronic financial business entity shall keep separate accounts in the electronic financial business to analyze business performance relating to fund management and electronic financial transactions,

and prepare a report on the business relating to electronic financial transactions and the outcomes of management and submit it to the Financial Services Commission, as determined by the Financial Services Commission (Article 42, paragraph 1). In addition, the Financial Services Commission may set the standards for management guidance for the following matters to direct the sound management of a financial company or an electronic financial business entity that performs any business relating to electronic financial transactions and to prevent electronic financial incidents, as prescribed by Presidential Decree (Article 42, paragraph 2).

The Financial Services Commission may entrust the Governor of the Financial Supervisory Service with part of its authority under this Act, as prescribed by Presidential Decree (Article 48).

c. Points Relevant to the Terms and Conditions of Electronic Financial Transactions

Any financial company or electronic financial business entity shall clarify the terms and conditions on a website or elsewhere in concluding a contract for electronic financial transactions with a user, and, at the request of a user, deliver a copy of the terms and conditions to the user, along with an explanation of the details thereof, by electronic transmission (by e-mail), facsimile, regular mail, or hand delivery (Article 24, paragraph 1 / Article 11, paragraph 2 of Regulation on Supervision of Electronic Financial Transactions). If a user requests a financial institution or electronic financial business entity to explain the terms and conditions, the financial institution or electronic financial business entity shall explain the key clauses of the terms and conditions to the user or otherwise display such clauses on a website or by other electronic means for the user to comprehend them with ease. It shall subsequently receive acknowledgement from the user via an electronic apparatus that the

user has been sufficiently made aware of such clauses (Article 11, paragraph 3 of the aforementioned Regulation).

When a financial company or an electronic financial business entity intends to prepare or alter the terms and conditions for electronic financial transactions, it or he/she shall in advance report thereon to the Financial Services Commission. However, in cases determined by the Financial Services Commission which do not adversely affect the rights, interests or duties of users, a report may be filed to the Financial Services Commission within ten days after the statement of terms and conditions has been prepared or altered (Article 25, paragraph 1).

A financial company or an electronic financial business entity may require a user to fully or partially bear the liability for any loss from an accident caused by the forgery or alteration of the means of access or in the course of electronically transmitting or processing the conclusion of a contract or a transaction request, provided that, with respect to any accident caused by the intention or gross negligence of the user, a prior agreement is made with the user to the effect that all or part of the loss may be borne by the user (Article 9, paragraph 2). In such cases, the intention or gross negligence of the user referred to in paragraph (2) shall be limited to that stipulated in the terms and conditions of electronic financial transactions within the limits prescribed by Presidential Decree (Article 9, paragraph 3).

Any user may withdraw his/her transaction request before the payment takes effect (Article 14, paragraph 1). However, a financial company or an electronic financial business entity and its user may, pursuant to a prior agreement, determine differently the timing for withdrawing a transaction request with respect to any batch transaction, reserved transaction (Article 14, paragraph 2). Any financial company or electronic financial business entity shall in-

clude in its or his/her terms and conditions the matters relating to the methods and procedures for withdrawing a transaction request under paragraph (1) and the prior agreement under paragraph (2) (Article 14, paragraph 3).

Any financial company or electronic financial business entity that issues an electronic prepayment means shall, upon request by its holder, refund the balance recorded on such electronic prepayment means pursuant to a prior agreement (Article 19, paragraph 1) and shall enter, in the terms and conditions, that it or he/she will fully pay the balance recorded on the electronic prepayment means when 1) the electronic prepayment means becomes unavailable because it is impracticable for a chain store to supply goods or services due to an act of God, 2) a chain store cannot supply goods or services due to any defect in the electronic prepayment means, and 3) the balance recorded on the electronic prepayment means falls below a fixed rate. In such cases, the fixed rate shall be less than 20/100 (Article 19, paragraph 2).

4. Banking Act

Article 52 of 'Banking Act' grants the authority to regulate the terms and conditions of electronic financial transactions to the Financial Services Commission and the Fair Trade Commission, providing that ① Banks shall protect the rights and interests of bank users in conducting business under this Act, and if they intend to establish or modify the standard terms and conditions relating to financial transactions, they shall report it in advance to the Financial Services Commission.[28] However, in cases where not adversely af-

28) Meanwhile, regarding the matter, the provisos of paragraph 1 of Article 86-2 of Regulation on Supervision of Banking Business enacted by the Financial Services Commission provides as follows: 1) modifying the contractual standards to expand the customer's rights or reduce the customer's obligations, 2) Drafting or modifying

fected by the rights and interests of the users as determined by the Financial Services Commission, they may report to the Financial Services Commission within ten days after establishing or modifying the standard terms and conditions. ② If a bank has established or modified the standard terms and conditions, it shall disclose such through its web site. ③ The Financial Services Commission upon receipt of a report on the standard terms and conditions pursuant to paragraph (1) shall notify the Fair Trade Commission of such standard terms and conditions. In such cases, if the Fair Trade Commission deems that the standard terms and conditions contain any matter provided for in Articles 6 through 14 of Act on the Regulation of Terms and Conditions, it shall notify the Financial Services Commission of such facts and request it to take necessary measures for the rectification thereof, and the Financial Services shall comply therewith unless any extraordinary ground exists. ④ The Financial Services Commission may advise a bank to modify its standard terms and conditions referred to in paragraph (1), where necessary to maintain sound order in financial transactions. ⑤ The Financial Services Commission may determine the timing and procedures for reporting the establishment or modification of standard terms and conditions under paragraph (1) and other necessary matters.

Paragraph 1 of Article 86-2 of the same Regulation provides that when a financial institution intends to draft or modify its contractual standards, it shall submit to the Governor the documents required to understand them at least ten (10) business days prior to the scheduled date of effect. In addition, paragraph 3 provides that the Governor shall review the contractual standards and

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the contractual standards substantially identical or similar to the contents of the contractual standards already reported to the Governor, 3) Drafting or modifying the contractual standards as determined by the Governor, which have no material effect on the rights or obligations of the customers.

may recommend the financial institution to modify the contents thereof when deemed necessary for maintaining the soundness of financial transactions; paragraph 3 stipulates that any financial institution recommended to modify the contractual standards shall report to the Governor on whether it will accept such a recommendation. Lastly, paragraph 6 provides that the Governor shall notify the Fair Trade Commission of submitted contractual standards on a quarterly basis, and the Fair Trade Commission shall review whether the submitted contractual standards constitute the unfair clauses referred to in Articles 6 through 14 of 'Act on the Regulation of Terms and Conditions' and promptly report the results to the Governor. In the end, all the aforementioned indicate that most of the Financial Services Commission's regulatory authority is entrusted to the Governor of the Financial Supervisory Service.

5. Capital Markets Act

Article 56 of 'Capital Markets Act' grants the authority to regulate the terms and conditions of electronic financial transactions to the Financial Services Commission and the Fair Trade Commission, providing that: "① A financial investment business entity that intends to establish or amend a standardized contract form in connection with the financial investment business shall report it in advance to the Financial Services Commission.[29] ② A financial investment

29) However, 1) When any term or condition of the standardized contract form, which has nothing to do with investors' rights and obligations, is amended, 2) when the standard contract form under paragraph (3) is used as it is, 3) when the terms and conditions to be established or amended are identical with those already reported by other financial investment business entities to the Financial Services Commission, and 4) when a standardized contract form applicable only to professional investors is established or amended, the standardized contract form newly established or amended shall be reported to the Financial Services Commission and the Association within seven days after such establishment or

business entity that has established or amended a standardized contract form shall publish it on its Internet homepage. ③ The Association[30] may establish a contract form, which will serve as a standard form in connection with the operation of a financial investment business (hereinafter referred to as "standard contract form" in this Article), in order to establish sound trade practice and prevent the widespread use of a contract form with unfair terms or conditions. ④ The Association shall, whenever it intends to establish or amend the standard contract form, report such intention to the Financial Services Commission in advance. However, the standard contract form newly established or amended shall be reported to the Financial Services Commission within seven days after such establishment or amendment, if the form is applicable only to professional investors. ⑤ The Financial Services Commission shall, upon receipt of a report on or being informed of the contract form under paragraph (1) or the standard contract form under paragraph (4), notify the Fair Trade Commission of the contract form or the standard contract form. In such cases, upon notification of a violation of any provision of Articles 6 through 14 of Act on the Regulation of Terms and Conditions is found in the contract form or the standard contract form, the Fair Trade Commission may notify the Financial Services Commission of the violation, request it to take all measures necessary for the rectification of such violation, and the Financial Services Commission shall, in return, comply with such request, except in extenuating circumstances. ⑥ The Financial Services Commission may in the event that it is either deemed that any contract form or standard contract form is likely to violate this Act or any finance-related statute, or else impinge on investors' interests, order the financial investment

amendment (the provisos of paragraph 1 of Article 56 of the same Act).

30) Refers to the Korea Financial Investment Association which was established pursuant to Capital Markets Act.

business entity or the Association involved to amend the contract form or the standard contract form in writing, indicating such foreseeable violation or infringement in specific detail.

By the way, pursuant to Article 438 (Delegation or Entrustment of Authority) of 'Capital Markets Act', the Financial Services Commission entrusts its authority to the Association over matters such as receipt of notifications and reports regarding financial investment business entities' establishment and revision of contract forms and reviews of whether the relevant contract form is likely to violate this Act or any finance-related statute or impinge on investors' interests (Article 387, paragraph 2, subparagraph 2 of Enforcement Decree of the same Act). The Financial Services Commission shall entrust its authority to the Governor of the Financial Supervisory Service over matters such as receipt of notifications and reports regarding the Association's establishment and revision of standard contract forms and reviews of whether the relevant standard contract form is likely to violate this Act or any finance-related statute or impinge on investors' interests (Article 387, paragraph 3, attached table 20, subparagraph 18 of Enforcement Decree of the same Act).

6. Insurance Business Act

'Insurance Business Act' features provisions similar to those concerning the regulation of terms and conditions found in 'Banking Act' and 'Capital Markets Act'. However, the Act categorizes business manuals for each type of insurance, insurance policies, and methods of calculating insurance premiums and liability reserves as "basic documents" and regulates those documents. In other words, a person who intends to run an insurance business must obtain a license relevant to each type of insurance to sell from the Financial Services

Commission. For that, the person must submit to Financial Services Commission an application accompanied by documents prescribed by Presidential Decree among articles of incorporation, business plans, and basic documents for each insurance type that is to be sold by the insurance business intended to run.

In addition, an insurance company shall prepare basic documents on the insurance products that it intends to sell, and the insurance company shall report to the Financial Services Commission in advance ① when a new insurance product is introduced or it becomes mandatory to buy an insurance product due to the enactment or amendment of Acts and subordinate statute, ② when an insurance company solicits insurance contracts through an insurance agency of a financial institution, ③ when prescribed by Presidential Decree for the protection of policy-holders, and ④ when the Financial Services Commission may requests insurance companies to submit materials on the basic documents for protection of policy-holders (Article 127).

An insurance company shall observe the following matters when preparing and changing its basic documents: ① not to include details violating this Act or any other Acts and subordinate statutes, ② not to include details disadvantageous to policyholders, such as the abridgment of the rights of policyholders, or expansion of obligations of policyholders without any reasonable grounds, and ③ to meet the standards set by the Financial Services Commission (standards regarding writing or changing basic documents), as prescribed by Presidential Decree in order to protect policyholders and secure financial soundness (Article 128-3). If the details of the basic documents reported by an insurance company and the details of materials on the basic documents submitted violate standards regarding writing or changing basic documents or the principles for calculating premium rates, the Financial

Services Commission may recommend amendments to the basic documents, as prescribed by Presidential Decree (Article 127-2).

However, pursuant to Article 194 (Entrustment of Affairs) of 'Insurance Business Act', the Financial Services Commission entrusts its authority to the Governor of the Financial Supervisory Service over matters such as the receipt of reports regarding the creation and revision of basic documents, requests for materials on basic documents, and recommendations to change basic documents (Article 100, paragraph 1, attached table 8, subparagraphs 31-33 of Enforcement Decree of Insurance Business Act).

7. Specialized Credit Finance Business Act

a. Overview

Of the Acts relevant to the financial sector, 'Specialized Credit Finance Business Act' separately specifies matters concerning business entities operating in the credit card sector, facility rental sector, installment financing sector, and financial sector for new technology businesses. The Act features provisions concerning terms and conditions for electronic financial transactions, whose key points are specified in the following sub-sections.

b. Key Points

Article 54-3 of the Act specifies matters concerning revisions to the terms and conditions. Specialized credit finance business companies are obliged to protect the interests of users of financial services. To that end, the Act features mandatory provisions requiring specialized credit finance business companies to report to the Financial Services Commission in advance if they intend to establish or revise terms and conditions. Exceptionally, a specialized credit

finance business company shall report to the Financial Services Commission within ten days after enactment or revision of financial terms and condition when ① the company revises matters that are not related to rights or duties of finance users from among financial terms and conditions, ② when the company uses the standardized terms and conditions without changing them, and ③ when the details of financial terms and conditions that the company intends to enact or revise are the same as those of financial terms and conditions reported by other specialized credit finance business companies to the Financial Services Commission (Article 54, paragraph 1).

In addition, paragraph 3 of Article 54-3 of the Act provides that the specialized credit finance business association can enact or revise terms and conditions that serve as a standard with regard to transactions in specialized credit finance business. In such cases, the specialized credit finance business association must report to the Financial Services Commission in advance.

The Act provides that the Financial Services Commission, upon receipt of a notification or report of the establishment or revision of financial or standardized terms and conditions, must report to the Fair Trade Commission the details of the relevant financial or standardized terms and conditions. If the Fair Trade Commission recognizes that the details of financial or standardized terms and conditions violate Articles 6 through 14 of 'Act on the Regulation of Terms and Conditions', the Fair Trade Commission can report the violations to the Financial Services Commission and request it to take necessary corrective measures, and the Financial Services Commission must comply with such request unless there is a special reason to the contrary (Article 54-3, paragraph 6).

B. Status of Regulatory Standards for IT Outsourcing in the Financial Sector

1. Significance of IT Outsourcing

Even if a company has established its IT strategies, it is nevertheless still difficult for the company to realize those strategies using limited manpower and resources. What is being examined as a solution for such a reality and currently widely used is outsourcing through IT outsourcing service providers.[31]

Outsourcing means 'to contract a portion of a company's work or activities to an external business entity and let the external entity conduct the work or activities'. The term originated from the production sector and constituted a traditional decision-making area in production management. Outsourcing has since evolved into a practice whereby external business entities comprehensively run and manage production, design, and specialized IT services. The meaning of outsourcing has thus expanded to refer to 'strengthening of core competencies through specialization.' Strategic outsourcing means an assortment of strategic management innovation activities whereby a company concentrates its internal resources on the competitive, core areas of its managerial elements and entrusts non-competitive, non-core areas to external specialist service providers, thereby achieving competitive advantage. The types of outsourcing practiced in Korea are: outsourcing through external specialist companies, outsourcing through the corporation's IT affiliates, outsourcing through establishing subsidiary companies.[32]

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31) Kim Bum-chul, Jeong Eun-ju, and Kim Bum-chul, "Current Status and Prospects of the IT Outsourcing Industry," Korea Information Processing Society, 2010.11.30., p58.

32) Kim Bum-chul, Jeong Eun-ju, and Kim Bum-chul, the aforementioned paper, pp58-89.

2. Considerations regarding IT Outsourcing

a. Protection of Core Competencies and Use of Optimized External Resources

An outsourcer must leave its IT planning manpower and informatization planning manpower as its resources unless under unavoidable circumstances and provide support so that such manpower can acquire specialized competencies within a short time period. This is because, even if the outsourcing has reasonable structure, considering it is a business-to-business practice, there needs to be IT planning competency to understand the company's intrinsic business operations and organization and to plan accordingly. Given the rapid pace of change in IT, it can be a structural solution to the problem of dependency on outsourcing service providers. As such, companies and outsourcing service providers should provide diverse opportunities that allow such manpower to grow into specialists.

b. Maintenance of a Long-Term Cooperationship with a Supplier

Outsourcing has been traditionally practiced based on the push-out philosophy (answering the question "am I doing this job effectively?"). However, in contrast, the type of outsourcing needed at present requires the buy-in philosophy (answering the question "can I do this job competently?"). In other words, the new type of outsourcing, rather than fostering, maintaining, and developing IT itself, answers the question of 'what is the most important thing to do for business growth?' For that, it is necessary to select a strategic partner company, buy in its manpower and technology, and then make effective and reasonable use of the infrastructure and technology acquired. That is to say, the true effects of outsourcing can only be manifested when outsourcing is implemented as a long-term core competency exchange model.

c. Establishment of Clear Quality Criteria and Evaluation Criteria for Outsourcing Service Providers

When intending to outsource, a company must make sure to enhance its service provider management, user satisfaction, and service level in order to keep a flexible partnership system through regular communication by implementing an IT governance system. In addition, outsourcing must be carried out based on a service level agreement (SLA). This is not only because the outsourcer company can use an SLA as a control mechanism vis-a-vis the outsourcing service provider, but also because an SLA induces the outsourcing service provider to invest more resources than initially planned, while at the same time streamlining its infrastructure investment and internal management for cost reduction purposes in order to act as a catalyst for the growth of the core competencies of both parties.

3. Korea's IT Outsourcing Industry

The Asian financial crisis coincided with a rise in outsourcing in Korea. Before that, most Korean companies focused on insourcing all of their functional areas and in turn expanding their business volumes. The Asian financial crisis flushed out companies devoid of competitiveness and consequently exacerbated social costs and economic unrest. In that context, outsourcing was seen as a valid management response. However, around the time of the Asian financial crisis, outsourcing was carried out in the same context as corporate restructuring and downsizing, extremely distorting the true nature of outsourcing. In fact, Korean companies actually carried out downsizing in the name of outsourcing, and exclusively for cost reduction purposes. The practice was carried out so recklessly as to obscure the original purpose of out-

sourcing, 'management of core competencies through externalization of business functions,' further accelerating the distortion. On a related note, in 2009, the IT outsourcing market in Korea was estimated to be worth approximately 5.1 trillion won, showing 3.1 percent growth from the previous year; as most Korean companies began taking cost reduction measures due to the financial crisis, more IT resources were transferred to their data centers, which, along with widening use of utility and cloud computing and increasing M&As, demonstrates the market's continual growth at the time.

4. IT Outsourcing in the Financial Sector

IT outsourcing in the financial sector is commonly practiced by subsidiary electronic financial business entities as defined in 'Electronic Financial Transactions Act'.

The term "subsidiary electronic financial business entity" means any person designated by the Financial Services Commission who assists in electronic financial transactions, who vicariously performs part of such transactions for a financial company or an electronic financial business entity, or who operates a payment gateway system (Article 2(5), Electronic Financial Transactions Act); specifically: 1) business entities supporting, through information processing systems, transaction approval on, and payment by, credit cards and other settlement of funds by credit card companies under the Credit Specialized Financial Business Act, 2) business entities supporting, through information processing systems, the withdrawal of funds, foreign exchange and other businesses of persons engaged in banking businesses, 3) business entities operating information processing systems relating to the electronic financial business on behalf of the relevant financial institutions or electronic financial busi-

ness companies, and 4) business entities operating information processing systems after signing contracts regarding partnership, trust or external orders with the business entities mentioned in 3) (Article 3 of Regulation on Supervision of Electronic Financial Activities).

5. Position of a Subsidiary Electronic Financial Business Entity

In electronic financial transactions, willful or gross negligence by a subsidiary electronic financial business entity is deemed willful or gross negligence by the relevant financial institution or electronic financial business entity. If a financial institution or electronic financial business entity has compensated a user for a loss caused by willful or gross negligence on the part of a subsidiary electronic financial business entity, the financial institution or electronic financial business entity can file a claim for damages against the subsidiary electronic financial business entity. A user, as per an agreement he/she made with a financial institution or electronic financial business entity, can perform an assortment of notifications he/she otherwise performs on the financial institution or electronic financial business entity on the relevant subsidiary electronic financial business entity. In such a case, the notifications made to the relevant subsidiary electronic financial business entity are deemed to have been made to the financial institution or electronic financial business entity.

6. Direct Regulations regarding Subsidiary Electronic Financial Business Entities

a. Duty to Ensure Safety (Article 21 of Electronic Financial Transactions Act)

A financial company or an electronic financial business entity and its or his/her subsidiary electronic financial business entity (hereinafter referred to as "financial company") shall perform its or his/her duties of a good manager to ensure the safe processing of electronic financial transactions. In order to ensure the safety and reliability of electronic financial transactions, a financial company shall comply with the standards determined by the Financial Services Commission with respect to the information technology sector, such as human resources, facilities, and electronic apparatus, and expenses for conducting electronic transmissions or processing. In reference to the above, Regulation Supervision of Electronic Financial Activities specifies regulatory provisions in the following four categories: ① management of personnel in the IT sector, ② protection of facilities, including the IT Room, ③ protection of electronic devices, including terminals, the Computer Data, telecommunication, ④ and other matters necessary for securing the safety of electronic financial businesses.

The following provisions regarding regulation of management of personnel in the IT sector of a financial institution or electronic financial business entity can be construed as performing the role of partially limiting indiscriminate outsourcing of subsidiary electronic financial business entities by prescribing the regulation of management of personnel in the IT sector of a financial institution or electronic financial business entity. In other words, in deciding on the scale of outsourcing, such standards can be said to act as marginal principle.

Article 8 (Personnel, Organization and Budget) of the Regulations on Supervision of Electronic Finance

① With respect to personnel and organization, financial institutions and electronic financial service providers shall:

1. Have an information processing system and organization devoted to businesses related to electronic finance;
2. Have personnel and organization within them capable of reviewing for validity, and controlling, agreements on outsourcing; and
3. Offer training and/or educational programs to help their IT professionals improve their skills and raise new IT professionals.

② With respect to personnel and budget, financial institutions and electronic financial service providers shall:

1. Ensure that the proportion of IT personnel is no less than 5 percent of their total employees and that the proportion of those involved in the protection of information is no less than 5 percent of their total employees; and
2. Ensure that the proportion of fund allocated to information protection is no less than 7 percent of their total IT budget.

③ Any financial institution or electronic financial service provider who fails to comply with any of the provisions under paragraph (2) above shall make available information on such failure, including the reason and any impact on the protection of users, to the public through its website or similar within one month after the end of its business year.

④ The provision regarding personnel under paragraph (2)1 is described in greater detail in Schedule 1 and the provision regarding budget under paragraph (2)2 in Schedule 2.

Appendix 1 Provisions concerning Personnel and Data Protection in IT

1. Total employees

A. The total employees of a financial institution or an electronic financial service provider shall be calculated based on those for whom the financial institution or the electronic financial service provider applies withholding tax under the Income Tax Act, including permanent and casual workers, but excluding outsourced employees.

B. For the purpose of these provisions, outsourced employees refer to those employed by an entity that is commissioned by a financial institution or an electronic financial service provider to provide mutually agreed services.

2. IT personnel

For the purpose of these provisions, IT personnel means:

A. Those among the total employees of a financial institution or an electronic financial service provider who are involved in businesses related to information technology, including IT planning, development, operation or security, as specified in the internal regulations on job allocation;

B. Those who are employed permanently or casually by a financial holding company's subsidiary responsible for processing computerized information for that holding company, work full time in the building where the computing room (including a disaster recovery center) of the holding company or the subsidiary is located, and are managed under Article 60(1)13 Manners of Managing Workforce hereof, provided that the subsidiary is one as defined in Article 4 of the Financial Holding Companies Act; or

C. Those who are outsourced employees other than those under sub-paragraph B above, work full time in the building where the computing room (including a disaster recovery center) of the holding company or the subsidiary is located, and are managed under Article 60(1)13 Manners of Managing Workforce hereof, provided that the subsidiary is one as defined

in Article 4 of the Financial Holding Companies Act. Notwithstanding the foregoing, the personnel under sub-paragraph C shall only be regarded as IT personnel within the number of personnel under sub-paragraph A above.

3. Information safeguarding personnel

For the purpose of these provisions, Information safeguarding means:

A. Those among the total employees of a financial institution or an electronic financial service provider who are involved in businesses related to safeguarding of information, as specified in the internal regulations on job allocation;

B. Those who are employed permanently or casually by a financial holding company's subsidiary responsible for processing computerized information for that holding company to perform a job of safeguarding information, work full time in the building where the computing room (including a disaster recovery center) of the holding company or the subsidiary is located, and are managed under Article 60(1)13 Manners of Managing Workforce hereof, provided that the subsidiary is one as defined in Article 4 of the Financial Holding Companies Act; or

C. Those who are outsourced employees other than those under sub-paragraph B above, work full time in the area of safeguarding of information in the building where the computing room (including a disaster recovery center) of the holding company or the subsidiary is located, and are managed under Article 60(1)13 Manners of Managing Workforce hereof, provided that the subsidiary is one as defined in Article 4 of the Financial Holding Companies Act. Notwithstanding the foregoing, personnel under sub-paragraph C shall only be regarded as information safeguarding personnel within the limits of the number of personnel specified under sub-paragraph A above.

'The Electronic Financial Transactions Act' stipulates that secondary electronic financial service providers should comply with the foregoing provisions while Regulations on Supervision of Electronic Finance seem to implicitly exclude them from the list of those subject to the requirements under the Act. The Regulations only require that financial institutions and electronic financial service providers should allocate different jobs to their own employees and the employees of their secondary electronic financial service providers or maintenance service providers (Article 26 of the Regulations on Supervision of Electronic Finance).

b. Creation and preservation of records of electronic financial transactions

Financial institutions and other similar organizations shall create records of their electronic financial transactions that can be traced and/or retrieved for reference or correction if anything therein is found incorrect and preserve such records for the relevant set period time (Article 22 of the Electronic Financial Transactions Act).

Information that must be preserved for five years in respect of an electronic financial transaction includes: i) the type and amount of the transaction (or the type of insurance if the transaction is purchasing an insurance policy) and information on the other party thereto; ii) the date and time of the transaction, the type of electronic device used apparatus, and information to identify the device; iii) if the transaction is made through a bank account, the title or number of the account (or the policy number if the transaction is purchasing insurance); iv) fees received by the financial institution or electronic financial service provider for the transaction; v) consent by the payer to withdrawal of cash; vi) log of access to the electronic device used for the transaction; and

vii) application for, or any change to the terms of, the transaction, provided that viii) the value of the transaction exceeds KRW 10,000. Notwithstanding the foregoing, secondary electronic financial service providers shall only preserve such information for one year. Information that shall only be preserved for one year in respect of an electronic financial transaction includes: i) records on that transaction if the value is no more than KRW 10,000, ii) authorization of the transaction in respect of use of an electronic means of payment, and iii) correction of any error and consequences thereof.

Information on electronic financial transactions shall be preserved in writing or by means of micro film, disk, electromagnetic tape or other computerized media.

c. Submission of documents

A financial institution or an electronic financial service provider shall comply with the applicable requirements issued by the Financial Supervisory Commission when it enters into, or amend, a partnership or outsourcing agreement with a subsidiary electronic financial service provider (including a case where such a subsidiary provider enters into, or amend, a partnership or outsourcing agreement with another secondary provider) in order to help ensure the stability and credibility of electronic financial transactions and the soundness of financial institutions and electronic financial service providers (Article 40 paragraph 1 of Electronic Financial Transactions Act) See below the detailed requirements with respect to the foregoing (Article 60 paragraph 1 of the Regulations on Supervision of Electronic Finance).

Article 60 (Requirements for Outsourcing, etc) of the Regulations on Supervision of Electronic Finance

① With respect to outsourcing for electronic financial transactions, financial institutions and electronic financial service providers shall:

1. Control the place where information processing systems are installed;
2. Ensure that no change is made to decryption between them and their users or their ledgers;
3. Ensure that no information about a user, such as account number or password, is leaked;
4. Take measures against falsification of access credentials, hacking or leakage of personal data;
5. Use a secure, private line for access between them and their subsidiary electronic financial service provider;
6. Take measures in preparation of unavailability of their services, including a failure in their information processing system;
7. Ensure that the following provisions are clearly incorporated in their outsourcing agreements, arrangements or similar.
   A. Confidentiality
   B. Compliance by the other parties with their security regulations
   C. Liability for breach of agreements
   D. Paragraphs of Article 7 of the Regulations on Supervision of Electronic Finance
8. Backup of important computerized data including the availability of facility for such backup
9. Minimization of vulnerability of information management, internal control for security, appropriateness of contract terms and conditions, and avail-

ability of internally controllable personnel and organization

10. Assessment of the secondary provider's financial soundness at least once a year to prepare for its potential bankruptcy and constant monitoring of its management practices
11. Assessment of services provided by the secondary provider at least once a year
12. No execution of any outsourcing agreement by the secondary provider without prior consent and incorporation of provisions equivalent to those under paragraph 7 in the agreement
13. Manners of human resources management including background check, reference from the employer, job takeover in case of transfer
14. Review of security and regular security audit regarding outsourcing

② Financial institutions and electronic financial service providers shall report results of the assessment under paragraph 1 subparagraphs 10 and 11 to the Governor of the Financial Supervisory Commission.

③ Upon receipt of the results under the foregoing paragraph, the Governor of the Financial Supervisory Commission may take them into account during the IT assessment under Article 58.2 hereof.

The Financial Supervisory Commission may request that a financial institution or an electronic financial service provider amend an outsourcing agreement if it determines that anything in the agreement undermines the soundness of that financial institution or electronic financial service provider or the interest of any user (Article 40 paragraph 1 of the Electronic Financial Transactions Act). The Governor of the Financial Supervisory Commission may request that, during auditing of a financial institution or an electronic financial service provider in connection with partnership or outsourcing, any of its sub-

sidiary providers submit documents as listed by the Commission (Article 40(2) of the Electronic Financial Transactions Act), which includes agreements regarding such partnership or outsourcing, any document contemplated therein and other information related to electronic financial transaction. Unless otherwise required by the situation, the subsidiary shall fulfill such request (Article 61 of the Regulations on Supervision of Electronic Finance).[33]

7. Indirect regulation of subsidiary electronic financial service providers

Each financial institution or electronic financial service provider shall have personnel and organization within it capable of reviewing for adequacy of, and internally regulating, agreements on outsourcing (Article 8(1) of the Regulations on Supervision of Electronic Finance).

Each financial institution or electronic financial service provider shall develop and operate auditing guidelines on its information processing system, including standards for supervision of outsourcing related to electronic finance to ensure the system's safety and efficiency (Article 22 of the Regulations on Supervision of Electronic Finance).

33) There has been an attempt to replace such right to request with a right to initiate an investigation. In addition, there has been a proposal that the Commission may recommend that a financial institution or an electronic financial service provider should not renew an agreement with any secondary electronic financial service provider who has violated that agreement.

C. Standards for Business Continuity Plan: An Overview

1. Highlights of the Regulations on Supervision of Electronic Finance

A business continuity plan (BCP) for a financial institution refers to documented policy and procedures whereby the institution can resume its critical business functions from disruption due to a disaster.

In Korea, Sound Practices for Business Continuity Planning ("Sound Practices") were adopted in 2006. Yet, no legalization regarding the practices has been made.[34] However, it can be said that core elements of BCP have been legalized, as Article 23 and Article 24 of the Regulations on Supervision of Electronic Finance stipulate Development and Operation of Contingency Measures and Contingency Response Drill, respectively.

The Regulations stipulate that each financial and electronic financial service provider, should have a plan to ensure the continuity of its businesses in the event of contingency such as failure, disaster, strike and terrorism, which contains i) response procedure per situation, ii) recovery plan using a backup site or a disaster recovery center, iii) establishment and operation of an emergency response group, iv) conditions and procedures for entry by proxy and manual work, v) drill, vi) emergency communication system with affiliated organizations or companies, vii) scope and process of reporting and notice. Article 73 of the Regulations on Supervision of Electronic Finance stipulates reporting of accidents in IT and electronic finance. The first paragraph of the article stipulates that any financial institution or electronic financial service provider shall report to the Governor of the Financial Supervisory Commission immediately if i) its computer-based operation is unavailable or delayed for 10 minutes or longer

34) Financial Supervisory Commission
(http://www.fss.or.kr/fss/konan/kn/search/search.jsp, last visited on Oct 5, 2016)

due to a failure in the information processing system or communication line, ii) an financial accident occurs in connection with its computerized data or program, iii) the financial institution or electronic financial service provider is notified by a user of any accident in the information processing system due to electronic infringement or any monetary loss resulting from the same, or iv) any accident as listed in Article 9(1) of the Act.

2. Highlights of the Sound Practices

a. Scope

The Sound Practices recommend that each bank sets up a business continuity plan (BCP) to implement mitigating measures against possible disruption of its critical business functions, including destruction of any of its critical business infrastructure, deaths of its employees, and prolonged unavailability of its backup facility. Each bank should conduct business impact analysis, risk assessment and business continuity management as part of its BCP and have an organization devoted to BCP functions. Key responsibilities of such an organization include assisting the board of directors and senior management in fulfilling their BCP responsibilities, documentation of BCP related policy and procedures, support for BCP related business of sales and other departments, definition of minimum BCP requirements for critical sales and other departments, review of insurance purchase to cover any disruption of critical businesses or systems, monitoring and control, reporting to the board, and implementation of decisions.

b. BCP in detail

A business continuity plan should include analysis of impact on sales, risk assessment, strategy to ensure business continuity, business continuity planning, securing of a backup business site, monitoring and reporting.

For analysis of impact on sales and risk assessment, each bank should identify critical business functions that must continue to run in the event of a disaster and prioritize all such identified business functions. Based on the priorities allocated, it should set up recovery targets including recovery time objective and recovery point objective. In particular, risks associated with business disruption due to a disaster should be assessed considering not only financial losses, but also non-monetary losses such as potential violation of laws, legal relevance, unavailability of support for customers (including account holders), employees, and impairment of reputation.

Factors that can cause disruption of a bank's business include a disaster that occurs at the head office, causing all of its businesses to stop functioning, a damage to the bank's automated financial system (including payment, settlement, communication), a disaster in the network shared by participants in the financial sector that can trigger a series of business disruptions, and a disaster occurring to other financial infrastructure.

The bank should set up a written business continuity plan containing detailed instructions and procedures to mitigate risks associated with a disaster based on critical business functions identified through analysis of impact on sales and business continuity management strategy.

A business continuity plan should include measures to mitigate risks associated with disruption of businesses (i.e. risk management organization, risk management procedures, communication tactics), procedures to resume busi-

ness, recovery of technical resources and management of key data and record as well as organization to mitigate risks. The Sound Practices provide procedures for establishing crisis management process: each bank should ensure that crisis management is implemented in a timely manner by assessing any disaster that has caused business disruption and taking mitigating measures immediately. In particular, documented procedures should be adopted regarding:

i) Roles and responsibilities of the board of directors and senior management in the event of a disaster; ii) notification and communication of any disaster to the crisis management organization; iii) reporting, approval and disclosure of a disaster; iv) prompt decision making on safety of employees, and containment of the disaster; v) evacuation from the workplace suffering a disaster to safeguard employees; vi) instructions and checklist in the event of a disaster; vii) unambiguous criteria for operating an alternative business site; viii) formation of a system to collect information quickly; ix) methods of communication with external organizations; and x) comprehensive supervision of restoration of disaster affected facility and businesses.

In addition, business resumption process should be adopted based on the business continuity plan. This includes definition of activities required for each step of the process and, in turn, definition of procedures for each of such activities. Business resumption process generally has three phases: mobilization phase that involves notification to business recovery teams and vendors to obtain required services; alternate processing phase that involves the resumption of the core business/service in a different way than the stipulated process; and full recovery phase that involves a process for moving back to the primary site.

Finally, the Sound Practices provide for monitoring and reporting, which is

necessary for the BCP department of each bank to keep track of changes to its internal and external business environment in order to sustainably uphold the BCP.

The BCP department should report results from the testing of a BCP established and any significant change in the same to the board of directors and senior management on a regular basis. Information to be reported includes significant changes in the BCP, identified critical business functions to resume and any change thereof, pilot implementation of BCP, results from implementation of BCP and any improvements needs, any disaster and disruption of business resulting therefrom, and response thereto.

Critical information reported, such as the validity of a resumption strategy in the event of disruption of a critical business function, results from pilot implementation of a BCP, how to improve the BCP, and progress in maintenance and repair, should be reported to the competent authority immediately.

D. Requirements on Controlling Sharing of Financial Information

1. Overview of laws on financial information

No definition is provided for 'financial information' in any law of Korea. It generally refers to personal data or credit information associated with transactions with financial institutions or personal assets.[35] There is no single law

35) The Act on Reporting and Using Specified Financial Transaction Information (Article 2(2)) defines financial transactions as: i) Importation, purchase, sale, repurchase, brokerage, discount, issuance, redemption, refund, trust, registration, or exchange of financial assets (as defined in subparagraph 2 of Article 2 of the Act on Real Name Financial Transactions and Confidentiality), or payment of interest, discounts, or dividends thereof by a financial company, or conducting such business as an agency, or other transactions of financial assets as prescribed by Ordinance of the Prime Minister; ii) transactions made in a derivatives market

governing financial information. Therefore, a close look at Korean laws on personal data and credit information will provide an insight into how financial information is treated.

In Korea, there are multiple laws and regulations used to govern personal data, depending on where it is used and collected. The private sector and the public had their own laws (e.g. personal credit data as defined the Credit Information Act), which stipulated how personal data should be collected, used, managed and destroyed. As many had pointed out problems with such discrete laws, consistent requirements were adopted in March 3, 2011 with the passing of 'the Personal Information Protection Act'.

Following the Act, a series of laws were adopted to govern collection and protection of personal data in various private sectors, including the 'Credit Information Use and Protection Act ("Credit Information Act")', which also provides legal ground for credit information business, and 'the Act on Promotion of Information and Communications Network Utilization and Information Protection ("Communications Network Act")'.

Article 2 of the 'Credit Information Act' and Article 2(1) of the 'Enforcement Decree of the Act' provide the scope of credit information as follows:

First, information by which a particular credit information subject can be identified: information on a living person, including his/her name, contact information (i.e. phone, address), personal ID, gender, nationality and occupation, and information on a company (referring to individuals and legal entities that run business and the organizations thereof; hereinafter the same shall apply)

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pursuant to the Financial Investment Services and Capital Markets Act, and other transactions prescribed by Presidential Decree; or iii) exchanging cash or checks with the alternatives to cash or checks prescribed by Presidential Decree at the place of business of a casino business operator.

or a legal entity, including its trade name, corporate registration number, taxpayer identification number, location of the head office and sales branches, date of establishment, purposes, sales practices, business type, name of representative and executive officers (limited to cases where such information is combined with the information falling under any of subparagraphs 2 through 5).

Second, information by which the transaction details of a credit information subject can be determined, as described in subparagraph 1 (b) of Article 2 of the Act: Information on the types, period and amount of and ceilings on commercial transactions, including loans, guarantees, provision of collateral, current account transactions (including household current account transactions), credit cards, installment financing, facility leases, and financial transactions.

Third, information by which the credit worthiness of a credit information subject can be determined, as described in subparagraph 1 (c) of Article 2 of the Act: Information on delinquency, dishonor, payments by subrogation, substitute payments, and other acts of disrupting the credit order through falsehoods, fraud and other unlawful means, including the sum of money and the dates of occurrence and resolution, in connection with financial transactions and other commercial transactions.

Fourth, information by which the credit transaction capacity of a credit information subject can be determined, as described in subparagraph 1 (d) of Article 2 of the Act: Information falling under any of the following by which the credit transaction capacity of a credit information subject can be determined in connection with financial transactions and other commercial transactions: i) total amount of assets, liabilities, and income, and the tax returns of an individual; ii) a company's overall information, including its history, outstanding stocks or shareholding ratio; its business details, including sales statements,

orders received or major contracts for management; matters concerning its finance, including financial statements (including the consolidated financial statements and combined financial statements; hereinafter the same shall apply); and the auditor's opinions and tax returns under the Act on External Audit of Stock Companies.

Fifth, any of the following information, as referred to in subparagraph 1 (e) of Article 2 of the Act: I) information on a court's rulings on adjudication of incompetency, quasi-incompetency and disappearance, decisions on rehabilitation or individual rehabilitation, decisions on adjudication of bankruptcy, decisions related to exemption and reinstatement, decisions on entry in a register of defaulters or cancellation thereof, and decisions related to auction, such as decisions on the commencement of auction and permission of a successful bid; ii) information on national taxes, local taxes, customs duties, or State credits in arrears; iii) information on fines, administrative fines, penalty surcharges, additional collection charges in arrears; and iv) information on social insurance premiums, public utility charges, or fees.

2. Comparison between sharing and transfer of personal information

'The Personal Information Protection Act' requires that, during collection of information, notification be made in case of sharing of personal data and consent be obtained in case of transfer to a third party.

Specific differences between sharing and transfer of personal information are summarized below.

Table 5. Comparison between sharing and transfer of personal information

Sharing	Onward transfer
• Disclosure of personal information to a third party for the business purpose of the information collector	• Disclosure of personal information to a third party for the business purpose of that third party other than the information collector
• Notification: When personal information is disclosed for direct marketing • Disclosure: Disclosure of the sharing (e.g. scope, recipient)	• Notification: Notification of disclosure to a third party • Consent: Consent to be obtained from the owner of the information regarding disclosure to a third party (recipient, purpose of use, scope, term of possession and use)
• Third party contracting service (telemarketing) • Third party management service (delivery, after sales service) • Third party computing management service (system, development)	• Email communication of financial services • Telemarketing for sales of insurance policies • Other partnership, joint sales of products, business agreement between enterprises
• Notification and consent required prior to outsourcing of sales or telemarketing • No notification or consent required regarding use of outsourcing • The recipient regarded as an employee of the information collector • The fact of outsourcing to be notified without detail	• No use for other purposes than intended by the recipient and no transfer to a third party • Separate consent obtained. Service usable without consent
• Stricter supervision of recipients - Examination of training on privacy and processing of personal data - Follow-up measures to ensure security including limited access to personal data - Liability to the information collector in case of its violation	-

Jeong Jae-cheol, "Implementation of the Personal Information Protection Act and Challenges," Payment and IT, Oct. 2011, p104.

By these standards, sharing of financial information will take place in order for the information collector (financial institution) to achieve its business purpose, and the recipient of the information will be a secondary electronic financial service provider. Therefore, no further explanation will be provided.

IV. New Trends in the Discussion of Electronic Finance

A. Rapid Changes in the Financial Environment

1. Current Status of Use of Mobile Banking

The market research company Gartner forecasted that there would be 4.9 billion units in the Internet of Things (IoT) by 2015 and that with an annual growth rate of 37.2%, the number of IoT units would reach around 25 billion in 2020.[36]

It has already been mentioned that with rapid change in the IT landscape and widespread use of smartphones, electronic financial transactions have risen exponentially. Research shows that 89.7% of deposits, withdrawals, and transfers that took place in June, 2016 are non face-to-face transactions made via Internet or mobile banking; that the percentage of mobile banking users among all registered Internet banking users is 61.8%; and that the percent of mobile banking users among actual Internet banking users (the number of people who actually used Internet banking in the past year) is 76.1%.[37]

After the abolition of regulation regarding the mandatory use of authenti-

36) http://www.hellot.net/new_hellot/magazine/magazine_read.html?code=202andsub=003andidx=30502 recited, last accessed on Oct. 5th, 2016.

37) The Bank of Korea's 「Status of Internet Banking Use in Korea for the Second Quarter of 2016」 (Aug. 9. 2016), FSS Briefing Material (Aug. 12, 2016), p6, recited, (http://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=19714, last accessed on Oct. 5th, 2016)

cated certificates in money transfers and payments in electronic financial transactions, Korean credit card companies improved their payment systems so that customers could pay with credit cards without authenticated certificates using various authentication means, such as easy payment services and app cards, regardless of the amount of money to pay. In addition, some banks recently made it possible to transfer money without authenticated certificates through their easy money transfer services.[38] These evidence the rapid pace of change in consumer-facing financial services.

2. Necessity of Strengthening the Security of Electronic Financial Transactions in a Changed Environment

With regard to electronic financial transactions including those made through Internet or mobile banking, there is still concerns and uneasiness about the risk of personal information leakage and electronic financial accidents caused by means such as pharming (a technique whereby a user's PC is infected with malicious code which then leads the user to a fraudulent website for the purpose of stealing the user's financial information) and smithing (a technique whereby malicious code is installed on a user's smartphone upon the user's clicking an IP address in a text message, and consequently, small payments are made without the user's knowledge, or otherwise the user's personal or financial information is stolen).[39]

There have been a lot of reports and actual hacking cases that show that

38) FSS Briefing Material (Aug. 12nd, 2016), p2, (http://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=19714, last accessed on Oct. 5th, 2016).

39) FSS Briefing Material (Aug. 12nd, 2016), p7, (http://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=19714, last accessed on Oct. 5th, 2016).

most of those aforementioned Internet-connected smart devices, including smartphones, tablets, laptops, and smart TVs, are vulnerable to hacking. In addition, monetary damage cases that involve card cloning or unauthorized money transfers, as well as those where financial service users' PCs or smartphones are infected with malicious coder resulting in leakage of financial information, continue to occur.[40] In such cases, collateral damage from information leaks or security accidents, if they occur, is massive. Therefore, companies are required to pay attention to and invest in information protection and to be equipped with systematic responses systems for security infringement accidents. Failing to do so would not only result in decreased reliability of the company, but also cause customers to turn their backs on the company.

Therefore, prior to developing and providing smartphone-based new financial services, Internet specialized banks must devise safety measures regarding the security of mobile operating systems and consider applying mobile security techniques such as those related to access control or preventing forgery or alteration of applications.

As basic security measures regarding the mobile operation systems of smart devices, it is necessary to identify various mobile threats in advance and construct an environment that is safe from possible infringement accidents and hacking.

From a legal perspective, in order for information protection plans to be established and run, it is necessary to enact sub-level rules such as information protection rules and security regulations, and to run those rules and regulations. Early-stage investments for establishing basic security systems-in-

40) FSS Briefing Material (Aug. 12nd, 2016), p7, (http://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=19714, last accessed on Oct. 5th, 2016).

cluding data encryption, database security, server operating system security, firewalls, intrusion prevention, and anti-virus programs-are also necessary.

In addition, financial service users must be prevented from unfairly bearing the liability for losses from electronic financial fraud due to extended applications of the disclaimers by financial companies included in the terms and conditions of their electronic financial transaction contract forms.[41]

With regard to security technology, it is also necessary to secure solutions for the prevention of extrusion of customers' information and, in the long term, to secure large security budgets for establishing security systems like a fraud detection system (FDS).

B. Legal Issues regarding Internet Specialized Banks

1. Inauguration of the Internet Specialized Bank

An Internet specialized bank refers to a bank with a small number of branches or without any branch that operates via electronic means such as ATMs and the Internet. In their early founding years, Internet specialized banks conducted business mainly online without any physical stores and had names such as direct banks, pure-play Internet banks, Internet-only banks, online-only banks, and virtual banks. Afterwards, as more and more Internet specialized banks started using offline facilities as subsidiaries, they began to be called Internet Primary Banks. Lately, with the advent of mobile channels, they are also called digital banks. An Internet specialized bank is distinguished from Internet banking, a term referring to an operation style in that it is a legal entity.[42]

41) FSS Briefing Material (Aug. 12nd, 2016), p8, (http://www.fss.or.kr/fss/kr/promo/bodobbs_view.jsp?seqno=19714, last accessed on Oct. 5th, 2016).

Internet specialized banks have advantages such as significant cost savings through non-store operations, price competitiveness, provision of services unconstrained by geographic location, and expeditious and convenient transaction procedures. However, due to their absence of physical stores, Internet specialized banks have their own inherent risks distinguishable from general banks, and furthermore, there also is a problem of poor initial business operations owing to high investment costs.

As of 2016, the prospect of Internet specialized banks opening in Korea is becoming clearer, and it is expected that Internet specialized banks will start operating in earnest in Korea in the near future.[43]

42) The Financial Services Commission website (http://www.fsc.go.kr/know/wrd_list.jsp?menu=7420000anddn_no=490, Sep. 23rd 2016).

43) On November 29th, 2015, the Financial Services Commission gave preliminary Internet specialized bank establishment approval to 'Korea Kakao Bank' (tentative name) and 'K-Bank (tentative name), and an approval procedure regarding human and material requirements is expected to be carried out soon. However, this preliminary approval is first-stage approval which is given before an amendment of Banking Act relevant to the adoption of Internet specialized banks, and the Financial Services Commission imposes the following conditions in regard to that: First, banking operations must be conducted by means of electronic financial transactions. Electronic financial transactions mean the practice where a bank provides financial products or services through electronic apparatus and its users use its financial products or services in automated ways without physical contact or communication with an employee of the bank. Second, banks applying for approval must be equipped with relevant physical resources, and facilities including human resources, organization, and computing equipment before applying for bank establishment approval. In addition, to the shareholders of the banks that have received preliminary approval, the Financial Services Commission also gave approval for a non-financial business operator's hold to excessive shares. The Financial Services Commission homepage, (http://www.fsc.go.kr/info/ntc_bref_view.jsp?menu=7210200andbbsid=BBS0029andno=31676,lastaccessedonSep.23rd,2016)

2. Adoption of Non-Face-to-Face Real Name Authentication

In May, 2015, the Korean government announced a plan for rationalizing real name authentication methods and gave permission for non-face-to-face real name authentication practices provided for in Act on the Real Name Financial Transactions and Guarantee of Secrecy and Electronic Financial Transactions Act. The Korean government's actions laid the foundation for various non-face-to-face electronic financial transactions including those using biometrics and for the establishment of Internet specialized banks. In about six months (3 months for second-tier financial service providers) since non-face-to-face real name authentication was allowed, a total of about 159,000 accounts have been issued in non-face-to-face ways from 31 financial companies.[44]

With the creation of such a non-face-to-face environment, it has been made possible for major Korean banks as well as Internet specialized banks to provide new financial services using biometrics-based non-face-to-face real authentication technology, including fingerprint recognition, iris recognition, and vein recognition.

For the achievement of accuracy in non-face-to-face real authentication, the Financial Services Commission's "Plan for Rationalizing Real Name Authentication Methods for Account Opening"[45] makes double-checking mandatory and recommends multi-checking. To be specific, in order to make up for the shortcomings of non-face-to-face identification, the plan makes it mandatory to use a combination of two methods among four non-face-to-face iden-

44) The Financial Services Commission (http://www.fsc.go.kr/info/ntc_news_view.jsp?menu=7210100andbbsid=BBS0030andno=31154, last accessed on Oct. 5th, 2016).

45) The Financial Services Commission (https://www.fsc.go.kr/downManager?bbsid=BBS0029andno=96532, last accessed on Oct. 5th, 2016).

tification methods, ① submitting a copy of the relevant real name authentication certificate, ② making a video call, ③ verifying the means of access (e.g. a debit card) when submitted, and ④ using existing accounts (also including other new methods tantamount to ①-④)). In addition, with regard to recommendations, the plan recommends that financial companies perform various stages of additional verification using their own verification methods (⑤ using the results of verification by other institutions, ⑥ multiple personal information verification methods) before the opening of an account takes place. 46)

However, despite its benefits and convenience of use, biometrics technology still poses significant security risks, such as personal information extrusion and duplication. It has a high risk of causing distrust due to device-related errors. Infringements to privacy and resistance to the use of biometrics can occur due to the extrusion of personal information, which are the most prominent problems related to biometrics technology. Security issues such as hacking via restoration of biometric information are expected to remain problematic. In addition, biometrics technology has inherent problems, such as high equipment costs and conflicts with legal systems e.g. Digital Signature Act.

With the recent wave of various studies and attempts regarding security accidents related to biometrics based authentication, many risks are being exposed. Various cases of biometric information forgery and extrusion keep being published. As it is difficult to discard or reissue biometric information once extruded, the risks related to biometrics are rising. To resolve such security risks, various countermeasures are being examined, and various bio-

46) Financial Services Commission Material, p7.(https://www.fsc.go.kr/downManager?bbsid=BBS0029andno=96532, last accessed on Oct. 5th, 2016).

metric security-related techniques are appearing, including bio information forgery identification techniques, multi-authentication techniques where multiple pieces of bio information are conflated to be used for authentication, and techniques that enable reissuance of biometric information such as one that changes bio information. Therefore, in order to be able to legally respond to issues attendant to these new developments, considerations must be made from a legislative perspective.

B. Legal Issues That Come with the Vitalization of Fintech

Global IT companies are forming a fintech market. The term fintech is a portmanteau of 'financial' and 'information communication technology'. Conceptually, fintech can be defined as a new type of financial service that global IT companies create based on their wide user base by combining information communication technology and an assortment of financial services including transfer, payment, and wealth management services.[47]

Innovative and creative financial services utilizing IT have recently flooded the market. It appears to be impossible to predict what form it will evolve into in the future. That is because there is a constant stream of new, more convenient techniques popping up that break down the existing barriers of different currencies and payment systems, as well as taking care of security issues. Current market leaders such as Alipay, TransferWise, and Lending Club are only the tip of the iceberg.[48]

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47) Samsung Securities, "What is FinTech", 2014. 10., p3, National Internet Development Agency of Korea, "Excavating Research Areas of FinTech through the Analysis of Its Relevant Technologies and Policy Trends at Home and Abroad", 2016. 2, p3. Recited.

48) Kim Gwang-jun, "Paradigm of Regulation on Fintech - Shifting the Focus from Pre-Regulations to Ex-Post Regulations," Korea Legislation Research Institute, 2015

Lately, fintech companies have widened their business scope into Internet specialized banks, P2P loans, robo-advisors, crowd funding, and block chains and are now operating in diverse sectors.[49]

These new changes in the financial environment resulted in the easing of various regulations in the Korean financial environment with an aim to support fintech. There is a consequent trend that prioritizes convenience in international electronic financial transactions, emphasizing the necessity and importance of fraud detection systems used by many Internet companies and financial institutions overseas.

To prevent cyber-crimes and financial fraud associated with electronic financial transactions, the Korean government is introducing security systems to existing banks as well as non-banking financial institutions, and it is also strengthening security in various ways, such as delaying withdrawals of money via ATMs and adding diverse means of authentication including ARS authentication and terminal designation.

In order to be able to identify abnormal transactions and detect financial transactions likely to be fraudulent, it is necessary to collect in detail users' environment information, location information and personal transaction history information. It is necessary to selectively keep additional information with the user's consent. In addition, in order for information on uncovered scam and fraud cases to be shared via FDS's established by existing financial institutions, the government and financial institutions must cooperate with each other.

The payment industry in any country of the world naturally has to be reor-

SUMMER vol. 47, p64.

49) The Financial Services Commission (Sep. 22nd, 2016.) Press release, p1.

ganized in response to social change, and there clearly is some intent to stimulate the economy by reducing payment-related costs for consumers, small business owners, and the self-employed and spreading convenience through diversification of payment services provided. However, achieving such convenience would lead to the advancement of technology related to procedures where personal information is transmitted and the information is matched with the relevant individual, as well as increased competition for providing more services based on such information. At the crux of it is the important issue of personal information protection. Therefore, it is necessary to monitor the payment industry and regulatory and supervisory policies, maintaining a balance. In other words, preemptive supervisory measures and systems need to be established taking into consideration the current circumstances where demand for the management and supervision of information leakage risks is high due to an increasing variety of payment means and an increasing number of their handlers.[50]

V. Conclusion

The development of the IT industry, has brought increased diversification and convergence of business models in the financial sector. This phenomenon is happening in every country of the world without exception. However, the systems for financial IT supervision and actual supervision activities vary by country depending on the country's legal system.

In the case of Korea, the country's strength as an IT powerhouse already

50) An Su-hyun, "Issues Relating to Promotion of FinTech from a Legal and Policy Perspective – Focusing on the Payment Sector", Korea Legislation Research Institute Fall 2016 Vol. 52, p19.

has begun to be reflected in its financial sector as well. Moreover, in terms of the legal system, the country is considered to be a step ahead of other countries due to its swift introduction of legislation regarding information and communication.

When it comes to provisions regarding the terms and conditions of electronic financial transactions, it can be said that Korea's legal system is better wired for speedy legislation than that of any other country.

The Provisions in 'Electronic Financial Transactions Act', 'Act on the Regulation of Terms and Conditions', and 'Regulation on Supervision of Electronic Financial Transactions' of Korea regarding the terms and conditions of electronic financial transactions are considered to be more advanced and well specified than those of other countries. This is due to the fact that Korea's IT-based industry is more vibrant than other countries', and there has been expeditious legislation in response to the growth of the electronic financial sector which includes Internet banking.

It has been explained earlier that with regard to BCP, in the case of Korea, Regulations on Supervision of Electronic Financial Transactions specify matters concerning the establishment and management of emergency measures, the execution of emergency response drill, and accident reporting. As 'Regulations on Supervision of Electronic Financial Transactions' is essentially administrative in nature, it can be said that matters in relation to the key points of BCP have already been brought to law. This can be construed as meaning that policy-wise efforts to quickly bring matters regarding BCP into law, as opposed to other countries that have guidelines of sorts, reduce the risk of financial accidents that can happen to financial institutions and allows regulation of financial institutions at government level so that they can equip themselves with systems capable of effectively responding to financial terrors.

However, of the principles that have yet to be enacted, those relevant to the effective execution of BCP - such as monitoring of the establishment and execution of BCP and creating departments dedicated to BCP and actual business affairs - are subject to require examination as to whether they should be enacted.

To allow entrusting financial information to overseas entities, which has been much discussed lately, means to allow a company's headquarters and overseas branches to jointly handle global-level analysis and evaluation tasks, and even if transferring financial information abroad is allowed, it does not seem wise allow transferring of a company's fundamental elements abroad altogether such as its financial networks and IT facilities for creating and storing financial information.[51]

Therefore, with regard to Korea's 'Electronic Financial Transactions Act', 'Credit Information Act', and Regulation on Supervision of Electronic Financial Transactions, it is deemed necessary to bring into law matters regarding personal information (especially financial information) protection and liability in the event of an extrusion of such information, matters regarding prohibiting reselling of entrusted personal information, the use of such information for purposes other than originally agreed upon, and liability of in the event of a violation, specifying of the Korean financial authorities' right to regularly monitor overseas consignment agencies, due diligence obligations of entrusting financial institutions towards to their depositaries and prudential standards for depositaries.

The global regulatory landscape concerning financial consumer protection has changed since the global financial crisis, including existing regulatory and

51) The Ministry of Foreign Affairs, 「Korea-US FTA Details Source」, 2011. 7, p122.

supervisory systems.

This is because, with the development of the financial market and the advent of new financial products, systemic risks have widened into risks concerning inter-markets and inter-financial products, increasing the necessity for financial consumer protection. At present, there is a dire need of a new paradigm for financial consumer protection systems suitable for the new financial environment which can be represented by Internet specialized banks and fintech.

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3-1

The Regulation and Governance of Psychosocial Risks at Work

: A Comparative Analysis Across Countries

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Ⅰ. Introduction

The issue examined in this paper is the regulation and governance of psychosocial risks at work. These risks are multifaceted and concern aspects of the design, planning, organisation and management of work, as well as work relationships and interactions, and some aspects of the physical work environment.[52] They include heavy workload, cognitive and emotional demands, time pressures, excessive hours of work, shift work and out of hours work, low autonomy and decision latitude, role conflict and role ambiguity, job insecurity, work in isolation and exposure to traumatic events. Psychosocial risks also concern interpersonal relationships at work, especially low support and recognition from managers, supervisors or co-workers, conflict, bullying and harassment, discrimination, aggression and violence; as well as organisational culture issues such as low worker participation, low trust and procedural injustice; and organisational change issues relating to poor management and low worker engagement.

There is ample evidence that psychosocial risks pose a significant problem for worker health and safety, and are linked with psychological and physical health effects, social and behavioural outcomes, and reduced capacity to work

52) The summary of psychosocial risks and their harmful effects presented in this paper is drawn from Beswick et al (2004); Bond et al 2010; Bonde (2008); Bongers et al (2002); Briner et al (2008); Demerouti et al (2001); D'Souza et al (2006); Eatough et al (2012); Friswell et al (2008); Hansen et al (2006); Häusser et al (2010); Johnson and Hall (1988); Karasek (1979); Kivimäki et al (2003, 2006); Kompier and van der Beek (2008); Kuper and Marmot (2003); LaMontagne (2007; 2010a,b); Lang et al (2012); Louie et al (2006); MacDonald (2006a,b); MacDonald and Oakman (2015); Maslach (1993; 2001); Muller et al (2008); Nixon et al (2011); Noblet and LaMontagne (2006); Ortega et al (2009); Siegrist (1996); Siegrist et al (2004); Stansfield and Candy (2006); Stansfield et al (2008); Strazdins et al (2004); and Virtanen et al (2005).

or participate in work activities arising from exposure to these risks (henceforth referred to as 'harmful effects').[53] Specific types of harmful effects include feeling tense or irritable, anxiety and depression, emotional exhaustion (burnout), sleep disturbances and fatigue, post-traumatic stress disorder (PTSD), elevated blood pressure and other cardiovascular changes, gastrointestinal problems, immune system effects, musculoskeletal disorders and physical injury. Exposure to psychosocial risks can also be a contributing factor for self-harm, including suicide, as well as for absenteeism, presenteeism and turnover in jobs, and increased use of alcohol, tobacco and other harmful substances.

The available evidence about the extent of work-related exposure to psychosocial risks and the impacts of that exposure is mixed, but indicates that the psychosocial aspects of work are a significant determinant of global health (Commission on Social Determinants of Health, 2008). In Europe around 22% of workers report experiencing work-related stress, 36% say they work under pressure to meet tight deadlines all of the time or almost all of the time, and 16% report being subject to physical violence, sexual harassment, bullying or harassment(EU-OSHA 2009; Eurofound 2016). Data for some specific countries suggests that in Australia around 24% of workers report high job strain,[54] while in the Republic of Korea 26% of workers report that they have stress at work (Kawakami et al, 2014), and in Japan 32% of workers reported suffering from strong anxiety, worry and stress during the previous year (Government of Japan Cabinet Office, 2012; MHLW, 2011).

There is a clear need for preventive action in workplaces to control exposure to psychosocial risks and harmful effects arising from this exposure.

53) Ibid.

54) Job strain entails high work demands and low control.

The research literature suggests that enterprises can decrease the potential for harmful effects occurring by *reducing demands* such as heavy workloads, cognitive and emotional demands, time pressures, hours of work, and role and interpersonal conflict, and by *enhancing resources* available to cope with those demands such as job control, procedural justice, support and recognition, and opportunities for participation and career advancement (Demerouti et al, 2001; Karasek and Theorell, 1990; Siegrist, 1998).[55]

This paper examines the regulation and governance of work-related psychosocial risks based on: (1) a systematic review and analysis of the international literature; (2) a comparative analysis of regulatory frameworks for managing work-related psychosocial risks in some different countries; and (3) interviews with Australian experts in the regulation and management of work-related psychosocial risks, who helped to identify regulatory frameworks and key sources in the literature. The paper reveals how different government (state) and private (non-state) actors seek to influence enterprises' actions in relation to work-related psychosocial risks, and use a variety of mechanisms to encourage enterprises to protect workers from the harmful effects of psychosocial risks.

The paper is structured as follows. Section 2 compares some different examples of legal obligations addressing work-related psychosocial risks, and the activities of government authorities and regulators in supporting, inspecting and enforcing preventive action in workplaces. As government regulatory regimes are only a subset of the broader universe of regulatory influences in which multiple actors and mechanisms are capable of motivating and facilitat-

55) The relevant models developed by these authors are the Job Demands-Resources Model, the Job Demand-Control-Support Model and the Effort-Reward Imbalance Model.

ing preventive action, Section 3 discusses this wider base for leveraging workplace action on psychosocial risks. Section 4 then draws together the insights from the preceding discussion as the basis for establishing 'state of the art' principles for regulating work-related psychosocial risks, through an approach that is 'holistic' in assessing the different types of psychosocial risks; 'participatory' in involving workers in identifying the risk factors and ways to minimise their harmful effects; and 'integrated' in combining measures to control work-related risk factors, promote the positive aspects of work, develop worker strengths and capacities to deal with risk factors, and ensure early intervention and assistance for those affected in order to reduce harmful effects.

II. Government Regulatory Regimes Addressing Psychosocial Risks

A. Overview

Around the world there are many different examples of government imposed legal requirements, which are aimed at controlling work-related psychosocial risks and their harmful effects. There are also examples of regulator information resources, strategies and programs to support, inspect and enforce action in workplaces to address psychosocial risks. In this section we begin by examining some legally binding (mandatory) requirements, before discussing the wider range of initiatives by regulators to support preventive action, and some examples of dedicated initiatives for inspecting and enforcing workplace action on psychosocial risks.

B. Mandatory legal obligations

The different examples of mandatory legal obligations that apply to psychosocial risks are variously established in Acts, regulations, ordinances or equivalent legally binding instruments. These are concentrated in Europe, but there are also examples in the Asia-Pacific and the Americas. The approaches taken in the different legal instruments range from broad duties and obligations, which embrace psychosocial risks and may or may not name these risks or their harmful effects; to more detailed requirements that are specific to psychosocial risks. The different instruments are therefore more or less explicit about their application to psychosocial risks. They also require different types of actions in workplaces to eliminate (prevent) or minimise (control) the risks and their harmful effects. They variously require assessment and control of risk factors; action on work design, organisation and management, and/or bullying, harassment and violence at work; health assessment and counselling for workers exposed to psychosocial risks;or programs, policies and procedures to address psychosocial risks or specific types of risks such as bullying, harassment, violence and excessive working hours.

Beginning with the approach of establishing broad duties and obligations in laws that apply to health and safety at work, which embrace psychosocial factors but without explicitly naming them, one example is the federal Occupational Safety and Health Act 1970 in the United States (OSHA (US)). This Act requires employers to provide employees with employment and a place of employment that is free from recognized hazards that are causing or are likely to cause 'death or serious physical harm to employees' (OSHA (US) s 5). While the employer's duty is broad in its application to a wide range of hazards, the duty extends only to physical harm. The duty therefore appears to be less applicable to psychological or mental health. In contrast, in Australia, the various

Acts for health and safety at work establish broad duties and obligations of employers and other persons conducting businesses or undertakings to ensure health and safety (so far as is reasonably practicable), in which 'health' is separately defined to include psychological as well as physical health. However, the relevant duties and obligations do not name psychosocial factors. They are framed in general terms; for example, provisions relating to eliminating or minimising risks, systems of work, the work environment, information, training, instruction and supervision, monitoring of health and workplace conditions, consultation, issue resolution, and so on.[56]

In the United Kingdom the principal legislation, the Health and Safety at Work Act 1974 (HSWA (UK)) similarly establishes the broad duty of employers to ensure the health, safety and welfare of employees (so far as is reasonably practicable), and related provisions for systems of work, and information, instruction, training and supervision, which extend to psychosocial factors without naming them in the legislation (eg HSWA (UK) ss 2 and 53). In addition, the Management of Health and Safety at Work Regulations 1999 (MHSWR (UK) require every employer to make a suitable and sufficient assessment of risks to the health and safety of employees and other persons, and any preventive and protective measures implemented must be consistent with the 'general principles of prevention' (eg MHSWR (UK) rr 3, 4 and Sch 1). The provisions in MHSWR (UK), including the general principles, give effect to the European

56) In Australia, there are separate laws for the Commonwealth, the six states and two territories but seven of these jurisdictions have adopted a Model Work Health and Safety Act (WHSA). Relevant provisions are WHSA ss 3, 4, 17-19, 46-49, 81-82. In the state of Victoria, relevant provisions of the Occupational Health and Safety Act include OHSA (Vic) ss 2, 5, 20-23, 35-36, 73. In the state of Western Australia, relevant provisions of the Occupational Safety and Health Act include OSHA (WA) ss 3, 5, 19, 24-25, and the OHS Regulations in that state include a general requirement for identification of all types of hazards, and assessment and reduction of risks.

Union's Framework Directive on the *Introduction of Measures to Encourage Improvements in the Safety and Health of Workers (European Commission 1989).* The general principles of prevention emphasise the need to avoid, evaluate and combat risks; adapt work to the individual (in regard to workplace design, choice of work equipment, and working and production methods); adapt to technical progress; replace the dangerous by non or less dangerous; establish a coherent prevention policy that includes organisation of work, working conditions and social relationships; give collective protective measures priority over individual protective measures; and give appropriate instruction to workers.

The Framework Directive therefore embraces psychosocial risk factors and provides a framework for assessing and managing these risks, as do the legal frameworks for the regulation of health and safety at work in all EU member states implementing this Directive (Leka et al 2011). Through the principles of prevention, the European laws go further than their Australian and United States' counterparts in highlighting some factors relevant to psychosocial risks. Of specific relevance are the references to adapting work to the individual in regard to the choice of working and production methods, with a view to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health; and developing a coherent overall prevention policy that covers organization of work, working conditions and social relationships.

Some EU member states have kept the details of their laws for health and safety at work close to the Framework Directive (eg Luxembourg, Poland, Romania, Slovenia, Spain and the United Kingdom). However, the laws in a number of European countries go further than the Framework Directive by incorporating more specific concepts and requirements for psychosocial risks.

For example, laws may require employers to prevent or control psychosocial risks, or stress and fatigue (eg Belgium, Bulgaria, Germany, Greece, Hungary, Iceland, Italy, Lithuania, Netherlands, Norway, Slovakia), or the protection of workers' mental health and wellbeing (eg Austria, Estonia, Finland, France), and include definitions of psychosocial risks or the psychosocial working environment (ILO, 2016, pp12-13). Two examples of European countries with a long history of regulating work-related psychosocial risks are Sweden and Denmark.

In Sweden the legal framework addressing psychosocial factors has been progressively developed and refined over almost four decades. The Work Environment Act 1977 (WEA (Sw), as amended) requires that the organization of work and the content of work are designed in such a way that the employee is not subjected to mental stress or physical strain that may lead to illness or accidents (WEA (Sw) ch 2, s 2). This includes addressing forms of remuneration, the organization of working time, avoiding or limiting closely controlled or restricted conditions of work and ensuring coherence between different tasks. It also means ensuring that the work provides opportunities for variety, social contact, cooperation, personal and professional development, independence and professional responsibility. Employers and employees must cooperate to create a good work environment, which includes the physical environment, and psychological and social work relationships (WEA (Sw) ch 3, s 1a).

The WEA (SW) is considerably more explicit about psychosocial risks and their control than legal standards in many other countries. Yet, the Act was underpinned by regulations establishing further requirements in relation to work in isolation (from 1982), violence and threats in the working environment (from 1993) and victimization at work (from 1993) (Bruhn and Frick 2011). In

addition, in 2016, new regulations commenced on the Organizational and Social Work Environment (AFS 2015:4), which address the organizational and social conditions and prerequisites for work, including resources (and support), work demands and victimization. The regulations build on the WEA (Sw)'s provisions for systematic work environment management, which require a work environment policy, development of knowledge, regular investigation and assessment of risks in work operations, and action to manage the risks. The regulations repeal and replace the 1993 provisions on victimization and require employers to take action to counteract victimization and to have procedures for handling victimization (AFS 2015:4, ss 13, 14).

The second example of a well-developed framework for regulating psychosocial risks at work is Denmark. The current Working Environment Act 2010 (WEA (Dk)) covers the physical and psychological working environment. General duties and obligations in this Act require workplace assessment, effective supervision, and information, instruction and training, as well as requiring that work is planned, organized and carried out in such a way as to ensure health and safety (WEA (Dk) ss 1a, 15 – 17, 38). These broad duties and obligations are underpinned by the legally binding Executive Order 559 of 2004 (EO 559) concerning the psychosocial working environment. This Executive order requires that all aspects of work are planned, organized and performed so as to ensure health and safety, and having regard to an individual assessment and an overall assessment of the physical, ergonomic and psychosocial conditions of the working environment that may affect the physical or mental health of employees (EO 559, ss 4 and 7). The Executive Order also establishes specific requirements in relation to monotonous work, work pace, work in isolation, working alone, bullying and sexual harassment (EO 559, ss 9, 11, 91).

Europe is not the only part of the world where laws for health and safety

at work explicitly address psychosocial risks. In the Asia-Pacific region, the legal obligations for psychosocial risks in two countries are particularly noteworthy. In Japan, the general obligations of employers in the Industrial Safety and Health Act 1972 (ISHA (Jap), as amended) require employers to endeavour to ensure the safety and health of workers by creating a comfortable working environment and improving working conditions (ISHA (Jap) Article 3). In addition to this general requirement, the ISHA (Jap) requires employers to make continuous and systematic efforts for the maintenance and promotion of workers' health by taking necessary measures such as providing health education, health counselling and other services to workers, and provides for the Minister of Health, Labor and Welfare (MHLW) to publish guidelines for the measures to be taken by employers (ISHA (Jap) Articles 69 and 70-2). The MHLW has published the Guideline for Promotion and Maintenance of Mental Health of Workers, which advises employers to prepare a plan for mental health in the enterprise with actions to be taken by managers/ supervisors, occupational health professionals, workers and external service providers. Core actions are the provision of information and training, improvement of the work environment, worker consultation and support for return to work for workers with work-related mental disorders.

In addition, in 2002 the MHLW launched a program addressing the specific problem of health impairment due to overwork. The aim of the program was to reduce overtime work to 45 hours or less per month, as well as providing for medical examinations and health guidance for over-worked workers. In 2005 this health guidance was incorporated in the legally binding Ordinance on Industrial Safety and Health 1972 (OISH (Jap), as amended, Art 52-2 to 52-8). Employers are now required to make arrangements for workers to receive health checks and guidance from a doctor if they have worked overtime ex-

ceeding 100 overtime hours or more per month, are deemed to have been suffering from accumulated fatigue, and the worker requests this guidance. The role of the doctor is to confirm the working conditions and the worker's condition of accumulated fatigue, and any additional mental and physical health conditions.

The second Asian country with a more developed legal framework for psychosocial risks is the Republic of Korea. In this country, the duties of employers in the Occupational Safety and Health Act 1981 (OSHA (Kor), as amended) have embraced and specifically referred to psychosocial risks since 2002. The current Act requires employers to create a pleasant work environment that can reduce the physical fatigue and mental stress of workers, and improve working conditions, as well as providing workers with information on safety and health in the workplace, and generally complying with the Act and orders made under the Act (OSHA (Kor) Art 5(1)-(3)). In addition, Ordinance 195 of the Ministry of Labour (Ord 195), which is equivalent to regulations, establishes countermeasures to prevent health problems caused by work-related stress (Ord 195 Art 669). An employer must take any of the countermeasures when his/her employees perform work that causes physical fatigue or mental stress. The countermeasures are:

(a) assessing possible stress factors such as the work environment, content of work and working hours, and planning and implementing countermeasures such as reducing working hours and rotating tasks;

(b) reflecting the employees' opinion when formulating working plans based on work load and work schedule;

(c) improving working conditions by allocating work hours and break times properly;

(d) doing his/her best to secure the welfare of employees related to work activities;

(e) placing employees in positions based on the results of medical check-ups and counselling, and providing enough explanation to the employee concerned about factors associated with work-related stress, the possibilities of health problems and countermeasures; and

(f) implementing health promotion programs to encourage employees to quit smoking and manage hypertension after assessing their cardiovascular disease risks.

From the examples provided so far, it is clear that a number of countries have mandatory legal obligations addressing work-related psychosocial risks. There are further examples in the Americas. As previously noted in this paper, the United States, in terms of its federal OSH laws, is among the countries that rely on broad general duties and obligations that embrace but do not specify psychosocial risks or particular measures to address them. In the federal jurisdiction there are no OSH standards (regulations) relating to any psychosocial hazards or harmful effects. However, among states that have their own State Plans[57] for occupational safety and health there are some examples of legally binding standards for specific problems such as work-related violence. One example is New York state, where there is a standard for Workplace Violence Prevention that applies to public sector employment (12 NYCRR Part 800.6). The standard requires employers to: develop and implement a written policy statement on workplace violence prevention; evaluate the risk of workplace violence to identify patterns in the type and cause of injuries; assess workplace policies, practices and procedures that may impact on the

57) For an explanation of State Plans see US Department of Labor, 2016. 'State Plans' at:https://www.osha.gov/dcsp/osp/.

risk of workplace violence; and examine the workplace to determine the presence of factors which may place employees at risk of workplace violence. Public employers with 20 or more fulltime permanent employees, which must develop a written program to prevent, minimize and respond to workplace violence. Employees and their representatives can request an inspection by the Department of Labor if they believe there is a serious violation of this standard or that an imminent danger exists.

Another country with specific requirements for certain types of harmful interactions at work is Canada. This country also has a federal system with legal requirements relating to health and safety at work in the federal, provincial and territorial jurisdictions. In some jurisdictions these requirements are set out in legally binding labour codes or standards instead of, or in addition to, Acts or regulations. As in Australia, broad general duties and obligations embrace psychosocial risks, with[58] or without[59] specific reference to these risks. In addition, in some jurisdictions there are specific requirements for work-related harassment (bullying) and/or for violence. For example, in the federal jurisdiction, the Canada Occupational Health and Safety Regulations 1986 (OHSR (Can), as amended) require employers to develop and post a workplace violence prevention policy setting out prescribed elements of the employer's obligations in relation to providing a violence-free workplace, and dedicating sufficient attention, resources and time to address factors that contribute to workplace violence, including bullying, teasing, and abusive and other aggressive behaviour (OHSR (Can) rr 20.2 and 20.3). Employers must also manage the

58) See for example Saskatchewan Occupational Health and Safety Act 1993 ss 2-4 and s 14; Manitoba Workplace Safety and Health Act 2014 ss 1, 2(2).

59) See for example Canada Labour Code ss 124-125; Ontario Occupational Health and Safety Act 1990 s32.0.5(1); British Columbia Workers Compensation Act 1996 Part 3; Québec Occupational Health and Safety Act 1979 ss I,9-11, 51-52).

risks of workplace violence by identifying contributing factors, assessing the potential for violence relating to each of these factors, developing and implementing systematic controls to eliminate or minimize the risk of violence to the extent reasonably practicable, reviewing the effectiveness of the prevention measures, and establishing emergency notification procedures where immediate assistance is required, including police assistance (OHSR (Can) rr 20.4-20.8).

In the province of Ontario, Part III.01 of the Occupational Health and Safety Act 1990 (OHSA (Ont)) concerns violence and harassment. Employers must prepare a policy for workplace violence and review this at least annually, and develop and maintain a program to implement the policy for violence. The elements of this are prescribed and include measures to: control the risks identified in an assessment; summon assistance when violence occurs or is likely to occur; report incidents of violence; investigate and deal with incidents or complaints of violence; and provide information and instruction to workers on the violence policy and program (OHSA (Ont) s 32.0.4). There is also a specific requirement that if the employer becomes aware, or ought reasonably to be aware, that a worker is likely to be exposed to physical injury in the workplace relating to domestic violence, the employer must take every reasonable precaution for the protection of the worker (OHSA (Ont) s 32.0.2). The OHSA (Ont) contains similar requirements in relation to workplace harassment and sexual harassment, as for violence, and the employer must prepare a policy, and develop and maintain a program to implement the policy (OHSA (Ont) s 32.0.2, 32.0.6-8).

In British Columbia, the Occupational Health and Safety Regulations 1997 (OHSR (BC)) require employers to manage the risks of violence by performing a risk assessment; establishing procedures, policies and arrangements to

eliminate or minimize the risk; providing information to workers exposed to the risk; and providing instruction about these preventive actions and response to incidents of violence (OHSR (BC) rr 4.2.7-4.31). There are no specific regulations for bullying and harassment in British Columbia but the WorkSafe BC Board has approved three policies, which concern employers', workers' and supervisors' duties in relation to these matters (WorkSafe BC 2013a,b,c). WorkSafe BC and the Workers' Compensation Appeal Tribunal are required to apply these approved policies when making decisions WCA (BC).

In Saskatchewan, the Occupational Health and Safety Regulations 1996 (OHSR (Sask)) establish requirements relating to policies for harassment and for violence at work (OHSR (Sask) rr 36-37). The latter address the content of the violence policy and are quite detailed in prescribing the types of workplaces requiring a policy, which include workplaces in healthcare, pharmaceutical-dispensing, education, financial matters, police, corrections or other law enforcement, security, crisis counselling and intervention, public transportation, workplaces open to the public for retail sales from 11:00 pm and 6:00 am and licensed premises. In addition, an employer of workers at late night retail premises must implement specific security measures relating to visibility into and out of premises, cash handling and the use of video cameras, and signs to indicate cash handling and video arrangements, as well as procedures to check-in on workers after 11pm and for the use of personal emergency transmitters (OHSR (Sask) r 37.1).

Elsewhere in the Americas, in central and South America, various countries have OHS or labour laws that embrace psychosocial risks, or mental health and wellbeing (eg Argentina, Chile, Cuba, Ecuador, Honduras, Peru, Uruguay, Venezuela). In Bolivia, the Constitution[60] prohibits any form of work-related harassment, and in Columbia Article 49III of Resolution 2646 of 2008[61] estab-

lishes requirements for the identification, evaluation, prevention, intervention and monitoring of exposure to psychosocial risks at work, and for determining the origin of diseases caused by work-related stress. Two countries with more detailed legal requirements relating to psychosocial risks are the Republic of El Salvador and Mexico.

In El Salvador the Reglamento General en Materia de Prevención de Riesgos en los Lugares de Trabajo 2012 requires employers to prevent, identify, eliminate or reduce psychosocial risks, which may be achieved by: (a) minimizing the negative effects of monotonous, repetitive work; (b) establishing means of fostering beneficial and respectful labour relations and effective communication; (c) involving workers in the implementation of changes in work organization; (d) raising awareness of the causes and effects of violence and sexual harassment; and (e) collecting proposals at all levels and in all areas of the workforce for controlling psychosocial risks (ILO, 2016, pp 12-13). Employers must also provide training and awareness raising programs on violence and psychosocial risks, establish mechanisms for investigation and early detection of these risks, and create a healthy working environment by developing a people-based organizational culture.

In Mexico, the Reglamento Federal de Seguridad y Salud en el Trabajo 2014 (the Federal Regulation for Occupational Safety and Health) requires workplace assessment, which includes identification of psychosocial risk factors (Bustamente, 2015; ILO, 2016, pp 12-13). Psychosocial risks are defined as factors that may cause anxiety disorders, sleep disorders and severe stress conditions, and arise from the nature of the work, job functions, working hours and exposure to traumatic events or acts of workplace violence. The latter in-

60) The Constitución Política del Estado de Plurinacional de Bolivia (2009).

61) Ministerio de la Proteccion Social (Colombia) Resolucion 002646 de 2008.

cludes acts of harassment, sexual harassment or bad treatment of a worker that may damage the worker's health and wellbeing. Employers are required to take action on psychosocial risk factors, including identification and analysis of jobs presenting psychosocial risk factors due to the nature of duties or working time; adopting appropriate preventive measures to reduce psychosocial risks; conducting medical examinations for workers exposed to psychosocial risks; and providing information on possible health disorders caused by exposure to psychosocial risks.

These examples from the Americas, like the examples from Europe and the Asia-Pacific, concern obligations under laws for health and safety at work. It is important to note then that provisions relevant to the control of psychosocial risks may be established under other laws.

In the Canadian province of Québec, which also has OHS laws, the Labour Standards Act 1979 (LSA (Qbc)) was amended in 2002 to introduce requirements relating to psychological harassment, which came into effect in 2004 (LSA (Qbc) Div V.2). Every employee has a legal right to a work environment free from psychological harassment, and employers must take reasonable action to prevent harassment and put a stop to harassment that they become aware of (LSA (Qbc) ss 81.18-19). These provisions are deemed to be part of any collective agreement that covers particular employees, and employees with harassment concerns must exercise recourses provided for in these agreements. The most common preventive action taken in workplaces is the development of policies and provision of training (Lippel et al, 2011). Harassment complaints not settled by the employer are investigated by the Commission des Normes du Travail (the Labour Standards Commission) if workers are not union members and, in unionized workplaces, unions investigate complaints and may then take a grievance to arbitration (Lippel et al,

2011).

Likewise, in Australia there are provisions in the Commonwealth Fair Work Act 2009 (FWA (Cth)), which enable a worker who reasonably believes s/he has been bullied at work to apply to the Fair Work Commission (FWC) for an order to stop the bullying (FWA 2009 (Cth), ss 789FA-FL). Workers in certain types of enterprises can lodge a complaint and, if the FWC is satisfied that the worker has been bullied at work and there is a risk that the worker will continue to be bullied, the FWC may grant an order to prevent the bullying, and focus on resolving the matter to enable normal working relationships to resume. The FWC takes into account any procedures available to resolve grievances and disputes at the worker's workplace, any final or interim outcomes arising from an investigation undertaken by the worker's employer or other body, and any other matters the FWC considers relevant.

In the Australian state of Victoria, there are stalking provisions in the Crimes Act 1958 (Vic) (CA (Vic)), which extend to behaviour that involves serious bullying (CA (Vic) s 21A(2)(da)-(g)). The provisions relate to bullying generally (not just at work) and offences carry a maximum penalty of 10 years imprisonment. While not explicitly addressed in criminal laws in other Australian jurisdictions, these laws capture behaviours and conduct typical of serious workplace bullying, such as assaults, threats, abuse, stalking, aiding or abetting suicide, and causing physical or mental harm (House of Representatives Standing Committee on Education and Employment, 2012).

In summary, this section has demonstrated that worldwide there are many different examples of mandatory legal obligations that extend to psychosocial risks and their harmful effects, and that the approaches taken in the legal instruments differ considerably in scope and specificity. They differ in whether they apply to psychosocial risks in general or specific types of risks (and which

ones), and the type of action they require of employers and other duty holders. Some requirements are stronger in the sense that they establish specific requirements relating to the design, organization and management of work, work demands and resources, social interactions and support at work and/or a range of specific aspects of these, such as work hours, pace of work, bullying, harassment, violence, and so on. Other requirements are weaker in that they establish generic requirements to assess and manage risks, provide information and training, consult with workers, and so on, but for those with legal responsibilities it may be less clear that these generic requirements apply to psychosocial risk factors like workload, time pressures, work schedules, shift work, low autonomy, poor role definition, out of hours work, job insecurity, procedural injustice and organizational change. Often regulators for health and safety at work rely on advisory and information resources to clarify these issues. These initiatives to support compliance, and examples of inspection and enforcement programs, are discussed next.

C. Compliance support, inspection and enforcement

Government regulators and authorities for health and safety at work underpin legal obligations to address work-related psychosocial risks with a variety of information materials, resources and tools to support workplace assessment of risks. The regulators may also play an active role in inspection and enforcement of the relevant obligations. These initiatives can make the difference between law staying 'on the books' and law being implemented in practice.

Some governments have formally approved policies, codes of practice or other standards to provide guidance about acceptable ways of complying. These instruments provide authoritative guidance, although they are not legally

binding. For example, in the Canadian province of British Columbia, WorkSafe BC Board has approved three policies about employers', workers' and supervisors' duties in relation to workplace bullying and harassment (WorkSafe BC 2013a,b,c). In Australia, in jurisdictions with harmonized WHS laws there is an approved code of practice for the management of risks in general. This is the How to Manage Work Health and Safety Risks Code of Practice (Safe Work Australia 2010). The code lists work-related stress, bullying, violence and fatigue as examples of psychosocial hazards. In the state of Western Australia, the government has approved a series of codes of practice, which address fatigue for commercial vehicle drivers, work-related violence, aggression and bullying, and working hours, as well as industry codes for call centres and for the public sector that address these risks (COSH, 2004; 2005; 2006; 2007; 2010).

A further, substantial example of authoritative guidance is the UK Health and Safety Executive's (HSE) Management Standards for Work-Related Stress (HSE, 2004; undated). The management standards are based on scientific evidence about the primary sources of stress at work, and cover bullying, harassment, violence and stressors more generally. The six elements of the standards are: (1) demands – including workload, work patterns and the work environment; (2) control – how much say a person has in the way they do their work; (3) support – including encouragement, sponsorship and resources provided by the enterprise, line management and colleagues; (4) relationships – including promoting positive working to avoid conflict and dealing with unacceptable behaviour; (5) role – including whether people understand their role within the enterprise and the enterprise ensures they do not have conflicting roles; and (6) change – how this is managed and communicated in the enterprise. For each of these six elements, there is a 'management standard'

and 'states to be achieved'. As well as detailed guidance about applying the management standards using a participative problem solving process, the Health and Safety Executive has also developed a 35-item survey – the Indicator Tool, which enterprises can use to assess their performance against the six management standards. The tool has been tested for validity and reliability, to ensure that the factors measured by the tool are positively associated with job satisfaction and negatively associated with job-related anxiety, depression and other harmful effects (Cousins et al, 2004; Edwards et al, 2008; Kerr et al, 2009; McKay et al, 2004; Rick et al, 2002).

The UK is not the only country to have developed a survey tool to support the assessment of psychosocial risks. In the Republic of Korea, a consortium of university academics and the Korean Occupational Safety Authority (KOSHA) have developed the Korean Occupational Stress Scale (KOSS), which is a tool for assessing stressors typical to work in Korea. The tool supports enterprises in complying with their legal obligation to reduce physical fatigue and mental stress. Risk factors assessed relate to the physical work environment, job demands, insufficient job control, interpersonal conflict, job insecurity, the organizational system, lack of reward and occupational climate (Chang et al, 2005). KOSHA also supported the Korean Society of Occupational Stress in producing Guidelines on the Occupational Stressor Scale for Korean Workers. Similarly, in Denmark, the Copenhagen Psychosocial Questionnaire for assessing the psychosocial working environment (COPSOQ II) was developed by the National Research Centre for the Working Environment (NRCWE) and includes information about conducting the survey and taking preventive action, and there are also guidelines on how to translate the findings of the survey into action (Kristensen, undated; NRCWE, 2007). This tool is now available in more than 25 languages, and has been adapted and applied in Spain and some Latin

American countries (ILO, 2016, p 22).

Australia has followed the trend to develop a valid and reliable survey tool for use in psychosocial risk assessment, through a research collaboration between the national WHS authority, Safe Work Australia, four WHS regulators and two universities – the People at Work project (Jimmieson & Bordia, 2014. The survey tool is based on the Job Demands-Resources Model of occupational stress and assesses seven job demands and six job resources, as well as three types of harmful effects – psychological strain, job burnout and musculoskeletal symptoms (Demerouti et al, 2001; Jimmieson & Bordia, 2014). The job demands are role overload, role ambiguity, role conflict, cognitive demand, emotional demand, group task conflict, group relationship conflict. The job resources are job control, supervisor support, co-worker support, praise and recognition, procedural justice and change consultation.

In addition to such survey tools and formally approved policies, codes of practice or standards to support the assessment of psychosocial risks, government OHS authorities and regulators provide information in the form of guidelines, guides, handbooks, fact sheets and similar guidance materials. In countries that have specific legal requirements for psychosocial risks, such guidance may interpret or apply these requirements. For example, in Sweden all the provisions of the regulations for the organizational and social work environment (AFS 2015:4) are followed by general recommendations, which provide guidance about how the duty holders can comply with the provisions in practice. Likewise, in Mexico, the Ministry of Labour and Social Welfare is developing technical guidelines on the psychosocial risk requirements of the new Federal Regulation for Occupational Safety and Health (ILO, 2016, p 21). And, in Denmark the Work Environment Authority provides guides and workplace assessment checklists for industry sectors where psychosocial risks are a par-

ticular problem (Rasmussen et al, 2011). There is also guidance about preparing action plans to address psychosocial risks.

Korea also has guidance for priority sectors and occupations. In this country, KOSHA has developed stress management guidelines for taxi and bus drivers, building cleaners, food service workers, salespeople, call centre operators, nurses, nursing home workers, emotional labourers, workers with long working hours, construction workers, bank tellers, hotel employees, cabin crews, train engineers and caddies, as well as guidelines for shift workers and for workers with PTSD and depression (Kawakami et al, 2014).

In countries that have more general legal obligations for health and safety at work that embrace but do not specifically mention psychosocial risks, guidance materials do the heavy lifting. That is, they provide the detail about the action that employers and other duty holders are advised to take to control psychosocial risks. For example, in Australia the national OHS policy agency, Safe Work Australia, and the OHS regulators provide guidance materials for work-related violence, bullying and harassment, stress and fatigue, and principles of good work design (Comcare, 2008; 2013; undated a,b; Safe Work Australia, 2014; 2013a,b,c,d; 2015; SafeWork SA, 2015; WorkCover NSW, 2002; Workplace Health and Safety Queensland, 2015; WorkSafe ACT, 2010;2012; WorkSafe Victoria, 2009a,b; 2012; 2015). In the United States, workplace violence is a key focus for the Occupational Safety and Health Administration (OSHA) due to the very high rate of violence-related fatalities and injuries.[62] There are OSHA guidelines or fact sheets about preventing workplace violence

62) The Bureau of Labor Statistics' Census of Fatal Occupational Injuries reported 14,770 workplace homicide victims between 1992 and 2012, and the Bureau of Labor Statistics Survey of Occupational Injuries and Illnesses reported 154,460 non-fatal work-related injuries and illnesses involving days away from work, which were attributable to violence, between 2003 and 2012.

for healthcare and social service workers, taxi and for-hire drivers, and for work in late-night retail establishments (OSHA, 2015a,b; 2010; 2009). In Peru, the National Centre for Occupational Health and Environmental Protection for Health provides information on work-related psychosocial risks and on bullying (ILO, 2016, p 22).

Over and above guidance, resources and tools to support workplace compliance with OHS and labour laws, as they apply to psychosocial risks, the government agencies that administer these laws (the regulators) may also inspect and enforce workplace action in relation to psychosocial risks. Key issues in inspection and enforcement are the methods and procedures for inspection and enforcement, and the development of inspectorate knowledge and skills in relation to psychosocial risks (competence).

A number of countries have developed procedures and methods to guide inspectors in assessing and investigating psychosocial risks. For example, in the United States, OSHA has Enforcement Procedures for Investigating or Inspecting Workplace Violence Incidents (OSHA, 2011). These instructions establish general policy guidance and procedures for field offices to apply when workplace violence is identified as a hazard while conducting an inspection under a national, regional or local program, and when responding to incidents of workplace violence; especially when conducting inspections at worksites in industries with a high incidence of workplace violence. The instructions define types of workplace violence, OSHA-identified high risk industries and catastrophic events. They include procedures for the opening conference, walk around and review of records, issuing citations and notices, and the closing conference, as well as addressing abatement methods and training. There are samples of hazard alert letters, memorandums to the assistant secretary and documentation of informed consent.

In the United Kingdom, the Health and Safety Executive has an Inspection Pack on Work-Related Stress, which is tailored to the agency's Management Standards for Work-Related Stress (HSE, 2011). The pack provides guidance for HSE inspectors about the nature of work stress, the management standards and how to apply them in enterprises, methods for proactive inspection, responding to complaints and enforcement including checking compliance with inspectors' improvement notices. There are also templates for improvement notices for risk assessment and for action plans, points to consider when serving improvement notices, and suggested paragraphs to include in covering letters accompanying notices. In Sweden, as well as ongoing initiatives to train inspectors in psychosocial risks, there is a handbook aimed at improving inspector competence and methods, which provides examples of how to inspect psychosocial risks and which provisions of legislation to cite when giving directions about psychosocial risks (Bruhn, 2006; Bruhn and Frick, 2011).

In Europe generally, procedures and methods for inspection of psychosocial risks are well-developed. The Senior Labour Inspectors Committee has compiled a toolkit for inspection of psychosocial risks in the EU member states and Iceland. The toolkit consists of a guide for labour inspectors, information about psychosocial risks at work and risk assessments, and tools for inspection. These include an interview guide for evaluating risk assessments for psychological stress; guidance tools for hospitals, hotels and restaurants, and transport of goods; a questionnaire; and a check list for stress at work (EU-OSHA, undated). Indeed several of the resources in the toolkit are based on the long standing work of inspectorates in particular countries. The interview guide comes from Germany where the Federal States Committee for Occupational Safety and Health developed this model for evaluating enterprise risk assessments in regard to the content of work and tasks, the organisation

of work and social relations. The guidance tools come from Denmark, which is a leader in the development of methods for inspection and enforcement of the psychosocial working environment (PWE).

The Danish Working Environment Authority (DWEA) has been inspecting PWE matters since the early 1990s but in 2007 launched a comprehensive strategy to strengthen its inspection and enforcement of these matters, as follows (DWEA, undated,a,b,c; Rasmussen et al, 2011). The DWEA developed and implemented 24 sector and job specific guidance tools, and trains all new inspectors in how to use these guidance tools, and how to assess and evaluate PWE health and safety risks, and refreshes this training in two annual workshops. The DWEA also established a systematic approach to PWE inspection through method descriptions and instructions for inspectors, specific guidelines on methods to use in PWE inspection, templates to assist inspectors in writing improvement notices and best practice examples of improvement notices, all of which are available to inspectors on the DWEA intranet. In addition, PWE task forces were established in four regional inspection centres, consisting of six to eight inspectors who are highly skilled in PWE matters. These specialists assist other inspectors with assessing PWE risks, writing improvement notices and inspecting complicated PWE problems, and provide guidance to enterprises that have received improvement notices. There are annual internal audits of improvement notices for PWE matters, to assess and communicate strengths and weaknesses and improve the quality of notices, which are overseen by a PWE methods committee.

The conceptual framework underlying the DWEA's guidance tools is based on the job demand/control model,[63] and the inspection method involves a par-

63) This is the model of Karasek and Theorell (1990).

ticipative approach to managing risks, aimed at addressing the most important and prevalent PWE risk factors in a given sector. The DWEA focuses on quantitative demands (workload, pace of work), emotional demands, work-related violence, traumatic experiences, night- and shiftwork, and bullying and sexual harassment. The aim is to assess if and how a given risk factor is present in an enterprise, and the measures that the enterprise uses to ensure that the risk factor is eliminated, reduced or managed to prevent health risks. The focus of inspection is then to assess whether there is a balance between the prevalence of the risk factor and the prevention measures taken by the enterprise. The 24 sector and job-specific guidance tools cover different sectors of care and teaching, transportation, services, and construction, industrial production and agriculture. Inspectors use the tools for pre-visit preparation, to support and structure dialogue during inspections, for evaluating whether the enterprise has complied with the Danish laws and for writing notices.

In essence, Denmark is an example of a country that has put concerted effort into mainstreaming inspection and enforcement of psychosocial risks. Apart from the methods and procedures implemented, the DWEA has developed inspectorate competence with psychosocial specialists supporting generalist inspectors, training and workshops for all inspectors to develop skills in psychosocial inspection, and peer review of inspection practices and the quality of improvement notices.

Other countries have also made inspector competence a focus of attention. In Sweden, from 2001-2003, the Work Environment Authority (SWEA) conducted a development project to enhance inspection of psychosocial risks, which included training of inspectors and recruitment of inspectors with more competence to inspect psychosocial risks, as well as the development of new inspection methods to enable generalist inspectors to inspect psychosocial

risks (Bruhn, 2006;). An independent evaluation of the development project found that inspector competency and how inspectors exercise their judgement is much less clear-cut in the context of inspecting psychosocial risks than it is with technical matters such as machinery and equipment (Bruhn and Frick, 2011).

In Australia, the larger OHS regulators[64] have started to build their inspectorate capacity in relation to psychosocial risks by appointing a small number of specialist psychosocial inspectors. The typical role of the specialists is to assist the regulator in operationalizing the general inspectorate's response to requests for assistance in resolving psychosocial risk issues in the workplace and proactively assessing psychosocial risks in targeted groups (Johnstone et al, 2011; and interviews with OHS regulators). In this country, a key issue is determining how to apply the general obligations in the laws for health and safety at work to psychosocial risks, in the absence of specific regulations. This means applying general obligations relating to systems of work, the work environment, consultation or provision of information, training, instruction and supervision, and the resolution of issues.

In summary, this section has shown that there is more to government regulation of psychosocial risks than the characteristics of legal obligations, however well these are crafted. Also at stake is the scope and quality of regulatory authorities' guidance, resources and tools to support compliance with legal obligations, and whether regulators have the methods and capability to effectively inspect and enforce compliance. Psychosocial risks present unique challenges as they concern fundamental issues of work design, organization and management, and the relationships and interactions between people at work. In this

64) The larger regulators are in the states of New South Wales, Queensland and Victoria.

regard it is of interest that a range of actors, other than government regulatory authorities for health and safety at work, are helping to mobilise the impetus and build capability for addressing psychosocial risks in the workplace.

III. Other Actors and Mechanisms Leveraging Workplace Action

The impetus and capability for addressing work-related psychosocial risks and their harmful effects stems from a much wider base than the government regulatory regimes establishing legal requirements for health and safety at work, and supporting, inspecting and enforcing these legal requirements (to a greater or lesser extent). There are multiple, influential actors and mechanisms leveraging action on psychosocial risks in international, regional and national arenas.

In the international arena, key actors are the International Commission on Occupational Health (ICOH), and the International Labour Organisation and the World Health Organisation, both of which are agencies of the United Nations. Union bodies such as the International Trade Union Confederation (ITUC), and the Labour 20 may also be influential. The latter is convened by the ITUC and the Trade Union Advisory Committee to the OECD, and brings together trade unions from G20 countries and global unions to represent the workers' interests at the G20 level. There is also the international standard setting body, the International Organization for Standardization (ISO).

Other actors operate regionally. This is the case, for example, for: the tripartite European Foundation for the Improvement of Living and Working Conditions (Eurofound); the European Agency for Safety and Health at Work

(EU-OSHA) as the EU's information agency for OSH; and the New OSH Era Consortium, which is an association of more than 20 funding organizations and research institutions in Europe. There are also networks in the Asia-Pacific – the ASEAN Occupational Safety and Health Network (ASEAN-OSHNET) and the Asian Pacific Academy for Psychosocial Factors at Work (APA-PFAW), and for countries and territories in the Americas (north, central and south) where Spanish or Portuguese are predominant languages. These include the Ibero-American Network for Work-Related Psychosocial Risks (RIPSOL), the Ibero-American Network for Dignity at Work and in Organizations, and the Latin American Research Network on Psychosocial Factors at Work (RIFAPT).

At national level the multiple actors include specific universities and research institutions, standard setting bodies, employer associations and unions (the social partners), and a range of other non-governmental organizations. While most actors are organizations or networks, individuals may also be influential in some circumstances. For example, in Japan a significant incentive for enterprise action to reduce overwork are civil actions seeking compensation, which have been initiated by family members of employees who have committed suicide due to excessive working hours or Karojisatsu (Kawakami et al, 2014). In the first such case, the Supreme Court ordered the employer to pay 168 million yen and in subsequent cases employers have typically paid from 50 to 100 million yen. Further incentive for preventive action is provided by individual workers' claims for work-related mental disorders, and death or permanent disability from cerebrovascular diseases and ischemic heart diseases caused by overwork or Karoshi (Iwasaki et al, 2006).

The various actors exert their influence or help build capability for addressing psychosocial risks through diverse mechanisms. These include awareness raising and campaigns, research and evaluation studies that contribute to the

evidence base for preventive action, standards and frameworks for managing psychosocial risks, collective agreements, and information and training materials.

In regard to *awareness raising and campaigns*, the International Commission on Occupational Health (ICOH) created its scientific committee on Work Organization and Psychosocial Factors in 1996. This committee promotes awareness, research and education, and dissemination of good practice, and aims to influence policy development in regard to work organization and psychosocial risks (ICOH, 2016). Also globally, the International Trade Union Confederation has campaigned with its member organizations, partners and affiliates and the ILO for improvement of OHS for workers in all countries, and including prevention of exposure to psychosocial risks (ITUC, 2010). The Labour 20 has campaigned for the development of country roadmaps for promoting safer workplaces to address psychosocial risks, stress, harassment, bullying, mobbing and other forms of violence at work, as well as improved OHS protection workers in non-standard forms of employment and for vulnerable workers (ITUC, undated).

In Europe, EU-OSHA organized the 2014-15 Healthy Workplaces campaign which focused on the management of stress, and provided support and guidance for workers and employers in managing psychosocial risks (ILO, 2016, p 19). In the Asia-Pacific, the ASEAN-OSH network fosters awareness of safe and healthy work as a means to both a productive and competitive workforce and better quality of life, and the APA-PFAW academy generates and shares knowledge and awareness of work-related psychosocial factors and opportunities to improve workplace health, safety, wellbeing and productivity in the region (ASEAN-OSHNET, 2016; APA-PFAW, 2016). And, in Latin Americas, the Ibero-American Network for Work-related Psychosocial Risks promotes com-

munication and scientific collaboration on potentially harmful working conditions contributing to cardiovascular disorders, musculoskeletal injuries, mental health and behavioural disorders, while the Latin American Research Network on Psychosocial Factors at Work promotes, disseminates and advances research and knowledge on psychosocial factors at work (ILO, 2016, p 25).

For *research and evaluation*, key examples are in Europe. The European Foundation conducts two regular surveys on working life issues: the European Working Conditions Survey (EWCS) and the European Company Survey (ECS),[65] while EU-OSHA launched the European Survey of Enterprises on New and Emerging Risks (ESENER) in 2009. Two reports published from ESENER that relate to psychosocial risks are the reports on drivers and barriers for psychosocial risk management, and the report on the management of psychosocial risks at work (EU-OSHA, 2012a,b). In addition, the New OSH Era Consortium developed the Psychological Health and Wellbeing in Restructuring: Key Effects and Mechanisms project (PSYRES), which provides a survey tool, and national information and datasets.[66]

Another institution providing a survey and datasets is the University of South Australia, which conducts the Australian Workplace Barometer project to investigate the relationship between work conditions, health and productivity through surveillance of psychosocial factors at work (Dollard and Bakker, 2010). The project uses the Psychosocial Safety Climate (PSC) survey to measure worker perceptions of management commitment and priority, and organizational communication and participation (Bailey et al, 2015; Hall et al, 2010).

65) Information about the surveys is online at: http://www.eurofound.europa.eu/surveys/european-working-conditions-surveys.

66) See the PSYRES website at: http://www.psyres.pl.

The project has generated a national database of PSC information that may be used to monitor trends over time and by industry sectors, occupations and other demographic variables (Bailey et al, 2015; Dollard et al, 2012).

Turning to the mechanism of *standards and frameworks*, a key development is the European Framework for Psychosocial Risk Management (PRIMA-EF), which was developed by a consortium of World Health Organization Collaborating Centres in Occupational Health.[67] The framework accommodates all the major psychosocial risk management approaches across the European Union,[68] and encapsulates the philosophy of relevant European Directives (Leka and Cox, 2008a,b). The framework includes risk assessment to understand the nature of problems and their underlying causes, design and implementation of actions to remove or reduce risks, and evaluation of those actions. There is also guidance about methods to inform risk assessment including surveys, individual or group discussions, observation methods, and an audit of management practices and mechanisms for worker support and organizational learning (Leka and Cox, 2008b).

Elsewhere in Europe, the British Standards Institution (BSI) has issued a publicly available specification on the management of psychosocial risks in the workplace (PAS 1010), which provides guidance about managing psychosocial risks within an OHS management systems framework (BSI, 2011). The PAS 1010 document also provides information about different types of psychosocial

67) The centres are the UK Institute of Work, Health and Organisations (University of Nottingham), the German Federal Institute for Occupational Safety and Health (BAuA), the Italian Institute for Occupational Safety and Prevention (ISPESL), the Netherlands TNO Quality of Life – Work and Employment, the Polish Central Institute for Labour Protection (CIOP) and the Finnish Institute of Occupational Health (FIOH).

68) For an overview of the national approaches see Zoni and Lucchini (2012)

risk factors, control measures, monitoring of organization performance and management review. A similar approach has been taken in Canada where the Bureau de Normalization du Québec (BNQ) and the Canadian Standards Association (CSA) developed a standard on managing psychosocial health, which was formally approved by the Standards Council of Canada (CSA, 2013). Like the British PAS 1010, the Canadian standard provides an approach to managing psychological health at work within an OHS management systems framework.

Globally, the International Organization for Standardization (ISO) has developed a standard for the measurement of mental workload. This standard is intended for use by ergonomic experts, psychologists, occupational health specialists and physiologists who have appropriate training in the theoretical background and practice of these methods, and interpretation of the results (ISO, 2004).

A further mechanism, *collective agreements*, respect requirements established in the law of the country but treats these as minimum standards that the agreements complement or can improve upon (ILO, 2016, p 15). In the context of the European employment strategy, employer associations and unions (the social partners) have negotiated collective agreements for work-related stress, and for harassment and violence at work (European Social Partners, 2004; 2006; 2007a,b; 2008). Although voluntary, such agreements create contractual obligations for organizations affiliated to the signatory parties to implement the agreement at each appropriate level of the member state's system of industrial relations (Eurofound, 2007). And, in Canada, in the province of Québec, the provisions of the Labour Standards Act relating to psychological harassment at work are deemed to be part of any collective agreement between employers and unions, and unions play a role in investigating com-

plaints not resolved by the employer and taking grievances to arbitration (Lippel et al, 2011).

For the final mechanism, *information and training materials* to support workplace action, the offerings are extensive. In the international arena, the ILO has published checkpoints for auditing and managing psychosocial risk factors for work-related stress, and has developed the SOLVE training package about integrating health promotion into workplace policies including addressing potential addictions and lifestyle habits (ILO, 2012). In addition, ICOH has published an OHS guide for employers, which includes a check list of measures for managing stress (ICOH, 2014).

In Europe, EU-OSHA has produced a series of reports on psychosocial risks and work-related stress. Some of the more recent reports deal with calculating the cost of work-related stress, trends in OHS for women at work, creating a positive work environment, mental health promotion and workplace violence and harassment (EU-OSHA, 2014; 2013a,b; 2011a,b). Eurofound and EU-OSHA have jointly published information about the prevalence and strategies for prevention of psychosocial risks (Eurofound and EU-OSHA, 2014). And the New OSH Era Consortium has published a guidebook about ensuring employee wellbeing during restructuring (Pahkin et al, 2011).

The Ibero networks provide information about work-related psychological risks and preventive interventions in Latin America (ILO, 2016, p 25). In the Asia-Pacific, the ASEAN-OSHNET provides a program on stress management in the workplace which is about how to cope with stress risk factors and handle the psychological health consequences, and self-management of stress in health and psychological care sectors of work (ASEAN-OSHNET, undated). And, in Korea, non-government organizations involved in stress prevention include the Korea Industrial Health Association and the Korean Association of

Occupational Health Nurses, which have nationwide networks and provide training for health managers and line supervisors on stress prevention in the workplace (Kawakami et al, 2014).

In Australia, initiatives by non-government bodies include resources for workplaces to use in identifying hazards, assessing risks and developing interventions to reduce psychosocial risk factors for musculoskeletal disorders (MSDs), which were developed by academics at La Trobe University in Melbourne (MacDonald and Oakman, 2015), and web-based information and tools to assist enterprises and individuals to address mental health at work, in general, which were developed by the Mentally Healthy Workplace Allianc e,[69] *beyond blue* and Heads Up.[70] These initiatives provide strategies to help individuals manage their mental health through diet, exercise, sleep and avoiding harmful levels of alcohol and other drugs.

In summary, this section has demonstrated the wide range of actors and mechanisms that contribute to the impetus and capability to control work-related psychosocial risks and minimize their harmful effects. There is clearly no shortage of advice and remedies, and those discussed here are just some of the offerings. While some of the initiatives are firmly focused on controlling work-related risk factors, others embrace a wider range of contributing factors in the community or relating to individual health, and recommend personal rather than organizational strategies to control psychosocial risks and their harmful effects. Thus, approaches to addressing psychosocial risks have different orientations. At one level these different approaches give enterprises

69) The Mentally Healthy Workplace Alliance was established by the National Mental Health Commission.

70) See Heads Up website at (https://www.headsup.org.au/ and beyondblue at https://www.beyondblue.org.au/).

and the individuals that work for them a choice about how to minimize or respond to psychosocial risks. At another level, the alternative approaches potentially contribute to confusion about what course of action to follow. Is it possible then to identify 'state of the art' principles for controlling psychosocial risks? This is the focus of the final section of this paper.

Ⅳ. Conclusion - Principles for Effective Regulation of Psychosocial Risks

In view of the ample evidence that psychosocial risks pose a significant OHS problem globally and in particular countries, there is a compelling need for preventive action by those who influence the design, organization and management of work, and the management of work relationships and interactions. Specific regulations are important for signalling to enterprises that they need to address psychosocial risks, to provide the impetus and firm foundations for preventive action, and to facilitate inspection and enforcement of psychosocial risks (Bruhn and Frick, 2011; Johnstone et al, 2011; Lippel et al, 2011). Regulations can provide clarity and transparency about the application of legal obligations to psychosocial risks, and contribute to the motivation for workplace parties to take seriously psychosocial risks and their harmful effects. Equally important is a well-structured and well-resourced approach to ensuring inspectorate capability and effective methods for inspecting psychosocial risks, as they inherently challenge due to their relationship to management prerogatives of work design, organization and management, and the management of relationships and interactions between people at work. A well-structured and well-resourced approach entails: the appointment of specialists in psychosocial risk management, and ongoing training and support for generalist

inspectors; the development and use of specific procedures, methods and tools for inspecting psychosocial risks; and the development of ways to strategically engage with enterprises (Bruhn, 2006; Bruhn and Frick, 2011; DWEA undated,a,b,c; EU-OSHA, 2016; HSE, 2011; OSHA, 2011;Rasmussen et al, 2011).

But what type of approach to addressing psychosocial risks should laws and regulators seek to invoke? First, the evidence suggests the merits of a holistic approach to assessment of risks, as psychosocial risks are multi-faceted and inter-related, and this is also the case for the harmful effects of exposure to these risks. It is therefore important to assess the different types of risk factors holistically, rather than focusing on particular types of risk or harmful effects in isolation.

Second, as the harmful effects of exposure to psychosocial risks arise from an imbalance between the demands placed on a person and the resources available to that person to cope with the demands (Demerouti et al, 2001; Karasek and Theorell, 1990; Siegrist, 1998), an effective approach to control of psychosocial risks is to reduce demands and enhance resources. This means reducing work demands such as heavy workloads, cognitive and emotional demands, time pressures, hours of work, and role and interpersonal conflict, and enhancing work resources such as job control, procedural justice, support and recognition from managers, supervisors and peers, and opportunities for participation and career advancement.

Third, there is general agreement that the approach to assessment of psychosocial risks should be participative, which means actively involving workers and their representatives in identifying psychosocial risk factors and ways to minimize their harmful effects. In practice, it is helpful to underpin the participative approach with a valid, reliable and readily usable survey tool, and there is considerable evidence relating to different national versions of such tools to

assess psychosocial risk factors (Chang et al, 2005; Edwards et al, 2008; Hall et al, 2010; Jimmieson and Bordia, 2014; NRCWE, 2007). In practice, survey tools provide the means to gather information about worker perceptions of work demands and resources. Beyond the use of sound survey tools, workplace parties should be free to choose from the range of resources and guidance material, provided that the approach they adopt is compatible with legal obligations. There is a role of OHS regulators to identify and guide workplace parties to the most authoritative and effective information and resources for their regime, recognizing that the multiple actors and mechanisms leveraging action on psychosocial risks, which go well beyond the government regulatory regimes.

Fourth, an integrated approach to workplace interventions is recommended. The rationale for this is that the relationship between exposure to psychosocial risks and the harmful effects of that exposure is not a simple one, as there is a process of interaction between what the job brings to the person and what the person brings to the job. Individual factors relating to physiology, personality, knowledge and skills, affect the individual's perception of psychosocial risk factors and the psychological and physical health impact of exposure to psychosocial risks (Jimmieson, 2010; LaMontagneet al, 2007, p 222; Quinlan et al, 2010, p 206; Way, 2012, p 14). An integrated approach means:

(1) protecting health by reducing work-related risk factors – the work demands outlined above ('preventing harm');

(2) promoting health by developing the positive aspects of work – the work resources outlined above – as well as worker strengths and positive capacities, which may be enhanced through initiatives to develop knowledge and skills, and promote psychological and physical health and well-

being ('promoting the positive'); and

(3) addressing workers' health problems regardless of cause through early intervention and assistance with seeking help, including mental health first aid, treatment and rehabilitation to support return to work ('managing illness'). (See Bambra et al, 2007; Egan et al, 2007; LaMontagne et al, 2014; Reavley et al, 2013).

Finally, while there is some evidence to suggest that improvements in the psychosocial working environment are achievable through well-designed interventions that are tailored to the enterprise, work context and workers' capacities, workplace parties and regulators need to have realistic expectations of the timeframes for achieving improvements (Albertsen et al, 2014; Nielsen et al, 2010; Smith et al, 2013). Also, enterprises struggle with psychosocial risk management if they have major organizational change underway, or lack human and technical resources, and competence to sustain implementation of the psychosocial risk management process (Mellor et al, 2011). It is therefore important to keep in mind key conditions for success. These are: active and visible support from senior management, human resource departments and line managers; regular communications and feedback to staff; sufficient organizational resources and expertise; departmental/team level assessment rather than enterprise wide assessment; and involvement by employees and union representatives (HSE, 2016; Mellor et al, 2011).

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Part 3. Society, safety & health

3-2

Regulation on psychosocial risks in the workplace

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I. Introduction

A. Research Purpose

In many developed countries, psychosocial risks such as work-related stress, violence, bullying and harassment have become major concerns in the field of occupational safety and health.[71]

The nature of work has changed dramatically due to globalization, migration, technological advances, and the emergence of the knowledge-based economy. These changes have been accompanied by the increased prevalence of new and emerging types of risks to workers' health and safety, such as psychosocial risks.[72]

Psychosocial risks, work-related stress, violence, harassment and bullying (or mobbing) are now widely recognized as major challenges to occupational health and safety (European Agency for Safety & Health at Work, 2007).[73] Reports indicate that work-related stress alone affects more than 40 million individuals across the EU, costing an estimated €20bn a year in lost time and health bills; it is among the most commonly reported causes of occupational illness by workers (European Foundation for the Improvement of Living & Working Conditions, 2007). According to the Fourth European Working Conditions Survey (2007), 6% of the workforce had been exposed to threats of physical violence, 4% to violence by other people, and 5% to bullying and/or harassment at work over the previous twelve months. From a wider per-

71) http://ejd.sagepub.com/content/16/2/169.short

72) http://www.sciencedirect.com/science/article/pii/S0925753511000269

73) Leka Stavroula, Tom Cox, and G. Zwetsloot, (2008) "The European framework for psychosocial risk management," PRIMA-EF, I-WHO Publications: Nottingham.

spective, psychosocial risks are also a major public health concern, and are associated with economic and social security challenges.

B. Research Method and Scope

This research work has been carried out in cooperation with the Australian National University's Regulation Research Center, RegNet. In Chapter II, a general description of and the theoretical background to psychosocial risks in the workplace will be presented. This chapter attempts to define the legal definition of 'psychosocial risk' and the associated risk factors, with the focus on the following: anxiety at work, excessive workload, conflicting demands, lack of role clarity, lack of involvement in making decisions, poorly managed organizational change, job insecurity, ineffective communication, lack of support from management or colleagues, psychological and sexual harassment, and third-party violence. This is followed by an attempt to determine the significance of psycho-social risks. Chapter III focuses on Korean governance and regulation of psychosocial risks in the workplace. Korea enacted the Act on the Korea Occupational Safety and Health Agency (KOSHA) in 1987. According to this law, KOSHA shall implement occupational safety and health policy, monitoring and control. Chapter IV of this paper deals with the International Guidelines on the Management of Occupational Psychosocial Risk Factors. Chapter V introduces the workplace psychosocial management practices of other countries.

In conclusion, this research recommends that KOSHA mission should be widened to address the psychosocial risk. However the existing KOSHA was primarily designed to manage physical risk and the obligations to control psychosocial risk were introduced recently in 2013. For this reason awareness among employers about the importance of psychosocial risk factors is very

low. In fact, the methodology for assessing psychosocial risk factors in the workplace is not yet sufficiently developed for its practical application. Furthermore, the authorities responsible for occupational health and safety need to prepare a strategy for managing employers and to provide the necessary information in order to ensure that they actually fulfill their statutory obligations, as well as to provide support in the form of social and economic resources. Furthermore, it is necessary to prepare a strategy for adequately managing and supervising employers' implementation of these obligations.

This paper aims to provide a general understanding of Korea's current national systems for the surveillance of psychosocial risks. It will analyze the contents of the current legal system and, finally, will propose practical guidance on how to advance the current implementation of psychosocial risk management beyond its current form.

II. General Description of and Theoretical Background to Psychosocial Risks in Korea

A. History of the Korean Occupational Safety and Health Act

The Korean Occupational Safety and Health Act (KOSaHA), which started as one chapter of the Korean Labor Standards Act, was separated from the Labor Standards Act on December 31, 1981. Since then it has become an independent Act, and has been revised thirty-eight times to reflect ongoing changes in the socio-economic environment in Korea.

In 2002, the Korean Occupational Safety and Health Act introduced a clause on 'mental health prevention' for the first time[74]. This clause stipulates that it is the duty of business owners "to create a pleasant working environment

and improve working conditions so as to diminish workers' physical fatigue and mental stress." However, it contains no concrete conditions or contents with regard to the implementation of this duty.

The Occupational Safety and Health Agency has the following legal purposes: (a) to develop industrial accident prevention technologies by taking research work; (b) to develop and deploy occupational safety and health technical guidance; (c) to provide training and guidance on practical workplace safety and health guidance to prevent industrial accidents; (d) to develop and provide training on safety and health diagnostic methodologies to enable workers to work in a safe and healthy workplace environment; (e) and to help employers to contribute to the national economy for disaster prevention. (the Korean Occupational Safety and Health Act, 2010.4.art.l.)

74) Korean Occupational Safety and Health Act (KOSaHA)(2016)
Article 5 (Duties of Business Owners, etc.)
(1) Business owners shall maintain and promote the health and safety of their workers and comply with the State's policies on the prevention of industrial accidents, by accomplishing the following matters:
1. They shall comply with the standards for the prevention of industrial accidents as prescribed by this Act and any order issued pursuant to this Act;
2. *They shall create a comfortable working environment and improve the working conditions so as to diminish the physical fatigue, mental stress, etc. of their workers*;
3. They shall provide workers with information on health and safety in the workplace concerned.

B. Legal Approach

1. Legal Definition: Psychosocial Risks and Associated Factors

Psychosocial risks[75] arise from poor work design, organization and management, as well as from a poor social context of work; and they may result in negative psychological, physical and social outcomes such as work-related stress, burnout or depression. Psychosocial stress could be an indirect risk factor in human error, which in turn can result in industrial accidents.[76]

Some examples of working conditions leading to psychosocial risks are as follows: (1) anxiety at work, (2) excessive workloads, (3) conflicting demands and lack of role clarity, (4) lack of involvement in making decisions that affect the worker and lack of influence over the way a job is done, (5) poorly managed organizational change, job insecurity, (6) ineffective communication, lack of support from management or colleagues, and (7) psychological and sexual harassment, third party violence, etc. Job insecurity is also a psychosocial risk factor. According to a research report, compared to regular workers (5.3 points) and self-employed workers (5.4 points), temporary workers' psychological anxiety scores were higher (5.7 points).[77]

According to a WHO report, there is a reasonable consensus among the various attempts to review the literature on the psychosocial hazards of work,

75) https://osha.europa.eu/en/themes/psychosocial-risks-and-stress

76) Jang, Tong-Il, et al. "Comparative Analysis of Work Stress Assessment Tools for Estimating Human Work Performance." Journal of the Korean Society of Safety 29.6 (2014): 144-150.

77) Lee, Sang-young et al. Psychosocial Anxiety in Korea: Risk Factors and Policy Implications, KIHASA, 2015.12. p.195. This study is based on a survey KIHASA conducted of 7,000 adults (home visit interview) in August ~ September 2015. In this study psychological anxiety meaning is related to the life of the general public, not only with work related risk factor.

which are experienced as stressful and/or otherwise carry the potential for harm. This consensus is summarized in ten different categories of job characteristics, work organization and management, and other environmental and organizational conditions which may be hazardous. (1) Job content, (2) workload and work pace, (3) work schedule: shift work and long work hours, (4) control, (5) environment and equipment, (6) organizational culture and function, (7) interpersonal relationships at work, (8) violence and bullying at work, (8) role in organization, (9) career development, (10) home-work interface.[78]

A growing body of evidence demonstrates that a poor psychosocial working environment and work-related stress can have both direct and indirect impacts on workers' physical health and mental well-being. The Fourth European Working Conditions Survey[79] found that one out of every five workers in the EU15 and almost one in three in the ten new member states believed their health was at risk due to work-related stress.[80]

When considering job demands, it is important not to confuse psychosocial risks such as excessive workload with conditions where, although stimulating and sometimes challenging, there is a supportive work environment in which workers are well trained and motivated to perform to the best of their ability. A good psychosocial environment enhances good performance and personal development, as well as workers' mental and physical well-being.

Workers experience stress when the demands of their job are excessive and greater than their capacity to cope with them. In addition to mental health problems, workers suffering from prolonged stress can go on to develop seri-

78) Jain, A., Stavroula Leka, World Health Organization, (2010), p.33.

79) EuroFound (2007), Fourth Working Conditions Survey, Dublin: Office for Official Publications of the European Communities.

80) Jain, A., Stavroula Leka, World Health Organization, (2010), p.63.

ous physical health problems such as cardiovascular disease or musculoskeletal problems.[81]

For the organization, the negative effects include poor business performance, increased absenteeism and increased accident and injury rates. Workers turn up for work when sick and unable to function effectively. Absences tend to be longer than those arising from other causes; and work-related stress may contribute to increased rates of early retirement. Estimates of the cost to businesses and society are significant and run into billions of euros at the national level.

2. Legal Principle of Managing Psychosocial Risk

We are living in a modern society and cannot be separated from labor, which can be understood easily by looking at the meaning of "freedom of profession" as defined by the Constitution. A "job" is an ongoing activity that a person takes to maintain a living and at the same time has an inseparable relation with that person's moral value. Thus, labor is a very important issue in people's existence, and this would have been no different even after the Industrial Revolution, and is no different now even after the high degree of technicalization of our own time. For this reason, labor disasters that hinder "safe work" have been strictly regulated compared with the past and have achieved corresponding results.[82]

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81) Musculoskeletal disorders (MSDs) are conditions that can affect muscles, bones, and joints. They include conditions such as: tendinitis, carpal tunnel syndrome, osteoarthritis, rheumatoid arthritis, fibromyalgia, bone fracture. 'Musculoskeletal Disease' at [http://www.online-medical-dictionary.org/] (visited 15. Oct 2016)

82) Lee, Sang-Yoon, Constitutional Problems on Suicide due to Overworking in Japan, Korean Public Law Journal, 8(4) 2007,11, 329-354, Korean Comparative Public Law Association.

The Korean Constitution Article 32 guarantees the right to work. The right to work has two basic meanings, i.e. the right to work, and the right to work in a safe environment.[83] As such, the state has the obligation to guarantee the right to work in a safe environment; and workers have the right to demand that the State ensure a healthy work environment and reasonable working hours, as well as appropriate wages and minimum wages.[84] The Occupational Safety and Health Act is one of the laws that exists to realize the right to a safe and healthy work environment, which is protected under Article 32 of the Constitution. The establishment of safe and healthy working conditions is respected within the legal task and duty imposed on social states.

C. Significance of Psychosocial Risks

Large scale socio-economic and technological changes in recent years, along with increasing trends in restructuring and downsizing, have continued in many organizations, resulting in an increase in sub-contracting and outsourcing that has affected the workplace considerably.[85] These trends and changes are often collectively referred to as 'the changing world of work'. This term encompasses a wide range of new patterns of work organization at a variety of levels, including the following: teleworking and the increased use of information and communication technology (ICT) in the workplace; downsizing, outsourcing, subcontracting and globalisation, with the associated changes in employment patterns; demands for workers' flexibility both in terms of num-

83) Korean Constitutional Court Decision (CC), 2015.12.23, Case No. 2014-3; Korean Constitutional Court Decision (CC), 2007.08.30. Case No. 2004-670.

84) id

85) Jain, A., Stavroula Leka, World Health Organization, "Health impact of psychosocial hazards at work: an overview," (2010), p.30.

ber and function or skills; an increasing proportion of the population working in the service sector, and a growing number of older workers; self-regulated work and teamwork, etc.[86]

1. Personal Perspective: Stress and Mental Health

Following these changes in working conditions, work situations are experienced as stressful when they are perceived as involving important work demands which are not well matched to the knowledge and skills (competencies) of the workers or their needs, especially when those workers have little control over their work and receive little support at work.[87] It was found that low levels of decision latitude and of social support, and high psychological demands were risk factors regarding poor self-reported health and long absence due to sickness.[88]

The contribution of psychosocial factors to poor health has also been recently analyzed.[89]

Research indicates that psychosocial working conditions may have a detrimental impact on both affective and cognitive outcomes such as anxiety, depression, distress, burnout, decision-making, and attention.[90] Depression is one of the leading causes of disability and is projected by the WHO to become

86) id

87) Jain, A., Stavroula Leka, World Health Organization, (2010), p.33.

88) Jain, A., Stavroula Leka, World Health Organization, (2010), p.34.

89) Niedhammer, I., Chastang, J.F., & David, S., (2008a), Importance of psychosocial work factors on general health outcomes in the national French SUMER survey; Occupational Medicine, 58(1), 15-24.; Jain, A., Stavroula Leka, World Health Organization, (2010), p.34. using data from the national French SUMER survey.

90) Jain, A., Stavroula Leka, World Health Organization, (2010), p.65.

the second leading cause of the global burden of disease by 2020.[91] Work-related stress, depression and anxiety can be directly associated to the exposure to psychosocial hazards at work.[92]

2. Organizational Perspective: Efficiency

It is generally reasoned that the proper and effective management of stress and psychosocial risks at work would create a healthy work environment in which workers feel valued and the workplace culture is more positive, resulting in improved productivity and business performance.

Decent work conditions will ensure the work ability and productivity of people and enable them to sustain themselves, their families and communities and to contribute to national development and GDP.[93] Conversely, poor occupational health and safety results in 270 million occupational accidents and 360 000 fatalities and causes 160 million new cases of occupational diseases each year. Altogether these lead annually to 2.3 million deaths of people at their best working age. In principle they all should be preventable.[94] The adverse conditions of work constitute an enormous and unnecessary loss of health, work ability, productivity and loss of well-being among working people and their families and communities. The burden to national and company economies is also high, amounting to 4–5% of business turnover and national

91) id

92) id

93) Centennial Declaration of the International Commission on Occupational Health, ICOH, http://www.icohweb.org/site/multimedia/core_documents/pdf/centennial_declaration.pdf

94) Centennial Declaration of the International Commission on Occupational Health, ICOH, http://www.icohweb.org/site/multimedia/core_documents/pdf/centennial_declaration.pdf

GDPs.[95]

A European opinion poll conducted by EU-OSHA shows that about half of workers consider the problem of work-related stress to be common in their workplace. Among the most frequently mentioned causes of work-related stress are job reorganization or job insecurity, long working hours or excessive workload, and harassment and violence at work. EU-OSHA provides information on recent data and research evidence relating to the prevalence and safety and health impact of work-related stress and psychosocial risks.

A preventive, holistic and systematic approach to managing psychosocial risks is believed to be the most effective. EU-OSHA's Enterprise Survey on New and Emerging Risks (ESENER) explores how psychosocial risks are perceived and managed across European enterprises, identifying the main drivers, barriers and needs for support. The survey shows that psychosocial risks are believed to be more challenging and more difficult to manage than 'traditional' occupational safety and health risks. Thus there is a need to raise awareness and provide simple practical tools that make it possible to deal with work-related stress, violence and harassment.

3. Integrative Perspective

The Industrial Safety and Health Act is based on the principle of the social state as well as on the principle of social solidarity. Psychosocial risk management contributes to social integration. Psychological stress leads to departure from work, and this separation deprives an individual of the opportunity to be integrated into society. It is widely recognized that social relationships and affiliation have powerful effects on physical and mental health. Social networks

95) id.

can have an impact on a person's health. Between these facts, it is supposed to be a causal relationship.[96] If the social and psychological risks are well managed in the workplace, social integration in the workplace will be enhanced.

D. Current Findings & Actions

1. Statistics on Psychosocial Risks

The Korea Occupational Safety and Health Agency (KOSHA), a government affiliated organization, conducted the Korean Working Conditions Survey (KWCS) in 2006, 2010 and 2011.[97] In 2006 and 2010, 10,000 workers were targeted for home interviews, while in 2011, 50,000 targeted workers were interviewed. The contents and method of the KWCS were similar to those of the Working Conditions Survey of the European Union. The results of the KOSHA surveys are considered representative of working conditions throughout Korea. According to the first KWCS in 2006, 17.9 % of respondents, including 18.7 % of males and 16.8 % of females, reported that their work had influenced their health during the previous twelve months. The survey also found that 3.4 % of the respondents had complained of depression, including 3.0 % of males and 3.9 % of females. Work-related depression or anxiety was reported by 1.2 % of respondents to the 2010 KWCS, including 1.0 % of males and 1.7 % of females, and by 1.1 % of respondents to the 2011 KWCS, including 0.9 % of males and 1.3 % of females.[98]

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96) Berkman, Lisa F., et al., "From social integration to health: Durkheim in the new millennium," Social Science & Medicine 51.6 (2000): 843-857.

97) Kawakami, Norito, et al., "National Status of Psychosocial Factors at Work in Japan, Korea, Australia, and China," Psychosocial Factors at Work in the Asia Pacific, Springer Netherlands, 2014. 27-52.

2. Practical Guidance of KOSHA on Psychosocial Risks

KOSHA produces various publications on a regular basis including Monthly Safety and Health and a web magazine. It also operates the Self-regulatory Safety System. Moreover, the agency develops and distributes diverse materials including videos, posters, slogans and pamphlets. Recently, KOSHA released free of charge ten ten-minute movie clips of a healing program designed to relieve workers' emotional stress and to prevent work-related stress, which people can easily access and follow at home or in the office.[99] The clips are categorized into three themes: physical relaxation, emotional relaxation, and stress relief.[100] The emotional relaxation video (2 episodes) contains breathing techniques designed to enhance feelings of security, whereas the stress relief video (5 episodes) presents methods of meditation for relaxing physical and mental tension. The video clips are available free of charge from the KOSAH website. Members of the general public can watch the clips on KOSHA Blog, YouTube and Facebook as well.

98) id

99) KOSHA, Healing Emotional Stress video, 2016/08/31

100) id

Theme	Method	Episode	Expectation
Physical relaxation (3 episodes)	Physical activity	① Stretching 1	Ease the neck and shoulder muscles
		② Stretching 2	Improve blood circulation, greater flexibility
		③ Brain activating stretching	Activate the intestinal function, boost immunity
Emotional relaxation (2 episodes)	Breathing	④ Relax breathing	Ease tension
		⑤ Thoracic breathing	Control breathing cycle, reduce uneasiness
Stress relief (5 episodes)	Meditation	⑥ Body meditation	Reduce headaches, high blood pressure, dyspnea, muscle tension
		⑦ Core energy meditation	Reduce emotional tension, enhance concentration
		⑧ Brain purifying meditation	Stabilize amygdala, activate serotonin secretion
		⑨ Brain wave control meditation	Increase dopamine, overall body relaxation
		⑩ Release meditation	Increase fiber density of the hippocampus, strengthen ability to control emotion

Ⅲ. Korean Regulatory System of Psychosocial Risks

A. Overview

Because Korea is experiencing radical economic growth, the workers' mental stress is greater than that experienced in other countries. In addition, we are living in times of continuous change and volatile markets. Profit-making enterprises are increasingly characterized by downsizing, work intensification,

and resource rationalization.[101] This has resulted in diversification, and the emergence of new risks within the field of occupational health and safety, which has an important impact on Korean workers' workplaces.[102] This is why a mandatory public policy is needed to prevent stress and promote mental and physical health and well-being at work. In this chapter, we will analyze how the official control system is organized and implemented in Korea.

B. Regulative Structure

1. Workplace Risk Management System

According to the ILO Framework Convention no.155 on Occupational Safety and Health, the term "health" in relation to work indicates not merely the absence of disease or infirmity, but also includes physical and mental elements that affect health and which are directly related to safety and hygiene at work.[103]

The ILO approach to mental health and well-being at work includes the following policy contents. "The policy referred to in Article 4 of this Convention shall take account the following main spheres of action in so far as they affect occupational safety and health and the working environment:

(a) design, testing, choice, substitution, installation, arrangement, use and

101) Langenhan, Melissa K., Stavroula Leka, and Aditya Jain, "Psychosocial risks: is risk management strategic enough in business and policy making?" Safety and Health at Work, 4.2 (2013): 87-94.

102) id.

103) C155 - Occupational Safety and Health Convention, 1981 (No. 155) Convention on Occupational Safety and Health and the Working Environment (Entry into force: 11 August 1983)

maintenance of the material elements of work (workplaces, working environment, tools, machinery and equipment, chemical, physical and biological substances and agents, work processes);

(b) relationships between the material elements of work and the persons who carry out or supervise the work, and adaptation of machinery, equipment, working time, organization of work and work processes according to the physical and mental capacities of the workers;

(c) training, including necessary further training, qualifications and motivations of the persons involved, in one capacity or another, in the achievement of adequate levels of safety and health;

(d) communication and cooperation at the level of the working group and at all other appropriate levels up to and including the national level;

(e) protection of workers and their representatives from disciplinary measures as a result of actions properly taken by them in conformity with the policy referred to in Article 4 of this Convention (C155 - Occupational Safety and Health Convention, 1981 (No. 155)).

Work organization + working conditions + labor relations

- Job content
- Workload and work pace
- Working hours
- Participation and control
- Status, career development
- Role in the organization/enterprise
- Interpersonal relations
- Organizational culture
- Home-work interface
- Individual and organizational factors and their interactions
- Impact on physical health
- Exposures to other hazards

In short, the risk assessment and management of psychosocial hazards at work is summarized as in the following picture.

In Korea, these are two important acts related to the management of workplace psychosocial risks: One is the Korean Occupational Safety and Health Act (KOSaHA), the other is the Korea Occupational Safety and Health Agency Act (KOSaHAA). The former is the basic act that addresses occupational health policy, whereas the latter is the law pertaining to the organization and operation of the agency responsible for the enforcement of the former, i.e. KOSaHA.

The Korean Occupational Safety and Health Act, passed in 1981, is composed of seventy-two terms and provisions mainly concerning organizational

and operational procedures. KOSaHA has the purposes of "maintaining and promoting the health and safety of workers by preventing industrial accidents, by establishing standards on industrial health and safety and clarifying where the responsibility lies, and by creating a comfortable working environment."[104] As for KOSaHAA, it was passed in 1987 and is composed of thirty terms. Almost all the provisions of this act are largely concerned with organizational and operational procedures.

The Korean Occupational Safety and Health Act was drawn up based on the legal principle that all workers should have the right to social security. The reasoning and ideology behind the Korean Occupational Safety and Health Act, as a law for the protection of workers, is essentially to guarantee proper working conditions and a safe working environment so as to protect human dignity. To that end, the act imposes certain duties and responsibilities on the state.

KOSaHA comprises nine chapters: Chapter 1 General provisions; Chapter 2 Safety and health management system; Chapter 3 Health and safety management regulations; Chapter 4 Measures for preventing harm and hazards; Chapter 5 Health management for workers; Chapter 6 Supervision and orders; Chapter 6-2 Occupational safety instructors and occupational hygiene instructors; Chapter 7(deleted); Chapter 8 Supplementary provisions; Chapter 9 Penal provisions. KOSaHA has seventy-two provisions in total.

According to KOSaHA, Article 27[105], the Minister of Employment and Labor

104) Korean Occupational Safety and Health Act (2016), Article 1 (Purpose)

105) Korean Occupational Safety and Health Act (KOSaHA)(2016)
Article 27 (Technical Guidelines and Standards of the Working Environment)
(1) The Minister of Employment and Labor may establish technical guidelines and standards for the working environment with regard to the following measures, and instruct and recommend them to business owners:

may establish technical guidelines and standards for the working environment with regard to the measures that a business owner shall take pursuant to Articles 23,[106] 24[107] and 26,[108] and Article 5(2)[109]. But all of these measures are concerned with the prevention of occupational physical risks, such as hazards caused by working machines or the inappropriate application of work methods. Psychosocial risk prevention measures have not yet been addressed by any government ordinance or standard. In KOSaHA, Article 5, the obligations of employers are set forth only in abstract, declarative words. In addition, the current law mainly contains provisions to prevent accidental disasters from occurring in the traditional manufacturing industries and to implement measures after an accident. There is a lack of effective measures to prevent the

1. Measures that a business owner shall take pursuant to Articles 23, 24, and 26.
2. Measures that a person specified in any subparagraph of Article 5 (2) shall take in order to prevent industrial accidents pursuant to Article 5 (2).

(2) Where deemed necessary for determining the guidelines and standards referred to in paragraph (1), the Minister of Employment and Labor may organize and operate standard formulation committees in the respective fields.

(3) The organization and operation of standard formulation committees and other necessary matters shall be prescribed by the Minister of Employment and Labor.

106) Korean Occupational Safety and Health Act (2016), Article 23 (Safety Measures)

107) Korean Occupational Safety and Health Act (2016), Article 24 (Health Measures)

108) Korean Occupational Safety and Health Act (2016), Article 26 (Suspension, etc. of Work)

109) Korean Occupational Safety and Health Act (KOSaHA) (2016)
Article 5 (Duties of Business Owners, etc.)

(2) Where any of the following persons engages in design, manufacturing, importation or construction, he/she shall observe the standards prescribed by this Act and the orders issued under this Act, and take the necessary measures to prevent industrial accidents caused by the use of such articles:

1. Any person who designs, manufactures or imports machinery, tools, and other equipment;
2. Any person who manufactures or imports raw materials, etc.;
3. Any person who designs or constructs any structure.

occurrence of the types of psychological instability and mental stress that may arise from "emotional labor" in the service industry. It is necessary to manage the health problems caused by abuse or assault by, or the unreasonable demands of, customers.[110]

2. Psychosocial Workplace Risk Surveillance

The national surveillance of psychosocial risk factors in the workplace is important both in terms of recording the changing work environment and developing policies and programs to prevent stress and promote mental and physical health and well-being at work.[111]

In order to establish a better surveillance system, one survey[112] recommends the following: (1) surveillance should be the priority for any national research agenda for psychosocial risk management; (2) stakeholders should cooperate with international systems operators to work towards the development of systems; (3) the issues for priority inclusion in surveillance systems are emotional demands/emotional labor, workplace bullying, harassment, and violence, exposure to acute stressors, organizational justice, the occurrence and impact of global organizational change, and positive psychological states; (4) systems should be sufficiently flexible to identify and assess emerging risk factors/groups; and (5) an international surveillance system should be implemented.

The surveillance system of psychosocial risk is composed of a risk manage-

110) Han, Insang, Scheme of the Labor Law's Approach to Emotional Labor, The Journal of Labor Law 35, 2015.12, 107-149.

111) Dollard, Maureen, et al., "National surveillance of psychosocial risk factors in the workplace: an international overview," Work & Stress 21.1 (2007): 1-29.

112) id

ment system, including a risk assessment system. In Korea there is an on-going research project which aims to test the validity and criteria-related reliability of the Korean version of the Copenhagen Psychosocial Questionnaire version II (COPSOQ-K),[113] which assesses the psychosocial working environment.[114]

113) The first version of the Copenhagen Psychosocial Questionnaire (COPSOQ I) was developed in 1997 by the Danish National Research Center for the Working Environment as a standardized questionnaire covering a broad range of psychosocial factors. Since its initial development in Denmark, COPSOQ I and II have been adapted to several languages. COPSOQ (either I or II in diverse languages) has been used so far in several research projects which have produced more than 100 internationally published articles. Moncada, Salvador, et al., "The Copenhagen Psychosocial Questionnaire II (COPSOQ II) in Spain—A tool for psychosocial risk assessment at the workplace," American Journal of Industrial Medicine, 57.1 (2014): 97-107.

Domain	Dimension	Domain	Dimension
Demands at work	Quantitative demands	Value at the workplace	Trust in management
	Work pace		Mutual trust between employees
	Cognitive demands		Justice
	Emotional demands		Social inclusiveness
	Demands for hiding emotions	Health and well-being	Self-rated health
Work organization and job contents	Influence		Burnout
	Development potential		Stress
	Variation		Sleeping problems
	Meaning of work		Symptoms of depression
	Commitment to the workplace		Cognitive stress symptoms
Collaboration and leadership	Predictability	Personality	Self-efficacy
	Recognition (reward)	Offensive behavior	Sexual harassment
	Role clarity		Threats of violence
	Role conflicts		Physical violence
	Quality of leadership		Bullying
	Social support from supervisors		Unpleasant teasing
	Social support from colleagues		Conflicts and quarrels
	Social community at work		Gossip and slander
Work-individual interphase	Job insecurity		
	Job satisfaction		
	Work-family conflict		
	Family-work conflict		

To ensure the best possible implementation of risk assessment, it is important to provide public support. The recent European model could be a benchmark model. The European Agency for Safety and Health at Work's (EU-OSHA) Online Interactive Risk Assessment (OiRA) is an online platform for creating free and easy-to-use sectoral risk assessment tools for small and micro-companies.[115] This project allows an increasing network of partners to develop tailor-made risk assessment tools, which are cost-free and target micro- and small enterprises. OiRA is expected to facilitate the Risk Assessment for Europe's micro and small organizations. The OiRA platform is used not only by the Sectorial Social Partners (employers' and employees' organizations) but also by national authorities (Ministries, Labor Inspectorates, OSH Institutes, etc.) to produce sector-specific risk assessment tools targeting small businesses.

It can be covered by the Industrial Accident Compensation Insurance Act when workers are injured by a mental risk. There is a debate related with this issue concerning the Employment Labor-related Industrial Accident Law. This debate addresses the problem of whether it should be included in mental illnesses such as mental depression mainly caused by emotional labor. In recent years in Korea, there have been cases in which occupational injuries have been recognized as having been caused by emotional labor. However, the scope and approval of work accidents such as mental illness/job stress due to emotional labor are still insufficient.[116] It is for this reason that a proposal was made

114) June, Kyung Ja & Choi, Eun Suk, Reliability and Validity of the Korean Version of the Copenhagen Psychosocial Questionnaire Scale, Korean Journal of Occupational Health Nursing, Vol. 22 No. 1, 1-12, February 2013.

115) EU-OSHA, http://www.oiraproject.eu/about

116) Han, Insang, Scheme of Labor Law's approach to Emotional Labor, The Journal of Labor Law 35, 2015.12, 107-149.

to revise the Industrial Accident Compensation Insurance Act. The proposal recommended that the list of industrial disaster diseases should be included to the list of diseases caused by mental stress, explicitly mentioning that "mental stress at work" should be included in the standard of recognition for work accidents. This issue is still under debate, but it is expected to be included in the accreditation standards for occupational accidents.

3. Implementing Practical Guidelines and Good Practice

In its December 2002 amendment to the Occupational Safety and Health Act, the Ministry of Labor stipulated that employers should prevent employee health problems due to physical fatigue and mental stress (Article 5).[117] Immediately afterward, the ministry completely revised the regulations on occupational health standards (Ordinance of the Ministry of Labor No. 195) and, in July 2003, established a new rule [Countermeasures on health problems due to work-related stress] in Article 259.[118]

This rule, however, focused more on preventing WR-CVDs (work-related cerebrovascular and cardiovascular diseases) rather than on preventing work-related stress by managing work-related factors.[119] In July 2011, when the rules on occupational safety and occupational health standards were combined and revised, this rule became Article 669 of the new Regulations (Regulation on occupational health standards).

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117) Kawakami, Norito, et al., "National Status of Psychosocial Factors at Work in Japan, Korea, Australia, and China," Psychosocial Factors at Work in the Asia Pacific, Springer Netherlands, 2014, 27-52.

118) id.

119) id.

Article 669 [Countermeasures to deal with health problems caused by work-related stress]
An employer shall take the following countermeasures to prevent health problems due to work-related stress pursuant to Item 1, Article 5 of the Act in cases where his/her employees are involved with work that causes ***physical fatigue and mental stress***, such as shift work including night work and long working hours, driving a taxi or bus, or monitoring work in the control room:

(a) assess possible stress factors such as the work environment, content of the work, and working hours, and planning and implementation of countermeasures such as reducing working hours and rotating tasks;

(b) reflect employees' opinions when formulating working plans based on work load and work schedule;

(c) improve working conditions by allocating work hours and break times properly;

(d) strive to secure the welfare of employees related to work activities;

(e) appoint employees to positions based on the results of medical check-ups and counseling, and provide clear explanations to the employees concerned about factors associated with work-related stress, the possibility of health problems and countermeasures; and

(f) implement health promotion programs designed to encourage employees to quit smoking and manage hypertension after assessing their CVD risks.

The first KOSHA guide dealing with the prevention of work-related stress was the 'Guidelines on the Occupational Stressor Scale for Korean Workers (KOSS) (2006)'.[120] These guidelines, which describe the KOSS and how to use it, were developed by the Korean Society of Occupational Stress with the support of KOSHA.[121] The KOSS was developed due to the increased demand for tools that can be used to assess stressors unique to Korean workers, in addition to the widely used tools, such as JCQ and ERI, developed in Western countries.[122]

In 2008, KOSHA developed health management guidelines for shift workers. In addition, during 2011–2012, KOSHA developed stress management guidelines for various high-stress working groups, including taxi and bus drivers, building cleaners, food service workers, sales-women, call center operators, nurses, nursing home workers, emotional laborers, PTSD patients, workers with depression, workers working long hours, construction workers, bank tellers, hotel employees, cabin crews, train engineers, and caddies.[123]

The Korean government has adopted some of the rules of the International Labor Organization (ILO). The ILO has been promoting the use of the Occupational Safety and Health Management System (OSHMS) as a means to continually improve occupational safety and health. The Occupational Health and Safety Management System is designed to serve as a logical and useful technique for improving occupational health and safety performance within a company, and its effectiveness has been steadily proven by experience.

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120) Kawakami, Norito, et al., "National Status of Psychosocial Factors at Work in Japan, Korea, Australia, and China," Psychosocial Factors at Work in the Asia Pacific, Springer Netherlands, 2014, 27-52.

121) id

122) id

123) id

> A comprehensive approach by practitioners, academics and researchers to emerging risks and new patterns of prevention is necessary to face the challenges that a changing world of work is bringing.[124]

For the ILO, the key to dealing with psychosocial hazards and risks in the workplace is prevention by means of the following:

- ○ implementation of collective risk assessment and management measures, as is done with other workplace hazards;
- ○ adoption of collective and individual preventive and control measures, thus increasing workers' ability to cope by increasing their control over their tasks;
- ○ improvement of organizational communication;
- ○ workers' participation in decision making;
- ○ construction of social support systems for workers within the workplace;
- ○ consideration of the interaction between working and living conditions;
- ○ enhancement of the value placed on safety and health within the organization.

Recently, the ILO held an international conference on psychosocial risk at which global trends on work-related stress, evaluation of interventions and multidisciplinary approach, evaluation of psychosocial risks, and other related issues were discussed. According to a researcher who conducted research on psychosocial risk evaluation, a psychosocial risk evaluation claim should be a

124) ILO, "Psychosocial risks and work-related stress" 〉 Tools http://www.ilo.org/safework/areasofwork/workplace-health-promotion-and-well-being/WCMS_108557/lang--en/index.htm

dialog between the interested parties (who occupy different positions within an organization) about their work conditions. However, practices involving pressure, complaint and resistance make abundantly evident the distance between those who "are the company" and those who "are not." Thus, we can see that the process of evaluation is, in fact, an artificial dialog, usually imposed by a labor inspector and moderated by an external technician. In these conditions it highly unlikely that it would be possible to define preventative measures and to improve working conditions.[125] The researcher emphasized that it was urgent to explore how to improve day-to-day dialog about work conditions, including the psychosocial aspects, without distance, rejection, and control.[126]

C. Governance System

The system of governance for workplace psychosocial health and safety is composed of the Korean Ministry of Labor, an executive agency for workplace health and safety, and the Occupational Health and Safety Committee. The Ministry of Labor has a general responsibility for occupational health and safety. The Korea Occupational Safety and Health Agency has the aim of establishing a safer and healthier working environment for all.

1. Korean Ministry of Labor

The Korean Ministry of Employment and Labor is responsible for establishing and coordinating employment and labor policies, employment insurance, vocational skills development training, equal employment, work-family bal-

125) Isabela Mussi, Psychosocial risk evaluation, https://www.safety2014germany.com/en/c3/c3-konferenzzeitplan.html?v=List&do=15&day=35&ses=6832#

126) id.

ance, labor standards, workers' welfare, industrial relations adjustment, cooperation between labor and management, occupational safety and health, industrial accident compensation insurance, and other affairs.[127]

2. Executive Agency for Workplace Health and Safety

KOSHA strives to prevent occupational accidents and diseases, promotes workers' health and safety, and encourages enterprises to launch accident prevention activities. It also provides up-to-date technical support aimed at improving occupational safety and health. From the beginning, KOSHA played a significant role in preventing occupational hazards, accidents, and diseases at worksites.[128] It provides technical support to help workers protect themselves by conducting inspections of hazardous machinery and equipment and eliminating hazards in their workplaces.

The Occupational Health and Safety Committee is a public-private governance system provided under the Act.[129] "In order to deliberate or resolve on

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127) http://www.moel.go.kr/english/moel/moelObjPurpose.jsp

128) KOSHA Basic businesses,
https://en.wikipedia.org/wiki/Korea_Occupational_Safety_and_Health_Agency

129) Article 19 (Occupational Health and Safety Committee)
(1) In order to deliberate or resolve on important matters concerning industrial health and safety, a business owner shall establish and operate an occupational health and safety committee composed of an equal number of workers and employers.
(2) Each business owner shall form an occupational health and safety committee to deliberate and decide on the following matters:
1. Matters concerning Article 13 (1) 1 through 5 and 7;
2. Matters concerning serious industrial accidents as prescribed in Article 13 (1) 6;
3. Matters concerning measures taken to ensure health and safety where harmful and dangerous machinery, apparatuses and other equipment are used.
(3) The meetings of an occupational health and safety committee shall be held, as prescribed by the Presidential Decree, and the results of the meeting shall be

important matters concerning industrial health and safety, a business owner shall establish and operate an occupational health and safety committee composed of an equal number of workers and employers."[130]

The KOSHA organization and management law was enacted in 1987, when the law had the same name as the institution, i.e. Korea Occupational Safety and Health. This law was eventually amended in 2008, and the institution was renamed as the Korea Occupational Safety and Health Agency to reflect its ability to perform tasks related to occupational health. This name was used in the same manner from 1987 to 2016.

Occupational injuries and diseases affect the happiness and wellbeing of workers both at home and at work, weaken the competitiveness of businesses, and decelerate economies.[131] The reduction of accidents, therefore, must be a prerequisite if real advancement is to be made in Korea.[132] In this regard,

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recorded and kept in the minutes.

(4) Where necessary for the maintenance and improvement of the health and safety of workers in the workplace, occupational health and safety committees may determine necessary matters concerning safety and health in the workplace.

(5) Business owners and workers shall faithfully fulfill the matters deliberated upon, decided, or determined by occupational health and safety committees under paragraphs (2) and (4).

(6) No deliberation, decision or determination by occupational health and safety committees under paragraphs (2) and (4) shall be contrary to this Act, any order issued under this Act, the collective agreement, the employment rules, and the health and safety management regulations as prescribed in Article 20.

(7) No business owner shall treat any member of an occupational health and safety committee unfavorably by reason of his/her lawful activities as a member.

(8) The nature and scale of the business for which an occupational health and safety committee is to be established, and matters necessary for the composition and operation of occupational health and safety committees and for dealing with cases where no decision is reached, shall be prescribed by Presidential Decree.

130) id

131) HOME 〉 〉 About KOSHA, CEO's message.

the Korea Occupational Safety and Health Agency should concentrate on multilateral efforts to prevent potential accidents.[133]

3. Related Organizations in the Private Sector

In Korea, the Industrial Accident Prevention and Compensation Bureau of the Ministry of Employment and Labor (MOEL), and KOSHA, a government affiliated organization that includes a research institute (OSHRI) and a training institute (OSHTI), are in charge of protecting and promoting workers' health. Some private organizations are also involved, including the Korea Industrial Health Association and the Korean Association of Occupational Health Nurses, both of which have nationwide service networks.[134]

The Industrial Accident Prevention and Compensation Bureau of MOEL is responsible for enacting, amending and enforcing acts and policies related to the prevention of work-related stress. In contrast, the Occupational Health Department of KOSHA is responsible for developing support programs and prevention manuals and for providing technical and financial assistance to workplaces based on the prevention policies of MOEL. OSHRI of KOSHA conducts research on the prevention of work-related stress, while OSHTI of KOSHA trains health managers and line supervisors at workplaces. In addition, private organizations such as the Korea Industrial Health Association and the Korean Association of Occupational Health Nurses run training sessions for health managers and line supervisors on work-related stress prevention in the

132) id

133) id

134) Kawakami, Norito, et al., "National Status of Psychosocial Factors at Work in Japan, Korea, Australia, and China," Psychosocial Factors at Work in the Asia Pacific, Springer Netherlands, 2014, 27-52.

workplace.[135]

The Korean Association for Medicine in the Workplace Environment is the most active non-governmental organization in the field of workplace risk prevention. Another such entity is the Korean Occupation Medicine Association (occupational medicine), which is dedicated to promoting and maintaining the health of working people, is conducting a study on the prevention of disease and environmental medicine to prevent, diagnose and treat health problems that can be caused by the harmful factors in workplace.

D. Regulatory Reform

In 2013, the Korean National Assembly (Parliament)[136] attempted to revise the law, stating that the majority of workers in Korea suffer mental stress due to work, which causes depression and other diseases and can lead to suicide. Notably, in the case of workers engaged in the service industry, it has been shown that they frequently experience unpleasant verbal abuse and aggressive behavior.[137] In addition, they stated that the current law does not include any provisions on the prevention and treatment of health problems caused by mental stress at work, so there is no support at the national or business level, nor any measures for treating health impairment, even when health problems are

135) Kawakami, Norito, et al., "National Status of Psychosocial Factors at Work in Japan, Korea, Australia, and China," Psychosocial Factors at Work in the Asia Pacific, Springer Netherlands, 2014, 27-52.

136) The National Assembly of the Republic of Korea is the unicameral national legislative body of South Korea, and is composed of 300 members [3]. The latest legislative elections were held on 13 April 2016. Single-member constituencies comprise 253 of the assembly's seats, while the remaining 47 are allocated by proportional representation. Members serve four-year terms.

137) Korean Parliament, Proposal for revision of the Occupation Safety and Health Act, 2013.05. 24., Han, Myungsook (representative) et al.

caused by mental stress at work. With this rationale the Korean representatives proposed the revision of the Occupation Safety and Health Act.

Under this proposal, employers should promptly notify their customers that they should not act in a way that could cause mental stress to a worker and provide employees with a psychological counseling service to enable them to prevent and treat health problems caused by mental stress at work. To prevent and treat mental stress at work, the employer should make and distribute instructions to workers, who are engaged in work involving high levels of mental stress, on the job every year. At the same time, the Minister of Employment and Labor will provide the necessary assistance to the Korea Occupational Safety and Health Agency (KOSHA) if it is engaged in business to prevent and treat health problems caused by mental stress at work. Furthermore, any employer that violates its obligations shall be punished by an administrative fine not exceeding 50 million won.

However, this proposal was not in the end accepted by the Korean Parliament. The National Assembly first presented the following reasons: The Framework Act on Labor Welfare already stipulates that employers shall implement measures or efforts to prevent and treat health problems caused by work stress.[138] In addition, Article 5(1)2 of the Occupational Health and Safety

138) Framework Act on Labor Welfare SECTION 3 Selective Welfare Program, Workers Support Program, etc. Article 83 (Workers Support Programs)
(1) A business owner shall endeavor to implement a workers support program through which he/she can protect his/her employees by assisting them in resolving problems undermining business performance, such as mental stress and personal grievances arising in the course of workers' performance of their duties or in daily life, and shall provide services such as expert counseling services to the workers in order to improve productivity.
(2) Except where otherwise prescribed by Presidential Decree, each business owner and participant in the workers support programs shall ensure anonymity to protect workers' confidential information in the course of implementing the

Act provides that "Employers shall establish a comfortable working environment and improve the working conditions so as to diminish the physical fatigue, mental stress, etc. of workers."[139] Therefore, it is not necessary to amend the Act and it is expected that an amendment clause will be sufficiently reflected within the implementation decree of the Occupational Health and Safety Act.

But the Basic Labor Welfare Act is oriented toward providing welfare, not to managing risk perspectives. As such, it is desirable to amend the Occupational Health and Safety Act and to create new enforcement ordinance provisions related to the amendments. The management of psychosocial risk is not something that should be regarded as a form of welfare provision, primarily because it is a work-related occupational risk factor. It must be managed in a different way as well as evaluated in a different way, separately from and unrelated to any welfare viewpoint.

Much more concretely, it is important that both employers and employees themselves are fully aware of psychological strain in the workplace as well as the possibility of its prevention.[140] Furthermore, employers need instruments to improve work conditions in this field; and we need qualified supervisors to advise and supervise enterprises on ways of preventing psychological strain in the workplace.[141]

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measures prescribed in paragraph (1).

139) Korean Occupational Safety and Health Act (KOSaHA)(2016)
Article 5 (Duties of Business Owners, etc.) (1)2

140) Dr Torsten Kunz, Impact of psychological strain in the workplace in the future https://www.safety2014germany.com/en/c3/c3-konferenzzeitplan.html?v=List&do=15&day=35&ses=6832#

141) id.

For this purpose, the nationwide program titled "Protection and Fortification of Health from Work Related Psychological Strain" was launched in Germany in 2013.[142]

This program is part of the "Joint German Occupational Safety and Health Strategy" supported by the German Government, Federal States, Social Accident Insurances, unions and employers. The most important parts of the program (in the period 2013 – 2018) consisted in informing employers and employees about the different kinds of psychological strain in the workplace and in motivating employers to prevent strain as well as to develop and distribute guidelines, questionnaires (in order to survey the existence of strain, etc.) and other practice-oriented material to be used in enterprises. Also, it aimed to educate nationwide all supervisors of the Social Accident Insurances and the Federal Agencies of Occupational Safety about psychological strain at the workplace, and to educate likewise the Occupational Physicians and Health and Safety Officers (OSH) responsible for consulting with enterprises.

The goal of this strategy is to reduce the negative health effects caused by psychological strain and, at the same time, to make the prevention of psychological strain at the workplace a "normal" everyday subject.

Ⅵ. Conclusion

It is generally accepted that "the safety and health of workers is a core essential value to take the leap to becoming an advanced society."[143] To trans-

142) id.

143) HOME 〉 〉 About KOSHA, CEO's message.

form Korea into a truly advanced country, one of our main priorities should be to secure the life and health of our workers in industries in terms of realizing the value of respect for human life.[144]

Koreans still have the second-longest average working hours of all the OECD member countries, yet labor productivity is relatively low.[145] More than seven out of ten workers claimed to have experienced reduced concentration and work efficiency due to excessive work. The term 'burnout syndrome' is widely used to refer to this condition, and is characterized by lethargy, self-loathing, or job refusal due to extreme mental and physical fatigue.[146] Unlike physical illnesses, the severity of this exhaustion syndrome is difficult to recognize because it hardly appears to have any powerful symptoms.[147]

Psychosocial risks in the workplace have been recognized as a key factor in the field of modern occupational safety and health. Especially today, since the demand for mental labor is increasing, management of the psychosocial risk in the workplace has become a key element of the work environment.

In this research the term 'workplace psychosocial risk' refers to the mental burden caused by work and jobs. It is mainly caused by work related to psychosocial stress.

According to the Korean Basic Law, the Occupational Health and Safety Act,

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144) id.

145) OECD stat. Average annual hours actually worked per worker, 2015. According to OECD data, South Koreans' labor productivity was $31.90 per hour in 2014, much lower than the OECD average of $49. The Korea Herald, "Koreans' average work hours still second-longest in the OECD", "Koreans work 40 hours legally, but actually work 48.6 hours." 2015-11-02.

146) Research paper of the Korean Ministry of Labor, "Cognitive research report on the way to work and culture", 2014.

147) id.

Article 5 stipulates that it is the employer's obligation to "provide a pleasant working environment and establish working conditions that reduce the physical fatigue and mental stress of workers." These obligations were introduced in 2013.

Awareness among employers about the importance of psychosocial risk factors is low. In fact, it is not enough simply to develop a methodology for assessing psychosocial risk factors in the workplace. The occupational safety and health authorities need to prepare a strategy for managing employers and provide the necessary information so as to ensure that they actually fulfill their statutory obligations and provide the necessary social and economic resources. Furthermore, there is a need to prepare a strategy for adequately managing and supervising employers' implementation of their obligations. It is essential that sufficient information be provided on how to include workplace psychosocial risk in workplace risk assessments; communication on workplace psychosocial risk should be expanded; and a systematic risk management tool for addressing workplace psychosocial risk factors should be widely introduced.

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Part 4. Trade & investment

Harmonisation or Proliferation? The impact of regional FTAs on investor protection

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Ⅰ. Objective of paper

The objective of this paper is to examine the impact of the new regional plurilateral Free Trade Agreements (FTAs) on investment protection in the Asia-Pacific region, focusing on Australia and Korea, and in particular, whether the regional FTAs are likely to lead to a greater harmonisation of investment rules. The paper aims to compare and examine the relationship between the overlapping bilateral and plurilateral agreements and the implications for investors and States.

Ⅱ. Introduction

In recent years there has been a proliferation of trade and investment agreements concluded between States. These include not only bilateral agreements, but also plurilateral or regional agreements, such as the recently concluded Trans-Pacific Partnership Agreement (TPP) and the ongoing negotiations of the Regional Comprehensive Economic Partnership (RCEP). This activity has resulted in what has been described as a 'spaghetti bowl' of agreements, with States sometimes having several different overlapping sets of trade and investment rules with other States under different treaties. This gives rise to a number of questions: what is the relationship between these overlapping agreements? Are the new regional agreements a force for harmonisation or are they just adding another level of complexity? These questions are particularly important in the area of investment as investment agreements generally grant an investor of one party to bring an investor-state arbitration claim against another party. As such, the identification of which rules are available to an investor in the event of an investment dispute has significant

consequences for investors and States.

A. Review of overlapping investment agreements in the region

This paper focuses on agreements concluded by Australia and Korea with partners in the Asia-Pacific region. In particular, on agreements with partners who are also party to any of the plurilateral regional FTAs either signed or under negotiation. These are the TPP, the RCEP and the ASEAN-Australia-New Zealand FTA (AANZFTA). This paper reviews Bilateral Investment Treaties (BITs) and investment commitments in FTAs and uses the term International Investment Agreements (IIAs) to refer to both of these kinds of agreements. Australia and Korea are parties to a bilateral FTA (KAFTA) which contains a detailed Investment Chapter. Australia and Korea are also both engaged in the RCEP negotiations, which will include commitments on investment. Korea is not a party to the TPP however there are reports that Korea has expressed an interest in joining the TPP at some stage.[148]

B. Focus on certain key investment provisions

This paper will focus on two key investment protections: the obligations of fair and equitable treatment (FET) and expropriation. The paper will also focus on provisions regulating investor-state dispute settlement (ISDS) proceedings, and in particular two key procedural mechanisms: a process for expedited preliminary objections, and a provision for interpretations of the agreement by the parties to be binding on any ISDS tribunal. Given the large number and variation between IIAs on these issues, this paper will describe the approaches

148) See http://thediplomat.com/2015/10/the-truth-about-south-koreas-tpp-shift/, accessed 5 August 2016.

in categories of IIAs in general rather than examining each treaty in detail.

C. Significance of the key investment provisions

This investment provisions focused on in this paper provide examples of how in recent agreements States have sought to refine and clarify investment obligations, and also how they have included procedural safeguards in the ISDS procedures. These provisions are designed to increase the control of the (State) parties over both the interpretation of key obligations and the conduct of ISDS proceedings. Discussions around the potential risks of investor-State dispute settlement (ISDS) for government regulation often focus on the obligations of fair and equitable treatment and expropriation as they are the most commonly alleged breaches by a significant margin. Accordingly, attempts to refine and clarify investment obligations have tended to focus on these two obligations.

1. *Fair and equitable treatment*

Most ISDS cases involve an alleged breach of fair and equitable treatment (FET). According to UNCTAD there have been 368 cases alleging a breach of fair and equitable treatment or a related standard and 94 cases where such a claim was upheld (representing a success rate of around 25%).[149]

There has been a long debate about the relationship between FET and the customary international law minimum standard of treatment (MST). The majority of older-style BITs contain a 'simple' or 'bare' FET obligation which refers simply to an obligation to accord 'fair and equitable treatment' to

149) *UNCTAD Investment Dispute Settlement Navigator* 〈http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches〉, accessed 23 September 2016.

investments. Where a treaty refers to FET but makes no broader reference to customary international law or the MST tribunals have reached differing conclusions. Some tribunals have found that the FET obligation should be interpreted by reference to the customary international law MST.[150] However others have found that where it is not explicitly limited, FET is an autonomous standard, potentially requiring treatment above or beyond what is required by the MST.[151]

Tribunals in this second category have interpreted FET quite broadly. For example, in *Rumeli v Kazakhstan* the tribunal cited a respected author's view that:

> FET ⋯ offers a general point of departure in formulating an argument that the foreign investor has not been well treated by reason of .. unfair measures being taken against its interest. ⋯ It is for the Tribunal to decide whether in all the circumstances the conduct in issue is fair and equitable or unfair and inequitable.[152]

Other tribunals have found that an unqualified FET obligation requires the State to provide a stable and predictable legal and business framework for investments.[153] The practice of a number of countries with respect to FET and

150) See *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* Award, ICSID Case No. ARB/05/22 (24 July 2008); *William Nagel v Czech Republic* Final Award, SCC Case No. 049/2002 (9 September 2003).

151) See *Bayindir Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan*, Award, ICSID Case No. ARB/03/29 (27 August 2009), par 186; *Suez, Sociedad General de Aguas de Barcelona SA v Argentina*, Decision on Liability, ICSID Case No. ARB/03/19 (30 July 2010).

152) *Rumeli Telekom AS v Republic of Kazakhstan,* Award, ICSID Case No. ARB/05/16 (29 July 2008), para 610, citing F.A. Mann.

153) *LG&E v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3

MST has been informed by the experience of the Parties to the North American Free Trade Agreement (NAFTA).

The original NAFTA text contained an FET obligation which did not explicitly link or limit the obligation of FET to the customary international law MST:

> Article 1105: Minimum Standard of Treatment
>
> 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

A series of early NAFTA decisions took relatively broad interpretations of FET. The tribunal in *Metalclad v Mexico* focused on the failure of the respondent to ensure a transparent and predictable framework for Metalclad's investment.[154] In *SD Myers v Canada* the tribunal essentially found a breach of MST on the basis of the breach of the National Treatment obligation.[155] In *Pope & Talbot v Canada* the tribunal found that FET includes additional fairness elements which go beyond the customary international law MST standard.

In response to these relatively broad interpretations of FET, in 2001, the NAFTA Parties adopted an interpretation of the MST Article.[156] The interpretation contains three key elements:

1) It clarifies that the obligation prescribes the customary international law

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October 2006, para 131.

154) *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para 99.

155) *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Partial Award, 13 November 2000, para 266.

156) *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, 10 April 2001, para 118.

minimum standard of treatment of aliens;

2) It clarifies that FET does not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment.

3) It confirms that a breach of any other provision does not establish a breach of MST.

A similar approach has been adopted by a wide range of States including Australia and Korea and is illustrated by the drafting of the MST provision in KAFTA:

> ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT[157]
>
> 1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.
>
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" shall not require treatment in addition to or beyond that which is required by that standard, and shall not create additional substantive rights. The obligation in paragraph 1 to provide:
>
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the

157) Emphasis added (footnote removed).

principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, shall not establish that there has been a breach of this Article.

The KAFTA MST obligation includes the same three key elements as the NAFTA joint interpretation. In general, since the NAFTA joint interpretation, NAFTA tribunals have been consistent in finding that there is a relatively high threshold to breach the customary international law MST. The interpretation of the MST obligation in *Waste Management II* has been approved of and adopted by a number of subsequent tribunals. In that case the tribunal found:

> the minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety – as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process. In applying this standard it is relevant that the treatment is in breach of representations made by the host State which were reasonably relied on by the claimant.[158]

158) *Waste Management Inc. v. United Mexican States* [II], ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, para. 98 (emphasis added).

This articulation makes clear that there is a relatively high threshold to breach MST – it won't be satisfied where the treatment of an investor could be characterised as simply 'unfair'. If the FET obligation is not explicitly linked and limited to the MST (which is the case with most older-style BITs) it is possible that a tribunal might interpret it consistently with this standard in any case. However it is equally possible that a tribunal may not, and may instead interpret FET as an autonomous obligation which does not require such a high threshold of conduct to constitute a breach. This would mean that a broader range of conduct could be found inconsistent with the FET obligation. In this regard, from the perspective of a respondent State, there is a greater degree of uncertainty and risk associated with an unqualified FET obligation than an obligation linked and limited to the customary international law MST.

2. *Expropriation*

The majority of ISDS cases have also involved an alleged breach of the expropriation obligation. In terms of the implications of ISDS for legitimate government regulation, concerns related to expropriation have mainly focused on the concept of *indirect* expropriation – where there is no direct taking or physical seizure of an investment, but government actions have an equivalent effect. Indirect expropriation is sometimes referred to as 'regulatory taking' and deciding an alleged indirect expropriation often involves drawing a line between legitimate government regulation on the one hand, and an illegitimate deprivation of an investment on the other hand. According to UNCTAD there have been 331 cases claiming a breach of expropriation in relation to an indirect expropriation and 47 cases where such a claim was upheld (a success rate of around 14%).[159]

Some modern agreements including KAFTA and TPP provide greater clarity on when an action will or will constitute an indirect expropriation. Annex 11-B of KAFTA provides detailed guidance on the factors that a tribunal must consider in determining whether or not there has been an indirect expropriation:

> ANNEX 11-B: EXPROPRIATION
>
> The Parties confirm their shared understanding that:
>
> 1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.
>
> 2. Article 11.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
>
> 3. The second situation addressed by Article 11.7.1 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
>
> 4. The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:
>
> (a) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone,

159) UNCTAD *Investment Dispute Settlement Navigator* 〈http://investmentpolicyhub.|unctad.org/ISDS/FilterByBreaches〉, accessed 23 September 2016.

does not establish that an indirect expropriation has occurred;

(b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(c) the character of the government action, including its objectives and context.

5. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[160]

The Annex contains a number of elements, but to highlight two of these:

I) it sets-out a high threshold of impact on an investment to establish an indirect expropriation – the effect has to be "equivalent to direct expropriation", or in other words as if the investment was physically taken or destroyed. It also states that the fact that an action has an adverse economic impact on an investment is not of itself sufficient to establish an (indirect) expropriation;

ii) it explicitly sets out what is commonly referred to as the 'police powers' principle: that (except in rare circumstances) non-discriminatory regulatory actions that are designed and applied to protect legitimate public welfare objectives do not constitute indirect expropriations. This is an important provision for governments in terms of clarifying the distinction between legitimate government action or regulation (which may nonetheless have a significant impact on an investment) and a compensable expropriation.

160) (footnotes removed).

Most older-style BITs do not contain any elaboration on the factors necessary to establish an indirect expropriation. When interpreting these kinds of treaties tribunals have taken varying approaches on whether or not, they recognise the 'police powers' principle. The majority of tribunals considering this question have found that an equivalent principle exists in customary international law and that the expropriation obligation should be interpreted consistently with this principle.[161] However other tribunals have disagreed.[162] So if a treaty does not include an explicit language on this point (which is the case with most older-style BITs), there is a risk that a tribunal may decide, for example, that there has been an indirect expropriation solely on the basis of the economic impact of a government action on the investment without considering whether there is a legitimate regulatory purpose. There is greater consistency with regard to the threshold of impact on an investment necessary to constitute an indirect expropriation, even where the treaties do not elaborate on this point. However even in this case including explicit guidance in the treaty – as in KAFTA – provides greater certainty to the State parties.

3. *ISDS: preliminary objections*

Under arbitral rules that apply in ISDS cases if a respondent State objects to the jurisdiction of the tribunal, the tribunal has discretion over whether to decide these objections separately, before proceeding to the merits, or to decide them together with the merits. Given the cost of defending ISDS claims,

161) See for example, *CME (Czech Republic) BV v Czech Republic,* para 320; *El Paso Energy International Company v The Argentine Republic* paras 234-5, 237-9; *Saluka v Czech Republic, paras 255-6; Tza Yap Shum v Peru*, paras 145-6.

162) See for example, *Metalclad v United Mexican States*, para 111; *Compania del Desarrollo de Santa Elena, SA v Republic of Costa Rica*, paras 71-72; *LG&E v Argentina; para 186; ADC Affiliate Ltd v Hungary* para 423.

it is an advantage to the respondent State to be able to dispose of a case at the jurisdictional stage rather than having to defend the case through to a full merits hearing. Older-style agreements, including most BITs, do not contain detailed provisions on ISDS and do not address this issue, and so it is left to the discretion of the tribunal. In contrast, some modern IIAs, including KAFTA, TPP and AANZFTA *require* that any objections to the competence or jurisdiction of a tribunal are decided *before* the tribunal proceeds to the merits.[163]

4. *ISDS: binding interpretations*

Modern IIAs – including KAFTA, AANZFTA and TPP – sometimes contain a provision that a joint decision of the Parties interpreting a provision of this treaty is binding on any tribunal, and any decisions or awards issued by a tribunal must be consistent with that decision.[164] This is a valuable mechanism for States as it allows them to respond to, or prevent, any overly broad interpretations of the agreement. The joint interpretation of the NAFTA Parties on MST – discussed above – demonstrates how such a mechanism can be effective. Older-style IIAs do not generally contain a specific mechanism providing for binding interpretations of the treaty.

163) See TPP, Article 9.23.5; KAFTA Article 11.20.7

164) See KAFTA, Article 11.22.3.

III. Australia's IIAs

A. Bilateral Investment Treaties

Australia has 21 BITs which are currently in force.[165] They were signed between 1988 and 2005 and include agreements with a number of TPP and RCEP Parties: China, India, Indonesia, Laos, Mexico, Peru, Philippines, and Vietnam.

Each of these BITs contain the core investment protections of FET and expropriation and each provide for investment disputes to be settled through ISDS proceedings. With the exception of the Mexico BIT, the BITs contain simple references to the obligations of FET and expropriation. The BITs do not link or limit FET to the customary international law minimum standard of treatment (MST) nor do they provide any detailed guidance on the factors necessary to establish that an indirect expropriation has occurred. Again, with the exception of the Mexico BIT, none of the BITs contain detailed rules on the conduct of ISDS proceedings, including provisions with regard to preliminary objections and binding interpretations. The Mexico BIT is an exception as it does limit FET to the customary international law MST and contains relatively detailed provisions on ISDS proceedings (compared to Australia's other BITs). The Mexico BIT does provide for binding interpretations but does not contain provisions requiring a tribunal to decide any preliminary objections before proceeding to the merits of the dispute.

165) The list of Australian BITs is available at http://dfat.gov.au/trade/topics/investment/Pages/australias-bilateral-investment-treaties.aspx, accessed 5 August 2016.

B. Free Trade Agreements

Australia has existing bilateral FTAs with Chile, China, Japan, Korea, Malaysia, New Zealand, Singapore, Thailand and the United States. Australia has an existing plurilateral FTA with the 10 ASEAN member states and New Zealand (AANZFTA). Australia has also concluded negotiations with the 11 other Parties to the TPP, which has been signed but is not yet in force. In addition, Australia is negotiating the plurilateral RCEP agreement, which also includes Korea, the 10 ASEAN member states, China, India, Japan and New Zealand. On top of this Australia has ongoing bilateral FTA negotiations with Indonesia and India, among others.[166]

With the exception of the China FTA, each of the concluded FTAs contain obligations of FET and expropriation. Australia's FTAs with Chile, Japan, Korea, Malaysia, New Zealand, Singapore, and the United States, together with AANZFTA and the TPP, each link and limit the FET obligation to either the customary international law MST, or to customary international law (Australia's FTA with Thailand does not). In addition all of Australia's concluded FTAs which include an expropriation obligation, except those with New Zealand, Singapore, and Thailand, contain detailed guidance on the factors necessary to establish that an indirect expropriation has occurred.

Australia's FTAs with Chile, China, Korea, Singapore and Thailand, as well as AANZFTA and the TPP each contain ISDS provisions. The FTAs with Chile, China, Korea, as well as AANZFTA and the TPP contain detailed ISDS provisions (including the key procedural safeguards referred to in section 2.3). The Singapore and Thailand FTAs do not contain detailed ISDS provisions. There

166) There are other FTA negotiations including the PACER Plus negotiations with the Pacific Forum Island Countries.

are no ISDS provisions in Australia's FTAs with Japan[167], Malaysia, New Zealand or the United States.

C. Overlapping IIAs

The result of the existence of these various BITs and FTAs is that Australia has investment obligations under more than one IIA with several partners. This situation is amplified by the negotiation of plurilateral or regional FTAs. Australia already has existing FTA and / or BIT investment commitments with most of the TPP Parties, and more than half of the TPP Parties are also negotiating RCEP. To provide some examples of the overlap in agreements:

Due to the existing bilateral FTAs and AANZFTA, when the TPP enters into force, Australia will have:

- three sets of FTA investment commitments with both Singapore and Malaysia; and
- two sets of FTA investment commitments with each of Brunei, Chile, Japan, New Zealand[168], the United States and Vietnam.
- Australia also has existing BITs with 3 TPP Parties: Mexico, Peru and Vietnam, however these will be terminated on entry into force of the TPP.[169]

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167) Note that the Japan-Australia FTA provides for the future negotiation of an ISDS mechanism, see Article 14.19.

168) Australia and New Zealand agreed that the AANZFTA Investment Chapter would not apply between Australia and New Zealand, see *Exchange of letters between Australia's Minister for Trade and New Zealand's Minister of Trade on the application of AANZFTA between Australia and New Zealand* 27 February 2009, available at, http://dfat.gov.au/trade/agreements/tpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF, accessed 5 August 2016.

In addition, when RCEP enters into force (assuming the TPP is already in force) Australia will have:

- four sets of FTA investment commitments with both Singapore and Malaysia;
- three sets of FTA investment commitments with each of Brunei, Japan, New Zealand and Vietnam; and
- two sets of FTA investment commitments with each of Cambodia, China, Indonesia, Korea, Laos, Myanmar and the Philippines.
- Australia also has existing BITs with 6 RCEP Parties: China, India, Indonesia, Laos, Philippines, and Vietnam (although the Vietnam BIT will terminate on entry into force of the TPP).

D. Korea

1. Bilateral Investment Treaties

According to UNCTAD figures Korea has 92 BITs which are either signed or in force.[170] These include treaties with RCEP Parties: Brunei, Cambodia, China, India, Indonesia, Laos, Mexico, Malaysia, Myanmar, Philippines, Thailand, and Vietnam.

Each of these BITs contain the core investment protections of fair and equitable treatment[171] and expropriation and each provide for investment disputes

169) See letters between Australia and each of Mexico, Peru and Vietnam, on the Termination of Investment Promotion and Protection Agreement, available at: http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx, accessed 5 August 2016.

170) UNCTAD International Investment Agreements Navigator, available at: http://investmentpolicyhub.unctad.org/IIA, accessed 5 August 2016.

to be settled through ISDS proceedings. All of these BITs contain simple references to the obligations of FET and expropriation. They do not link or limit FET to the customary international law minimum standard of treatment (MST) nor do they provide any detailed guidance on the factors necessary to establish that an indirect expropriation has occurred. With the exception of the treaties with Mexico and Vietnam, none of these BITs contain detailed rules on the conduct of ISDS proceedings.

2. Free Trade Agreements

Korea is party to 16 FTAs and other investment agreements with substantive investment commitments which have been signed or are in force.[172] For the purposes of this paper, these include FTAs between Korea and Australia, Canada, Chile, China, India, New Zealand, Peru, Singapore, United States and Vietnam. They also include the China-Japan-Korea Investment Agreement (CJK) and the ASEAN-Korea Investment Agreement (AKIA). Korea is also party to the RCEP negotiations.

Each of these IIAs contain obligations of FET and expropriation. All of these IIAs each link and limit the FET obligation to either the customary international law MST, or to customary international law. In addition each of these IIAs, except those with Chile, Singapore and ASEAN, contain detailed guidance on the factors necessary to establish that an indirect expropriation has occurred.

All of the IIAs referred to above contain ISDS provisions. Most of these treaties contain detailed ISDS provisions (including the key procedural safeguards

171) The Korea-Philippines BIT does not contain an FET obligation.

172) UNCTAD International Investment Agreements Navigator, available at: http://investmentpolicyhub.unctad.org/IIA, accessed 5 August 2016.

referred to in section 2.3 above). However the CJK and AKIA agreements contain fewer procedural safeguards (for example they do not include provisions on the determination of preliminary objections or binding interpretations). Korea's FTAs with China, India, Peru and Singapore do not contain detailed ISDS provisions.

3. Overlapping agreements

Korea doesn't have any overlapping FTA investment commitments at present with regard to the partners that this paper is focusing on (parties to the AANZFTA, TPP and RCEP) however it does have a number of overlapping investment commitments – through FTAs, Investment Agreements and BITs.

At present, Korea has:

- three sets of investment commitments under different IIAs with both China and Vietnam;
- two sets of investment commitments under different IIAs with each of Brunei, Cambodia, India, Indonesia, Japan, Laos, Malaysia, Myanmar, Philippines, Singapore, and Thailand.

When the RCEP comes into force, Korea will have:

- four sets of investment commitments under different IIAs with both China and Vietnam;
- three sets of investment commitments under different IIAs with each of Brunei, Cambodia, India, Indonesia, Japan, Laos, Malaysia, Myanmar, Philippines, Singapore, and Thailand; and
- two sets of investment commitments under IIAs with both Australia and New Zealand.

Ⅳ. Relationship between the agreements

A. Vienna Convention

The starting point for interpreting overlapping treaties is Article 30 of the *Vienna Convention on the Law of Treaties*[173] (VCLT) which is titled 'Application of successive treaties relating to the same subject-matter'. At present there are 114 parties to the VCLT, including Australia and Korea. Although not all of Australia and Korea's treaty partners are parties to the VCLT, certain provisions of the VCLT, including Article 30, are generally accepted as codifications of customary international law.[174] Article 30 provides in relevant part:

> Article 30: Application of successive treaties relating to the same subject-matter
>
> 1. Subject to article 103 of the Charter of the United Nations, the rights and obligations of States parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs.
>
> 2. When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.
>
> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

173) *Vienna Convention on the Law of Treaties* (Vienna, 23 May 1969)

174) *Aust Modern Treaty Law and Practice* 2nd Ed. (2007), Cambridge University Press, p.228.

4. When the parties to the later treaty do not include all the parties to the earlier one:

(a) as between States parties to both treaties the same rule applies as in paragraph 3;

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.

Although it is not explicit in the text, the rules of Article 30 are *residual* rules.[175] That is, they apply subject to any contrary intention of the parties to a treaty. Or in other words, where the parties have agreed on the relationship between a treaty and any overlapping treaties, this intention will prevail over the rules of Article 30. It is necessary therefore to examine the provisions in individual treaties. Before turning to examine the relevant treaties, it is useful to explore some of the key elements of Article 30.

First, Article 30 applies to successive treaties relating to the "same subject matter". Aust considers that this phrase should be construed strictly[176], however in the context of this paper, there is little doubt that BITs, the investment chapters of FTAs and other IIAs would be considered as dealing with the same subject matter.

Second the key concept is compatibility or incompatibility. In the absence of any contrary intention of the parties, the provisions of an earlier treaty will only apply to the extent that its provisions are c*ompatible* with the later treat y.[177] This raises the question: what does compatibility mean?

175) Aust Ibid., p.227.

176) Aust Ibid., p.229.

The ordinary meaning of "incompatible" is where two things are "so different in nature as to be incapable of coexisting".[178] In relation to the interpretation of treaties, and the relationship between treaties, 'incompatibility' has often been treated as a synonym for 'conflict'. In this context, the meaning of incompatibility or conflict has been interpreted in two ways, one narrow or strict, and one broad.[179] The narrow or strict view is that conflict or incompatibility exists when it is impossible to comply with two obligations simultaneously, or in other words, where a party cannot comply with an obligation in one treaty without breaching an obligation in another.[180] The broader view is that the concept extends to situations where one treaty prohibits conduct that another treaty allows[181] or where two rules or principle ssuggest different ways of dealing with a problem.[182]

The next question is whether there is any incompatibility between successive IIAs concluded by Australia and Korea. In the case of the obligations of FET and expropriation there is clearly no incompatibility in the narrow or strict sense. While the obligations vary between earlier and later IIAs, it is entirely possible to comply with both obligations simultaneously. In the author's view there is no incompatibility in the narrow sense either. Modern FTAs such as

177) VCLT Article 30(3).

178) Oxford English Dictionary

179) *Fragmentation Of International Law: Difficulties Arising From The Diversification And Expansion Of International Law*, Report of the Study Group of the *International Law* Commission 2006 (ILC Fragmentation Report), para 24; Hepburn, Jarrod, "Applicable Law in TPP Investment Disputes", Paper prepared for the Symposium: *The Age of Mega-Regionals: TPP and Regulatory Autonomy in International Economic Law*, 19-20 May 2016, [unpublished] University of Melbourne, p.5.

180) ILC Fragmentation report, para 24; Hepburn, p.5.

181) Hepburn, p.5.

182) ILC Fragmentation report, para 25.

KAFTA include more detailed and elaborated obligations which clarify what is required by the obligations of FET and expropriation, and provide greater guidance to determine whether or not there has been a breach of the obligations. The earlier IIAs – primarily BITs – concluded by both Australia and Korea do not contain this greater interpretive guidance. They generally refer simply to 'fair and equitable treatment' and measures 'equivalent to expropriation' without any further elaboration. However this does not mean that these simpler-style obligations in older BITs require are incompatible with the more elaborate obligations in more recent IIAs. They do not necessarily require different treatment. As discussed above, tribunals have taken different approaches when interpreting older-style, simple FET and expropriation provisions. Some have interpreted these obligations more broadly than the more elaborate provisions in recent FTAs, resulting in a broader or more onerous obligation on States. However other tribunals have interpreted these older-style obligations as being essentially the same as their more modern elaborated counterparts. Therefore, while there is a risk that older-style FET and expropriation obligations could be interpreted more broadly by a particular tribunal this is not necessarily the case. The fact that there is a possibility that two similar obligations could be interpreted differently does not mean that they are incompatible.

Similarly, in the author's view there is no incompatibility with regard to the procedural safeguards focused on in this paper: an expedited process for preliminary objections; and binding interpretations of the treaty. While these provisions are not generally included in Australia or Korea's BITs, they are included in most of Australia and Korea's more recent IIAs. If an Australian investor brings a claim against Laos under the AANZFTA, rather than the Australia-Laos BIT would there be an incompatibility because AANZFTA con-

tains an expedited process for preliminary objections and the BIT does not? In the author's view the answer to this question must be no. If there is more than one treaty available to an investor and it chooses one through which to pursue a claim, it consents to ISDS in accordance with the terms of that treaty. The fact that there would be no mandated expedited process for preliminary objections if the investor had submitted its claim under the BIT does not mean that there is an incompatibility.

There have been several ISDS cases which have involved a question of Article 30 of the VCLT and potential incompatibility between treaties. In general, tribunals deciding these cases have adopted an approach to incompatibility which is closer to the 'narrow' approach described above. These tribunals have not found that the existence of additional obligations, or more favourable obligations in one treaty will give rise to an incompatibility with another treaty. For example, in *Eureko v The Slovak Republic*[183] the Tribunal was considering a question of compatibility between obligations in an intra-EU BIT and under EU law. The Tribunal found that the existence of additional protections in the BIT which went beyond those under EU law did not give rise to an incompatibility:

> 'in the view of the Tribunal there is no incompatibility in circumstances where an obligation under the BIT can be fulfilled by Respondent without violating EU law.'[184]

183) *Eureko v The Slovak Republic*, Award on Jurisdiction, Arbitrability and Suspension, 26 October 2010.

184) *Eureko v The Slovak Republic,* para 271.

Similarly, in *Eastern Sugar v Czech Republic*[185] considering a similar issue, the Tribunal also found that the existence of additional rights in an intra-EU BIT does not constitute incompatibility with rights under EU law.[186]

B. Do the treaties address the relationship with other IIAs?

There is a significant amount of variation in the treaties concluded by both Australia and Korea in terms of how they address the relationship with overlapping agreements. Some of the relevant agreements (mainly older-style BITs) do not contain any relationship clause at all. In some cases the parties to a treaty have addressed the relationship of a later treaty with an earlier treaty directly – either by terminating the earlier agreement or otherwise specifically clarifying the relationship between the treaties. Many of the IIAs (primarily FTAs) which address the relationship between treaties use the terminology of "inconsistency" rather than "incompatibility". These terms are commonly regarded as synonyms for each other and for the purposes of this paper the difference in terminology between Article 30 of the VCLT is not significant. If a treaty addresses the question of inconsistency between treaties, it is addressing the question of incompatibility.

1. Australia

Australia has included relationship clauses in each of its FTAs. In contrast, most of Australia's BITs do not contain a relationship clause.

185) *Eastern Sugar v Czech Republic*, Partial Award, 27 March 2007.

186) *Eastern Sugar v Czech Republic*, para. 170.

a. FTAs

All of Australia's FTAs reflect an intention that the FTA will co-exist with any existing agreements. With the exception of the Australia-Chile FTA and the Australia-New Zealand Investment Protocol, all of Australia's FTAs contain a relationship clause which provides that in event of any inconsistency between the FTA and any other bilateral agreement to which both parties a party, the parties shall consult with a view to finding a mutually satisfactory solution.

In addition, in each of Australia's FTAs except for those with Singapore and Thailand, the Parties affirm their existing rights and obligations with respect to each other under other agreements to which both Parties are party.

Australia's FTAs with China, Japan, Korea, Malaysia and the AANZFTA also include a provision along the lines that: 'nothing in this Agreement shall be construed to derogate from any right or obligation of a Party under … other agreements to which the Parties are party'.

b. BITs

Most of Australia's BITs do not contain any relationship clause to other agreements. In terms of the agreements focused on in this paper, the two exceptions are Australia's BITs with India and Peru which contain similar relationship clauses. The India BIT provides that:

> If the provisions of … an international agreement between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments … to treatment more favourable than is provided for by the present agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.[187]

2. Korea

As is the case with Australia's IIAs, all of Korea IIAs demonstrate an intention that the treaty coexists with any overlapping agreements.

a. FTAs

There is a significant amount of variation in how Korea's FTAs address the issue of pre-existing or successive overlapping agreements. Most of the Korean FTAs focused on in this paper contain a provision that 'the Parties affirm their existing rights and obligations with respect to each other under … international agreements to which both Parties are party'. Korea's FTAs with Australia, India, New Zealand, Peru, Singapore and Vietnam each provide – like most of Australia's FTAs – that in the event of any inconsistency between the FTA and other agreements to which both Parties are party, the Parties shall consult with a view to finding a mutually satisfactory solution.

In addition the Korea-United States FTA, the ASEAN-Korea Investment Agreement and the China-Japan-Korea Investment Agreement (CJK) each confirm that the agreement does not derogate from, or affect, the rights and obligations under other treaties between the parties.[188] The ASEAN-Korea and CJK agreements also provide that nothing in the agreements affect any more favourable treatment provided in another applicable agreement between the parties.

b. BITs

Of the 13 BITs focused on this paper, 8 contain a relationship clause which

187) Australia – India BIT, Article 16.

188) See KORUS, Article 1.2; ASEAN-Korea IA, Article 23; China-Japan-Korea Investment Agreement, Article 25.

addresses the relationship of the BIT with other agreements. The China-Korea BIT does not contain a general relationship clause however it specifically terminates the pre-existing 1992 China-Korea BIT.[189] The remaining 7 BITs each refer to situations where other agreements provide for more favourable treatment of investors. Korea's BITs with Cambodia, Laos, Mexico and Vietnam all take a similar approach which is illustrated by the Korea-Vietnam BIT:

> Where a matter is governed simultaneously both by this Agreement and by another international agreement to which both Contracting Parties are parties, … nothing in this Agreement shall prevent eitherContracting Party or any of its investors who own investments in the territory of the other Contracting Party from taking advantage of whichever rules are the more favourable to his case.[190]

This approach confirms that where there are successive agreements between the same parties later BIT does not affect an investor's right to take advantage of whichever rules are more favourable. Korea's BITs with Brunei, India and Indonesia take a slightly different approach. The Brunei and Indonesia BITs are similar and provide:

> 'Where bilateral or multilateral agreements to which both Contracting Parties are parties, provide more favourable treatment in respect of investments of either Contracting Party or its investors than this Agreement, such agreements shall apply to the extent that they are more favourable than this Agreement'[191]

189) China – Korea BIT (2007), Art 14(4).

190) Korea – Vietnam BIT (2003), Article 18.

191) Brunei-Korea BIT (2000), Article 10

The India-Korea BIT is slightly different and provides that rules in other agreements providing more favourable treatment for investments *shall prevail* to the extent they are more favourable, over the rules in the BIT.[192]

Korea's BITs with Japan, Malaysia, Philippines and Thailand[193] do not contain a relationship clause.

3. Relationship clauses in the TPP, ANZFTA and KAFTA

This section will examine the relationship clauses in selected agreements – including KAFTA – in more detail. Given the overlap between the parties to the TPP, AANZFTA and the RCEP negotiations, it is worth focusing on the relationship clauses in the TPP and AANZFTA as it would be reasonable for the approach in these agreements to influence the approach of the parties in the RCEP which both Australia and Korea are negotiating.

The TPP provides:

Article 1.2: Relation to Other Agreements

1. Recognising the Parties' intention for this Agreement to coexist with their *existing* international agreements, each Party affirms:

(a) in relation to existing international agreements to which all Parties are party, including the WTO Agreement, its existing rights and obligations with respect to the other Parties; and

(b) in relation to existing international agreements to which that Party

192) India-Korea BIT (1996), Article 11.

193) The Myanmar-Vietnam BIT, signed in 2014 but not yet in force, does not appear to be publicly available.

> and at least one other Party are party, its existing rights and obligations with respect to that other Party or Parties, as the case may be.
>
> 2. If a Party considers that a provision of this Agreement is inconsistent with a provision of another agreement to which it and at least one other Party are party, on request, the relevant Parties to the other agreement shall consult with a view to reaching a mutually satisfactory solution. This paragraph is without prejudice to a Party's rights and obligations under Chapter 28 (Dispute Settlement).[FN1]
>
> [FN1] For the purposes of application of this Agreement, the Parties agree that the fact that an agreement provides more favourable treatment of goods, services, investments or persons than that provided for under this Agreement does not mean that there is an inconsistency within the meaning of paragraph 2.

The TPP clause is unusual in explicitly stating the intention of the Parties that the TPP coexists with existing agreements. The TPP Parties also affirm their existing rights and obligations to each other under existing international agreements. It seems clear therefore, that the TPP Parties do not intend to replace or supersede their existing obligations with respect to each other under existing agreements. The TPP Parties also directly address the potential of conflict with other agreements, in an approach which is common in both Australia's and Korea's FTAs. The TPP relationship clause provides that:

> If a Party considers that a provision of this Agreement is inconsistent with a provision of another agreement to which it and at least one other Party are party, on request, the relevant Parties to the other

agreement shall consult with a view to reaching a mutually satisfactory solution.

This consultation mechanism provides a solution to any possible conflict. A recent analysis of the TPP relationship clause expressed a view that this conflict mechanism "envisage[s] that the TPP provisions may conflict with the provisions of earlier treaties".[194] However the present author takes a different view. Another interpretation is that the consultation mechanism is included as a practical mechanism to resolve any conflict should they arise, or become apparent in the future. This does not necessarily mean that the Parties are aware of, or anticipate any conflicts with regard to existing agreements. In fact, the structure of the other paragraphs of the TPP relationship clause suggest that this is not the case. The Parties express their intention for the TPP and existing agreements to coexist, and they affirm their existing rights and obligations under these agreements. These intentions are not consistent with an expectation of conflict under existing agreements. In addition, while paragraph one refers to existing agreements, the consultation mechanism in paragraph two is not limited in this way and so can be interpreted to cover *future* agreements as well. In this light the consultation mechanism can be understood as a practical mechanism to resolve any conflicts or perceptions of conflicts *should* they arise.

The consultation mechanism in the TPP and a number of other Australian and Korean IIAs, is an expression of the parties' intention as to how any conflicts between agreements should be resolved. The parties have considered the potential for conflict and included a method to resolve any such conflict. In the authors view, the consultation clause demonstrates that the parties to these

194) Hepburn, p.5.

agreements did not intend to leave the interpretation of incompatibility or conflicts to the residual rules of Article 30 VCLT.

Significantly, the TPP Parties have also expressed their view on what constitutes conflict. Footnote 1 to Art 1.2 provides:

> For the purposes of application of this Agreement, the Parties agree that the fact that an agreement provides more favourable … investments or persons than that provided for under this Agreement does not mean that there is an inconsistency within the meaning of paragraph 2.

The TPP Parties have clearly expressed that more favourable treatment, or different treatment of investments or investors does not constitute inconsistency. Therefore that fact that commitments made with respect to investors – including the standards and scope of protection – differ between agreements, does not mean that there is a conflict. In this respect the TPP Parties can be seen as expressing a shared view of conflict which is narrower than some characterisations of the concept.

AANZFTA provides:

Article 2 Relation to Other Agreements

1. Each Party reaffirms its rights and obligations under the WTO Agreement and other agreements to which the Parties are party.

2. Nothing in this Agreement shall be construed to derogate from any right or obligation of a Party under the WTO Agreement and other agreements to which the Parties are party.

3. In the event of any inconsistency between this Agreement and any other agreement to which two or more Parties are party, such Parties shall immediately consult with a view to finding a mutually satisfactory solution.

4. Nothing in this Agreement shall prevent any individual ASEAN Member State from entering into any agreement with any one or more ASEAN Member State and/or Australia and/or New Zealand relating to trade in goods, trade in services, investment, and/or other areas of economic co-operation.

5. The provisions of this Agreement shall not apply to any agreement among ASEAN Member States. The provisions of this Agreement shall also not apply to any agreement involving any ASEAN Member State and/or Australia and/or New Zealand unless otherwise agreed by the parties to that agreement [FN1].

[FN1] This Paragraph does not apply to any future agreement concluded in accordance with this Agreement.

In several respects the relationship clause in AANZFTA is similar to the equivalent TPP clause. Although it is not as explicit as the TPP, the intention of the AANZFTA Parties is clearly that the agreement will coexist with existing agreements between the Parties (and in fact this was one of the guiding principles of the AANZFTA negotiations)[195]. Each AANZFTA Party 'reaffirms' and states that nothing in AANZFTA shall be construed to derogate from any right or obligation under other agreements between the Parties. Unlike the TPP,

195) See, *Guiding principles for negotiation on ASEAN-Australia-New Zealand Free Trade Area*accessed at:http://dfat.gov.au/trade/agreements/aanzfta/pages/guiding-principles-for-negotiation-on-asean-australia-new-zealand-free-trade-area.aspx

these provisions appear to be limited to agreements between *all* of the AANZFTA Parties (as opposed to agreements between two or more Parties). The AANZFTA clause contains a similar conflict clause to the TPP which provides for consultations between the relevant Parties in the event of a conflict between the AANZFTA and another agreement with a view to finding a mutually satisfactory solution. The key aspects of this consultation mechanism are the same as the mechanism in the TPP discussed above. For the same reasons, in the author's view, this expresses the intention of the Parties that any potential conflicts will be resolved between the relevant Parties rather than through reliance on the residual rules of Article 30 of the VCLT. Unlike the TPP, AANZFTA does not elaborate on the meaning of conflict for the purposes of the relationship clause. It is relevant however that six of the TPP Parties are also party to AANZFTA.

KAFTA provides:

> Article 1.2: Relation to Other Agreements
>
> 1. Each Party affirms its existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO Agreement.
>
> 2. This Agreement shall not be construed to derogate from any international legal obligation between the Parties that provides for more favourable treatment of goods, services, investments, or persons than that provided for under this Agreement.
>
> 3. Unless otherwise provided in this Agreement, in the event of any inconsistency between this Agreement and other agreements to which both Parties are party, the Parties shall immediately consult

> with each other with a view to finding a mutually satisfactory solution, taking into consideration general principles of international law.

The KAFTA relationship clause has elements common to both the AANZFTA and TPP clauses. The Parties affirm their existing rights under existing agreements. KAFTA also includes a consultation mechanism to resolve any possible conflicts between KAFTA and either existing or future agreements. In addition, KAFTA includes a provision that the agreement "shall not be construed to derogate from any international legal obligation between the Parties that provides for more favourable treatment of … investments, or persons". Unlike the AANZFTA non-derogation clause, KAFTA refers only to more favourable treatment.

V. Implications of overlapping treaties

Most of both Australia's and Korea's recent FTAs – including the TPP, KAFTA and AANZFTA – contain a consultation mechanism for the relevant parties to resolve any potential conflict between the FTA and any other treaties, including earlier IIAs. In this respect the parties have expressed their intention that any questions of conflict or incompatibility are resolved in the way determined by the parties rather than through relying on the residual rules on the application of successive treaties in the VCLT.

A. General principle of coexistence

The survey of Australia's and Korea's IIAs demonstrates that the general approach taken by both countries is of co-existence. Newer agreements are in-

tended to sit alongside and supplement, rather than replace, existing agreements. If there is more than one IIA available to an investor which provides for investor-state arbitration, it is generally open to the investor to choose which set of rules it wishes to invoke.

From the State Parties' perspective this results in a degree of uncertainty. As our survey demonstrates there are significant differences between overlapping IIAs, in particular between the older-style BITs and the more modern IIAs. More modern FTAs – such as KAFTA and TPP – include significantly more explicit safeguards for legitimate government regulation. These include a greater elaboration of the standards and factors required to establish a breach key obligations. They also include greater procedural safeguards which give a respondent Party more control over the ISDS proceedings. These differences could have a significant impact on both the conduct, and potentially the outcome, of an ISDS dispute.

B. Addressing the relationship between successive IIAs

1. Termination of earlier agreements

From the State's perspective, terminating an older BIT in the context of negotiating an updated set of investment commitments is a reasonable approach. During IIA negotiations (at least in the case of modern FTAs) the Parties often devote considerable time and effort to agreeing to a balanced set of investment commitments with explicit safeguards for legitimate regulation. These modern commitments reflect lessons learned from experience with older-style agreements and ISDS cases. If there is also an older-style IIA between the Parties which remains in force – and which does not contain these explicit safeguards –, this could be seen as undermining the value of the new agreement.

It effectively leaves the 'back door' open for an investor to circumvent the carefully calibrated provisions in the new treaty by invoking protections under the older treaty.

For example if a Chinese investor in Korea considered that it's investment had been unfairly treated as a result of a regulatory change it may consider bringing an ISDS claim alleging a breach of 'fair and equitable treatment'. As there are a number of potentially available IIAs which provide for ISDS between China and Korea the investor would consider which of these IIAs was most favourable for its case. The 2007 China-Korea BIT contains a 'simple' FET obligation which does not contain any elaboration or link the obligation to a particular standard of treatment.[196] In contrast the 2015 China-Korea FTA explicitly links and limits what is required by the FET obligation to the customary international law Minimum Standard or Treatment (like KAFTA and TPP).[197] While a tribunal may interpret FET in the China BIT consistently with the approach in the FTA there is a risk that it may not, and may instead interpret this older-style FET obligation as requiring a standard of treatment in addition to what is required under the customary MST. The investor would at least have a better prospect of arguing for a broader interpretation of FET under the BIT than it would under the FTA. In these circumstances it would be reasonable to expect the Chinese investor to bring a claim under the older-style BIT than the modern FTA with its explicit safeguards.

Both Australia and Korea have IIAs in which they have addressed the issue of successive agreements directly – by terminating pre-existing overlapping agreements. For example, in the TPP Australia agreed with Mexico, Peru and Vietnam to terminate the existing BITs between them on entry into force of the

196) China-Korea BIT, Art 2.2

197) China-Korea FTA, Art 12.5.

TPP.[198] Also, as part of the Australia-Chile FTA, the parties agreed to terminate the pre-existing BIT between them.[199] In terms of Korea's practice, in the 2007 China-Korea BIT the parties agreed to terminate the pre-existing 1992 BIT.[200]

Australia did not take the same approach in the AANZFTA even though there are four pre-existing BITs between Australia and other AANZFTA parties (Indonesia, Laos, Philippines, Vietnam). It does not appear to be Korea's practice to terminate pre-existing BITs when negotiating overlapping FTAs.

2. Specific provisions on the application of agreements

There are other ways to specifically address the relationship between two agreements besides termination. In AANZFTA, Australia and New Zealand agreed that the Investment Chapter of AANZFTA would not apply between Australia and New Zealand, and so these matters are regulated by the bilateral ANZCERTA Investment Protocol rather than AANZFTA.[201] Australia and New Zealand did not take the same approach in the TPP, however they did agree that nothing in the TPP shall derogate from their rights and obligations with respect to each other under their bilateral (CER) agreements, or AANZFTA, and also that ISDS in the TPP would not apply between Australia and New Zealand.[202]

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198) See letters between Australia and each of Mexico, Peru and Vietnam, on the Termination of Investment Promotion and Protection Agreement, available at: http://dfat.gov.au/trade/agreements/tpp/official-documents/Pages/official-documents.aspx

199) Australia-Chile FTA, Annex 10-E: Termination of the Bilateral Investment Agreement.

200) China – Vietnam BIT (2007), Art 14(4).

201) *Exchange of letters between Australia's Minister for Trade and New Zealand's Minister of Trade on the application of AANZFTA between Australia and New Zealand* 27 February 2009.

Australia has not always taken this approach of addressing the relationship between specific overlapping agreements. For example, Australia had pre-existing bilateral FTAs with two other ASEAN members – Singapore and Thailand – at the time of conclusion of AANZFTA but did not include a provision similar to that with respect to New Zealand. Similarly, Australia did not specifically address the relationship of the TPP investment commitments with the pre-existing FTAs with Singapore, the United States, Chile, ASEAN, Malaysia or Japan in the TPP.

C. Harmonisation?

The multi-party regional FTAs including the TPP, AANZFTA and RCEP have the potential to act as a force for harmonisation of investment rules. In contrast to bilateral agreements they include a single set of rules which apply to all parties. As they contain standards which have been accepted by a wide range of parties, they also have the potential to have a broader influence if they are adopted as the preferred practice of the parties to the agreements, and possibly third parties.

An analysis of recent IIAs, including the TPP, KAFTA and AANZFTA, demonstrates a significant amount of convergence in terms of the provisions focused on in this paper. While there are differences between these FTAs, they take a similar approach to the drafting of the key obligations of FET and expropriation as well as procedural ISDS safeguards including with regard to preliminary objections and binding interpretations. We do not yet know what approach

202) *Exchange of letters between Australia's Minister for Trade and Investment and New Zealand's Minister of Trade on: Investor State Dispute Settlement*, Trade Remedies and Transport Services, 4 February 2016, accessible at: http://dfat.gov.au/trade/agreements/htpp/official-documents/Documents/australia-new-zealand-investor-state-dispute-settlement-trade-remedies-and-transport-services.PDF, accessed 7 August 2016.

will be taken in RCEP however it clearly provides an opportunity for further convergence.

However the potential of these agreements to achieve a harmonisation of investment commitments is limited by the continued existence of earlier overlapping IIAs which take a different approach. As discussed, both Australia and Korea have generally pursued an approach of coexistence of overlapping agreements which means that these older IIAs continue to be in force.

Should the parties wish to use regional FTAs like TPP and RCEP as a more powerful force for harmonisation they could do so by drafting relationship clauses which address the relationship with any pre-existing agreements more directly. The most direct way to simplify or harmonise relations is to adopt the approach taken by Australia in some recent FTA negotiations – to terminate the pre-existing BITs so that they are effectively superseded or updated by the more modern FTAs.

The case of pre-existing FTAs is more complicated as they typically regulate a wide range trade-related issues, in addition to investment and often contain 'market access' commitments. It is also possible that the parties to a pre-existing bilateral FTA may have made a higher level of commitments to each other than they would be prepared to offer to a broader group of parties in a later plurilateral FTA. As a result, the parties are unlikely to want to terminate a pre-existing FTA. However in this case there could be alternative approaches to address the uncertainty arising from having different sets of investment commitments under successive agreements – in particular where they both include an ISDS mechanism. This could include suspending the operation of the ISDS procedures in the earlier agreement while the later agreement is in force.

It remains to be seen whether RCEP will be a force for harmonisation in the area of investment commitments. This will depend on the outcome of the negotiations in terms of the level of commitments, but also on the approach which the RCEP Parties take with regard to the relationship of RCEP with pre-existing IIAs. There are a large number of existing IIAs between the RCEP Parties – including between each of Australia and Korea and other RCEP Parties. In this respect RCEP represents a good opportunity to harmonise investment commitments should the Parties wish to do so.

Ⅵ. Conclusions

Both Australia and Korea have a number of overlapping IIAs obligations, including a number of existing IIAs with parties to the TPP and RCEP negotiations. There are significant differences between these IIAs, in particular between the older-style BITs and the more modern IIAs. Most modern IIAs concluded by both Australia and Korea contain a number of explicit safeguards seeking to assert more control over (i) the interpretation of key investment protections; and (ii) the arbitral process in the event of an ISDS dispute. In contrast the older-style BITs concluded by both Australia and Korea do not in general contain equivalent explicit safeguards. As a result, there is less certainty and predictability in terms of the interpretation of key protections and the conduct of the arbitral process under these older-style IIAs. The VCLT contains rules on the application of successive treaties relating to the same subject-matter which focus on incompatibility between provisions in successive treaties. This paper argues that differences in the drafting of key investment protections such as fair and equitable treatment and expropriation, or the existence of procedural safeguards in one treaty but not another treaty do not

amount to an incompatibility. Further the VCLT rules are residual rules which apply subject to any provisions in the relevant treaties addressing their compatibility with other treaties. In modern agreements, including KAFTA and the TPP, the parties have expressly addressed the relationship of the treaties with other agreements. These modern IIAs address the possibility of incompatibility and include a consultation mechanism in the event of any potential incompatibility which demonstrates that the parties do not intend to rely on the residual rules in the VCLT.

The general approach under IIAs is of co-existence. Newer agreements generally sit alongside, rather than replacing, existing agreements. If there is more than one treaty available to an investor which provides for ISDS, it is open to the investor to choose which treaty it wishes to bring a claim under in the event of an investment dispute. In this respect the approach of coexistence gives rise to a degree of uncertainty. Regional or plurilateral agreements, such as the TPP and RCEP provide the potential to act as a force for the harmonisation of investment rules. However this goal will not be fully realised unless the parties effectively address the relationship between these FTAs and any pre-existing overlapping IIAs.

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Summary & Conclusion

Summary & Conclusion

The summary and conclusion of each detail topic in this collaborative paper as follows,

The research paper topic of Dr. Hong Seung Hun is *'Responsive Risk-based Regulation in Australia',* At first, The background of this study is that Australia is one of rare developed economies that successfully withstood the impacts of the Global Financial Crisis in 2008-2009. The questions start from what we can learn from Australia's experience. Secondly, the purposes of this studies are to explore risk-based regulatory approaches of Australian financial regulators: the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) and to focus on how Australia's financial regulators have developed risk-based approaches as a response to the performance and attitudes of regulated institutions.

Secondly, the main contents are consist of three points. It offers theoretical discussions on risk-based regulation and responsive regulation. And APRA has been developing its risk-based supervisory tools in accordance with responsive regulation. Lastly, ASIC's way of deploying responsive regulation is limited to formal enforcement tools. But it has shown its commitment to responsive regulation by introducing flexible enforcement options.

Thirdly, Expected effect of this report is that it will be informative to those who seek to better understand Australia's experience on financial supervision. Also it will guide a direction for regulatory reform in financial regulation.

The research paper topic of Dr. Joung Mee Han is *'Responsive Risk-based IT Financial Regulation in Korea'*. At first, The background of this study is that Electronic finance's non-face-to-face nature, the use of public networks, and

increasing dependence on IT vis-a-vis third-parties, the overall risk situation and risk levels have considerably changed from the pre-fintech operating environment. Consequently, stakeholder in electronic finance, including individual users, financial institutions, and financial regulators, are required to assess various risks associated with electronic finance and to respond appropriately. The purpose of this study is that the electronic financial sector is particularly susceptible to drastic change as usage increases. As such, IT risk management and information security are deemed the most crucial issues necessitating the establishment of a pre-emptive response system. At last, The aim of this study is to examine supervision systems with regard to responding to electronic financial transactions and financial accidents given the rise in the levels of electronic financial transactions and information technology in the financial sector.

Secondly, the main contents are consist of two points. One is that when it comes to provisions regarding the terms and conditions of electronic financial transactions, it can be said that Korea's legal system is better wired for speedy legislation than that of any other country. Given 'Electronic Financial Transactions Act', 'Act on the Regulation of Terms and Conditions', and 'Regulation on Supervision of Electronic Financial Transactions,' the provisions in the Acts and Regulations of Korea regarding the terms and conditions of electronic financial transactions are judged to be more advanced and well specified than those of other countries. This is judged to be due to the fact that Korea's IT-based industry is more vitalized than other countries', and there have been swift introductions of legislation in response to the growth of the electronic financial sector which includes Internet banking.

Another main content is that the payment industry in any country of the world naturally has to be reorganized in response to social change, and there

clearly is some intent to stimulate the economy by reducing payment-related costs for consumers, small business owners, and the self-employed and spreading convenience through diversification of payment services provided. However, achieving such convenience would lead to the advancement of technology related to procedures where personal information is transmitted and the information is matched with the relevant individual, as well as increased competition for providing more services based on such information. At the crux of it is the important issue of personal information protection. Therefore, it is necessary to monitor the payment industry and regulatory and supervisory policies, maintaining a balance. In other words, preemptive supervisory measures and systems need to be established taking into consideration the current circumstances where demand for the management and supervision of information leakage risks is high due to an increasing variety of payment means and an increasing number of their handlers.

The research paper topic of Dr. Elizabeth Bluff is *'The Regulation and Governance of Psychosocial Risks at Work : A Comparative Analysis Across Countries'*. This paper examines the regulation and governance of psychosocial risks at work. These risks have significant, detrimental effects on psychological and physical health, which principally arise where there is an imbalance between the work demands placed on a person and the resources available to them to cope with those demands. The sources informing the paper were a systematic review and analysis of the international literature; a comparative analysis of regulatory frameworks for managing work-related psychosocial risks in different countries; and interviews with Australian experts in the regulation and management of work-related psychosocial risks.

The paper compares different examples of laws (statutes, regulations and equivalent instruments), and programs conducted by government regulators

for health and safety at work to support, inspect and enforce workplace action on psychosocial risks. The paper then discusses examples of initiatives by a wider range of actors that influence workplace action on psychosocial risks through awareness raising and campaigns, research and evaluation studies, standards and frameworks, collective agreements, and information and training initiatives. The paper concludes by outlining principles for regulating work-related psychosocial risks, through an approach that is 'holistic' in assessing the different types of psychosocial risks; 'participatory' in involving workers and their representatives in identifying risk factors and ways to control them; and 'integrated' in combining measures to prevent harm by controlling risk factors, promoting the positive aspects of work and worker strengths and capacities, and managing illness through early intervention and assistance to workers whose health is harmed.

The research paper topic of Dr. Seunghye Wang is *'Functional Equivalence Principle in Mutual Recognition Agreement on food safety'*. Psychosocial risks in the workplace have been recognized as a key factor in modern occupational safety and health. Especially today, as the volume of mental labor is increasing, the management of psychosocial factors in the workplace has become a key element of the work environment. In this research, the term 'workplace psychosocial risk' refers to the mental burden imposed by working, labor and jobs. This burden is mainly caused by work related to psychosocial stress. According to Article 5 of Korea's basic law, The Occupational Health and Safety Act, it is the employer's obligation to "provide a pleasant working environment and working conditions that reduce the physical fatigue and mental stress of the workers." The Korean Occupational Health and Safety Agency is in charge of this mission. But it was primarily designed to manage physical risk, and these obligations to control psychosocial risk were introduced recently in 2013.

For this reason awareness among employers about the importance of psychosocial risk factors is very low. In fact, methodology for assessing psychosocial risk factors in the workplace is not sufficiently developed so as to be applied. The authorities responsible for occupational safety and health need to prepare a strategy for managing employers and provide the necessary information so as to ensure that they actually fulfill their statutory obligations, and to provide support in the form of social and economic resources. In addition, it is necessary to prepare a strategy for adequately managing and supervising employers' implementation of their obligations.

The research paper topic of Mr. Richard Braddock is *'Harmonisation or Proliferation? The impact of regional FTAs on investor protection'*. At first, The background of this study is that there has been a proliferation of trade and investment agreements concluded between States in many years. These include not only bilateral agreements, but also plurilateral or regional agreements, such as the recently concluded Trans-Pacific Partnership Agreement (TPP) and the ongoing negotiations of the Regional Comprehensive Economic Partnership (RCEP). This activity has resulted in what has been described as a 'spaghetti bowl' of agreements, with States sometimes having several different overlapping sets of trade and investment rules with other States under different treaties. This gives rise to a number of questions: what is the relationship between these overlapping agreements? Are the new regional agreements a force for harmonisation or are they just adding another level of complexity? These questions are particularly important in the area of investment as investment agreements generally grant an investor of one party to bring an investor-state arbitration claim against another party. As such, the identification of which rules are available to an investor in the event of an investment dispute has significant consequences for investors and States.

Secondly, the purpose of this study is to examine the impact of the new regional plurilateral Free Trade Agreements (FTAs) on investment protection in the Asia-Pacific region, focusing on Australia and Korea, and in particular, whether the regional FTAs are likely to lead to a greater harmonisation of investment rules. The paper aims to compare and examine the relationship between the overlapping bilateral and plurilateral agreements and the implications for investors and States.

Lastly, there are expected effects in this paper. Both Australia and Korea have a number of overlapping agreements containing investment obligations. The general approach under trade and investment agreements is of co-existence. Newer agreements sit alongside, rather than replacing, existing agreements. If there is more than one treaty between two States which provides for investor-state arbitration, it is generally open to an investor to choose which set of rules it wishes to invoke in the event of an investment dispute. Regional agreements, such as the TPP and RCEP, provide the potential to harmonise investment rules between the parties. In order to promote harmonisation and certainty, parties can clarify the relationship of a treaty with an earlier overlapping treaty, including by terminating the earlier treaty.

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