

GLOBALIZATION OF LEGAL SERVICES IN ASIA: COMPARISON OF TPP AND KORUS-FTA ON LEGAL SERVICES AND A POTENTIAL USE OF SOUTH KOREA'S THREE-STAGE LIBERALIZATION MODEL BY TPP COUNTRIES

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INTRODUCTION

The global legal service industry is growing.¹ The industry's total revenue in 2014 was \$616.4 billion and is forecasted to grow to \$815 billion in 2017.² This rapid growth is attributable to increasing cross-border transactions, world trade and capital flows, and general globalization phenomena.³ More law firms are exporting their legal services and establishing branch offices on foreign soil.⁴ Legal services exported by the United States grew by 18% in the Asia-Pacific region, 36% in South and Central America, and by 97% in the Middle East.⁵ In the United Kingdom, over half of the top 25% of law firms generated 40% of their fee income from international operations in 2012.⁶ This

¹ James R. Faulconbridge et al., *Global Law Firms: Globalization and Organizational Spaces of Cross-Border Legal Work*, 28 NW. J. INT'L L. & BUS. 455, 455–57 (2008) (“Profession has been rapid with exponential growth from the halcyon period of the mid-1980s onwards. After a decade or so of a number of large law firms pursuing a global strategy designed to serve existing clients and to extend their market coverage, by the year 2000 legal services had firmly joined other professional services in creating organized global service provision using networks of offices in numerous cities, thus bringing the global and local together in the products offered to clients. . . . [t]hree empirical barometers aptly illustrate the unprecedented rates of globalization of the legal profession and firms from the 1980s.”); Alison Hook, *Sectoral Study on the Impact of Domestic Regulation on Trade in Legal Services*, OECD, at 3, <http://www.oecd.org/site/tadstri/40778871.pdf> (explaining both legal advisory and dispute resolution services have rapidly grown for the last several decades).

² FIRST RESEARCH, *Legal Services Industry Profile*, (Mar. 19, 2016), http://www.firstresearch.com/industryanalysis/First_Research_Industry_Profile_Sample.pdf; Legal Services: Global Industry Guide, MARKETLINE, http://www.researchandmarkets.com/research/d6c438/legal_services_gl. (last visited Mar. 19, 2016).

³ Hook, *supra* note 1, at 6.

⁴ “The growth in international investment through foreign offices occurred within firms as well as among the group of firms; that is, individual firms supported more foreign offices in 2000 than in 1985. According to the 1985 Martindale-Hubbell directory, 58% of the firms examined having a foreign office (that is, 58% of the 43 firms) had only one foreign office. By 2000, only 18% of the firms examined had just one foreign office, while more than 80% had two or more foreign offices.” Carole Silver, *Regulatory Mismatch in the International Market for Legal Services*, 23 NW. J. INT'L L. & BUS. 487, 504 (2003).

⁵ U.S. INT'L TRADE COMM'N, *Recent Trends in U.S. Services Trade: 2013 Annual Report*, Inv. No. 332-345, USITC Pub. 4412 (2013), at 5–9, <http://www.usitc.gov/publications/332/pub4412.pdf>.

⁶ *Growing globalisation in legal market prompts new international LL.M LPC qualification at the University of Law*, GUARDIAN, <http://www.theguardian.com/partner-zone-college-of-law/growing-globalisation-legal-market-new-international-qualification> (last visited Mar. 22, 2016).

international revenue added a net three billion pounds to the United Kingdom's total trade balance.⁷

Nevertheless, legal services are still predominantly considered a domestic affair because laws and regulations are confined to a specific jurisdiction.⁸ This jurisdictional limitation creates a gap between demand and supply of legal services.⁹ While demands for cross-border legal services are growing,¹⁰ supplies—law firms and lawyers—cannot freely cross borders. To alleviate this problem, countries have entered into multilateral and preferential trade agreements to liberalize trade in legal services.¹¹

In Asia, among them are the two recent trade agreements, the Trans-Pacific Partnership Agreement (“TPP”) and the United States-South Korea Free Trade Agreement (“KORUS-FTA”).¹² This paper examines the text of the legal service provisions in the TPP and the KORUS-FTA, focusing on terms regarding domestic regulatory measures. It then discusses impact of imposing domestic regulatory measures on trade in legal services by presenting a case study of South Korea's liberalization process under the KORUS-FTA. As the TPP and the KORUS-FTA share most of the legal services-related provisions, the TPP party countries may consider South Korea's three-stage liberalization model when developing their market-opening plan. In addition to the TPP parties, other members of the WTO may also find South Korea's case useful as the TPP and the KORUS-FTA follow the principles of the General Agreement on Trade in Services (“GATS”).¹³

⁷ *Growth forecast for global legal services but tough times for high street lawyers*, LAW SOC'Y (Feb. 6, 2013), <http://www.lawsociety.org.uk/news/press-releases/growth-forecast-for-global-legal-services-but-tough-times-for-high-street-lawyers/>.

⁸ Carole Silver, *Local Matters: Internationalizing Strategies for U.S. Law Firms*, 14 IND. J. GLOBAL LEGAL STUD. 67, 68 (2007).

⁹ See Malcom Mercer, *Access to Justice and Market Failure*, SLAW (Nov. 1, 2011), <http://www.slaw.ca/2016/11/01/access-to-justice-and-market-failure/>.

¹⁰ Paul D. Paton, *Legal Services and the GATS: Norms as Barriers to Trade*, 9 NEW ENG. J. INT'L & COMP. L. 361, 373 (2003).

¹¹ See Paton, *supra* note 10, at 377.

¹² IAN F. FERGUSSON & BRUCE VAUGHN, RESEARCH SERV., R40502, TRANS-PACIFIC PARTNERSHIP AGREEMENT 3 (2010); United States-South Korea Free Trade Agreement, (Dec. 2010), <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text> [hereinafter KORUS-FTA].

¹³ See WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm (last visited Mar. 22, 2016); Laurel S. Terry, *From GATS to APEC: The Impact of Trade Agreements on Legal Services*, 43 AKRON L. REV. 875, 900 (2010) (General Agreement on Trade in Services was created as one of the subsidiary agreements to the WTO agreement.).

In Section I, this paper provides an overview of the existing multilateral and regional agreements on liberalizing trade in legal services. In Section II, the paper compares the texts of the TPP and KORUS-FTA on legal services especially their provisions regarding domestic regulatory measures. In Section III, the paper presents a case study of South Korea's three-stage legal market opening. In Section V, the paper attempts to evaluate the three-stage liberalization model based on the interviews with South Korean legal scholars and practicing lawyers. In Section III, this paper concludes that the three-stage liberalization model in South Korea is effective in initiating the market opening, but its impact may be limited if the government places restrictive domestic measures in the latter stages. This is especially true when a de facto legal market opening generates a similar level of market access and benefits "under the shadow."

At the same time, the South Korean case study shows that even when the host country imposes restrictive domestic measures, the three-stage liberalization model may still help advancing liberalization of trade in legal services.¹⁴ First, the liberalization process under this model reduces uncertainty in laws and regulations applied to and enforced on foreign legal service suppliers or their services.¹⁵ Second, foreign law firms gain market benefits, although limited due to domestic regulatory measures, especially in the areas where they already have market advantage.¹⁶ Third, the three-stage liberalization model encourages the host country's domestic law firms to initiate structural reforms that will benefit the domestic clients.¹⁷ Last, the parties entering into a trade agreement may have a first-mover-advantage in developing rules on trade in legal services and the disciplines of domestic regulation.¹⁸ Therefore, when the TPP partner countries or WTO member states contemplate legal market opening, South Korea's model can be a helpful guide in developing its own liberalization framework.

I. BACKGROUND

Effective since 1995 as a part of the World Trade Organization ("WTO") agreements, the General Agreement on Trade in Services

¹⁴ See KORUS-FTA, *supra* note 13, at art. 12.

¹⁵ See *id.*, at art. 12.

¹⁶ See *id.*

¹⁷ See *id.*

¹⁸ See *id.*

(“GATS”) is the first and the only multilateral trade agreement in services that includes the legal profession.¹⁹ The GATS seeks to promote trade and development through progressive liberalization.²⁰ Since it adopted the positive-list approach,²¹ however, many member states did not opt-in the legal service sector in their schedule of concessions.²² The only countries in Asia that included the legal service sector so far are Japan, Malaysia, and Thailand.²³

Liberalizing trade in legal services is particularly challenging because legal services are generally domestic operations.²⁴ Trade in legal services is largely affected by domestic regulations, which include licensing and education requirements.²⁵ Consequently, even if market access is granted under the GATS obligations, barriers for foreign law firms and lawyers to enter a host country’s legal market are considerably higher when there are restrictive domestic regulations.²⁶ The GATS, however, allows the member states to impose domestic regulations as long as they meet the obligations set forth in Article VI.²⁷ In legal services, domestic regulations generally fall into one of the following categories:

Qualification requirements: licensing system, education requirements, and experience requirements;

Nationality requirements: citizenship requirements, limitations or prohibitions on foreign ownership, and visa requirements;

¹⁹ WORLD TRADE ORG., *supra* note 14; Terry, *supra* note 14.

²⁰ The General Agreement on Trade in Services (GATS): objectives, coverage and disciplines, WORLD TRADE ORG., at para.1, https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm (last visited Mar. 22, 2016).

²¹ The positive-list approach allows WTO members to set out the sectors they agree to be covered by the relevant rules. See Jane Kelsey, *Understanding Cariforum’s Commitments On Trade In Services & Investment: How To Read a Schedule* (2009), <http://www.normangirvan.info/wp-content/uploads/2009/11/kelsey-1-how-to-read-a-schedule1.pdf>.

²² Bar Association, *GATS General Agreement on Trade in Services*, INT’L BAR ASS’N 16 (2002), <http://www.ibanet.org/Document/Default.aspx?DocumentUid=4F39B8D5-2110-4A8A-BDAF-7CB1D7083236>.

²³ *Id.* at 17.

²⁴ See Silver, *supra* note 8.

²⁵ See *id.*

²⁶ Ingo Borchert et. al., *Policy Barriers to International Trade in Services: Evidence from a New Database* 34–36 (World Bank Dev. Research Grp. Trade & Integration Team, Working Paper No. 6109, 2012).

²⁷ General Agreement on Trade in Services Art. VI, 1869 U.N.T.S. 183, 33 I.L.M. 1167 (1994) [hereinafter GATS].

Regulations on qualified foreign lawyers: discriminatory taxes and personnel hiring restrictions;

Regulations on qualified foreign firms: incorporation requirements, partnership and association restrictions, residency requirements, and equity limits;

Regulations on practice areas: prohibition of practicing on domestic law or certain areas of domestic law.²⁸

Domestic regulatory barriers are also identified in a recent World Bank publication that reports the trade policies of 103 countries in eighteen service sectors including the legal service sector.²⁹ The report states that while liberalization of service sectors is underway, domestic regulatory measures on foreign ownership, qualifications, and operations often function as “second-generation barriers” to market access.³⁰ This means that although countries no longer explicitly discriminate against foreign service suppliers they now place regulatory measures and generate similar preventive effects on foreign service suppliers’ market access.³¹

After the Uruguay Round, the WTO member states continued liberalization efforts through the Doha Round negotiations, beginning in November 2001.³² The goal of the Doha Round was “achieving a progressively higher level of liberalization.”³³ Fourteen years later, however, the negotiations were still incomplete.³⁴ As such, in December 2015, the WTO member states declined to “reaffirm” Doha’s mandate and decided to begin a new WTO age.³⁵ One key issue in the Doha Round was developing “disciplines on domestic regulation” in trade in

²⁸ Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT’L L. 941, 951 (1995).

²⁹ Borchert, *supra* note 27, at 2.

³⁰ *Id.* at 12.

³¹ *Id.*

³² Laurel S. Terry, *Current Development Regarding the GATS and Legal Services: The Suspension of the Doha Round, “Disciplines” Developments, and Other Issues*, Bar Exam’r, (Feb. 2007) at 27, http://www.americanbar.org/content/dam/aba/migrated/cpr/gats/bar_examiner_2_07.authcheckdam.pdf.

³³ *Id.*

³⁴ Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 TEX. INT’L L.J. 573, 577 (2010).

³⁵ Shawn Donnan, *Trade talks lead to ‘death of Doha and birth of new WTO*, FIN. TIMES (Dec. 20, 2015), <http://www.ft.com/intl/cms/s/0/97e8525e-a740-11e5-9700-2b669a5aeb83.html#axzz42NTdvqd1>.

services.³⁶ Members recognized that domestic regulations often act as trade barriers and negate the benefits of guaranteed market access under the GATS terms.³⁷ When the multilateral negotiations on domestic regulations stalled, countries continued the effort through regional and bilateral agreements.³⁸

In Asia, such effort was first made through the Asia-Pacific Economic Cooperation (“APEC”).³⁹ APEC is the primary economic forum in the Asia-Pacific region with its members accounting for 40% of the world’s population, 54% of the world’s GDP, and 43% of world trade.⁴⁰ In May 2008, APEC introduced a legal services initiative that created an online database containing information of the member states’ regulatory regime on foreign legal service suppliers and to identify countries’ best practices in reducing regulatory barriers.⁴¹ APEC’s agreements are non-binding, and the initiative expired without renewal in 2010.⁴²

The Association of Southeast Asian Nations (“ASEAN”) also included liberalization of the legal service sector in its agenda.⁴³ In 2011, the ASEAN Economic Community (“ACE”) agreed to substantially remove restrictions on legal services by 2015.⁴⁴ This agreement, however, has received criticism for being a mere “paper commitment”⁴⁵ as it lacks supranational institutional authority, unlike the European Union, and cannot strictly mandate member states to comply with its plan.⁴⁶

³⁶ The WTO Council for Trade in Services created a working group to develop disciplines on domestic regulations. See *WTO negotiations on domestic regulation disciplines*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/dom_reg_negs_e.htm (last visited Mar. 22, 2016).

³⁷ *Id.*

³⁸ Donnan, *supra* note 36.

³⁹ Terry, *supra* note 14, at 898.

⁴⁰ *Id.*; *The Asia-Pacific Economic Cooperation (APEC)*, BOUNDLESS.COM, <https://www.boundless.com/marketing/textbooks/boundless-marketing-textbook/global-marketing-7/important-international-bodies-and-agreements-54/the-asia-pacific-economic-cooperation-apec-269-4076/> (last visited Mar. 20, 2016).

⁴¹ Terry, *supra* note 14, at 894.

⁴² Pasha L. Hsieh, *Examining the Liberalization of ASEAN’s Legal Services Market: Challenges and Reforms*, ASIAN PAC. INTEGRATION (Feb. 2015), http://www.cnplaw.com/en/interlaw/files/submission_Hsieh.pdf.

⁴³ See Pasha L. Hsieh, *ASEAN’s Liberalization of Legal Services: The Singapore Case*, 8 ASIAN J. OF WTO & INT’L HEALTH L. & POL’Y 475, 475 (2013).

⁴⁴ *Id.* at 478.

⁴⁵ *Id.* at 477.

⁴⁶ *Id.* at 478.

Most recently, on February 4, 2016, a number of Asian countries⁴⁷ signed the final draft of the Trans-Pacific Partnership (“TPP”).⁴⁸ The TPP is a historical deal as it is the largest regional trade agreement.⁴⁹ It involves twelve partner countries that consist of 40% of the world’s economy and one-third of world trade.⁵⁰ The TPP contains provisions on trade in services including legal services.⁵¹ Notably, the TPP countries made specific efforts to come to terms with the domestic regulatory measures on trade in legal services by identifying categories of domestic regulations and encouraging the parties to negotiate and develop a shared framework.⁵² Another recent treaty that was created by two TPP countries is the bilateral free-trade agreement between the United States and the Republic of Korea (“KORUS-FTA”).⁵³ The treaty has significant impact on both parties’ economies, as the United States and South Korea are the sixth and the second largest trading partner to each other, respectively.⁵⁴ In the following section, this paper compares the text of these two agreements, the TPP and the KORUS-FTA, and examines how they develop the terms of trade in legal services including disciplines of domestic regulation.

II. COMPARISON OF THE TPP AND KORUS-FTA TEXTS ON TRADE IN LEGAL SERVICES

At the outset, the TPP and the KORUS-FTA share most of the provisions on trade in services, following the general GATS structure.⁵⁵ However, several of their provisions are different from the GATS and different from each other, evidencing parties’ attempt to further liberalize

⁴⁷ Australia, New Zealand, Vietnam, Singapore, Japan, Malaysia, Brunei Darussalam, Chile, Mexico, Peru, Canada and the US. *Trans-Pacific Partnership Ministers’ Statement*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement> (last visited Mar. 22, 2016).

⁴⁸ *Id.*

⁴⁹ Kevin Granville, *What is the TPP? Behind the Trade Deal That Died*, N.Y. TIMES (Nov. 11, 2016), http://www.nytimes.com/interactive/2016/business/tpp-explained-what-is-trans-pacific-partnership.html?_r=0.

⁵⁰ U.S. TRADE REPRESENTATIVE, *supra* note 48.

⁵¹ *Id.*

⁵² *Trans-Pacific Partnership Ministers’ Statement*, *supra* note 48.

⁵³ KORUS-FTA, *supra* note 13.

⁵⁴ *Korea*, K-STAT, <http://stat.kita.net/stat/world/major/KoreaStats06.screen> (last visited Jan. 21, 2016).

⁵⁵ Trans-Pacific Partnership Agreement, art. 10, <https://ustr.gov/sites/default/files/TPP-Final-Text-Preamble.pdf> (last visited Feb. 12, 2017) [hereinafter TPP]; KORUS-FTA, *supra* note 13, at art. 12.

trade in legal services.⁵⁶ For example, unlike GATS or KORUS-FTA, TPP contains a provision that encourages parties to negotiate on domestic regulatory measures when they attempt to introduce one.⁵⁷ The KORUS-FTA does not contain such a provision, but the United States and South Korea voluntarily negotiated on the same issue regarding how and to what extent the South Korean government may impose domestic regulatory measures on foreign legal services and suppliers in South Korea.⁵⁸

The subject matter and the scope of the provisions in the TPP and the KORUS-FTA on legal services are nearly identical.⁵⁹ Both agreements apply to “measures affecting cross-border trade in services by service suppliers of another [or the other] Party.”⁶⁰ They also define “cross border trade in services” and “cross-border supply of services” the same way as, “the supply of a service (a) from the territory of a Party into the territory of another Party; (b) in the territory of a Party to a person of another Party; or (c) by a national of a Party in the territory of another Party.”⁶¹ These types of services included in the TPP and KORUS-FTA are equivalent “cross-border supply of services,” “commercial presence,” and “movement of natural persons” in GATS.⁶² Cross-border supply of a service occurs, for example, when a law firm in the United States provides legal advice to a client in Vietnam through telecommunications on a transaction to be made in the United States. If the same United States law firm opens a branch office in Vietnam and provides legal advice to the Vietnamese client, this is commercial presence. In contrast, if a lawyer from the United States law firm travels to Vietnam as an independent supplier or as an employee of a law firm in

⁵⁶ See TPP, *supra* note 56, at art. 10.3(1), 10.4, 10.8, Annex 10-A; See also KORUS-FTA, *supra* note 13, at art. 12.1, Annex 12-A.

⁵⁷ TPP, *supra* note 56, at Annex 10-A(9), (10).

⁵⁸ See KORUS-FTA, *supra* note 13, at Annex II.

⁵⁹ In TPP, the agreement on trade in legal services are attached to Article 10. TPP, *supra* note 56, at art. 10. In KORUS-FTA, trade in legal services are governed by Article 12. KORUS-FTA, *supra* note 13, at art. 12.

⁶⁰ TPP, *supra* note 56, at art. 10.2; KORUS-FTA, *supra* note 13, at art. 12.1 (stating that such measures include the production, distribution, marketing, sale, and delivery of a service and more).

⁶¹ TPP, *supra* note 56, at art. 10.1; KORUS-FTA, *supra* note 13, at art. 12.13.

⁶² GATS, *supra* note 28, at art. 1(2)(a)-(d) (“[f]or the purposes of this Agreement, trade in services is defined as the supply of a service: (a) from the territory of one Member into the territory of any other Member; (b) in the territory of one Member to the service consumer of any other Member; (c) by a service supplier of one Member, through commercial presence in the territory of any other Member; (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.”).

Vietnam, this is an example of a movement of natural persons. The TPP and the KORUS-FTA do not, however, cover “consumption abroad,” which occurs when, for example, the Vietnamese client travels to the United States and seeks legal service.⁶³

Following the GATS, the TPP and the KORUS-FTA also incorporated traditional non-discriminatory provisions—most-favored-nation⁶⁴ and national treatment.⁶⁵ The former provision, most-favored nation, requires the parties not to discriminate between trading partners while the latter, national treatment, requires the parties not to discriminate between domestic services and suppliers and those of trading partners.⁶⁶ The TPP and the KORUS-FTA also contain provisions on market access,⁶⁷ transparency,⁶⁸ domestic regulations,⁶⁹ recognition,⁷⁰ Local presence,⁷¹ payments and transfers,⁷² and denial of benefits.⁷³

Unlike GATS, both the TPP and the KORUS-FTA adopted the “negative list approach.”⁷⁴ As such, by entering the agreements the parties agreed by default to guarantee full market access, national treatment, most-favored-nation treatment, and other stated commitments

⁶³ *Guide to reading the GATS schedules of specific commitments and the list of article II (MFN) exemptions*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/serv_e/guide1_e.htm (last visited Mar. 23, 2016).

⁶⁴ KORUS-FTA, *supra* note 13, at art. 12.3; TPP, *supra* note 56, at art. 10.4; Most-favored-nation (MFN) states that countries cannot normally discriminate between their trading partners. Grant someone a special favor (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members. *See Principles of the trading system*, WORLD TRADE ORG., https://www.wto.org/English/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Mar. 23, 2016).

⁶⁵ KORUS-FTA, *supra* note 13, at art. 12.2 TPP, *supra* note 56, at art. 10.3.; National treatment (NT) is “[t]he principle of giving others the same treatment as one’s own nationals. GATT Article 3 requires that imports be treated no less favorably than the same or similar domestically produced goods once they have passed customs. GATS Article 17 and TRIPS Article 3 also deal with national treatment for services and intellectual property protection.” WORLD TRADE ORG., https://www.wto.org/english/thewto_e/glossary_e/national_treatment_e.htm (last visited Mar. 22, 2016).

⁶⁶ WORLD TRADE ORG., *supra* note 65.

⁶⁷ KORUS-FTA, *supra* note 13, at art. 12.5; TPP, *supra* note 56, at art. 10.5.

⁶⁸ KORUS-FTA, *supra* note 13, at art. 12.8; TPP, *supra* note 56, at art. 10.11.

⁶⁹ KORUS-FTA, *supra* note 13, at art. 12.7; TPP, *supra* note 56, at art. 10.8.

⁷⁰ KORUS-FTA, *supra* note 13, at art. 12.9; TPP, *supra* note 56, at art. 10.9.

⁷¹ KORUS-FTA, *supra* note 13, at art. 12.5; TPP, *supra* note 56, at art. 10.6.

⁷² KORUS-FTA, *supra* note 13, at art. 12.10; TPP, *supra* note 56, at art. 10.12.

⁷³ KORUS-FTA, *supra* note 13, at art. 12.11; TPP, *supra* note 56, at art. 10.10.

⁷⁴ *Summary of the Trans-Pacific Partnership Agreement*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (last visited Mar. 14, 2016); William Cooper & Mark Manyin, *The U.S.-South Korea Free Trade Agreement (KORUS FTA): Looking Ahead—Prospects and Potential Challenges*, 15 INT’L J. KOR. STUD. 127, 140 (2011).

unless each party made reservations as a non-conforming measure in the Annexes.⁷⁵ Parties can renew or amend these non-conforming measures as long as the new measure is not more restrictive than the previous one.⁷⁶ This difference in the approach arguably suggests that the parties to the TPP and the KORUS-FTA attempted to increase their commitments to liberalization of trade in legal services.⁷⁷

Although the TPP and the KORUS-FTA are substantially similar, there are a number of important differences. Under the TPP, the scope of non-discriminatory measures may be broader because national treatment and most-favored-nation principles apply to both services and service suppliers.⁷⁸ In the KORUS-FTA, however, non-discriminatory measures apply only to service suppliers, not services themselves.⁷⁹ Whether this additional word “services” makes a difference in application is a question beyond the scope of this paper. The pure textual difference may suggest that the TPP parties intended to expand the coverage of the non-discriminatory measures to services.

Notably, the TPP contains two provisions on domestic regulation that the KORUS-FTA does not contain.⁸⁰ First, Article 10.8(1) of the TPP states, “each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective, and impartial manner.”⁸¹ This provision generally governs the parties’ behavior in introducing and maintaining domestic regulatory measures. Although this paper does not discuss its implication in detail, the TPP parties may object to one party’s domestic measure by asserting that the measure is not administered in a reasonable, objective, or

⁷⁵ *Cross-Border Trade in Services Chapter Summary*, U.S. TRADE REPRESENTATIVE SERVICES, <https://ustr.gov/sites/default/files/TPP-Chapter-Summary-Cross-Border-Trade-in-Services.pdf> (last visited Mar. 21, 2016); William H. Cooper et. al., *EU-South Korea Free Trade Agreement and Its Implications for the United States*, CONG. RESEARCH SERV. (Dec. 1, 2011), <https://www.fas.org/srg/crs/row/R41534.pdf>.

⁷⁶ TPP, *supra* note 56, at Art. 10.7 (a)-(c) (“[o]n the other hand, the parties to the GATS and the KORUS-EU adopted the positive list approach, therefore, parties should make commitment and be bound by it.”); TPP, *supra* note 49, at Annex II; KORUS-FTA, *supra* note 13, at Annex III.

⁷⁷ See TPP, *supra* note 56, at art. 10.7(a) – (c).

⁷⁸ See TPP, *supra* note 56, at art. 10.3(1) (“[e]ach Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to its own services and service suppliers”; See also TPP, *supra* note 56, at art. 10.4 (“[e]ach Party shall accord to services and service suppliers of another Party treatment no less favourable than that it accords, in like circumstances, to services and service suppliers of any other Party or a non-Party”).

⁷⁹ KORUS-FTA, *supra* note 13, at art. 12.1.

⁸⁰ TPP, *supra* note 56, at art. 10.8(1), (3).

⁸¹ *Id.* at art. 10.8(1), (3).

impartial manner.⁸² Second, the TPP also makes a reference to international standards.⁸³ Article 10.8(3) states that “in determining whether a Party is in conformity with its obligations [not to impose unnecessary barriers],⁸⁴ account shall be taken of international standards of relevant international organizations applied by that Party.”⁸⁵ The GATS also refers to international standards in determining a member state’s conformity with domestic regulation provisions.⁸⁶ In both the GATS and the TPP, the context in which international standards apply is very similar. For example, both treaties require that domestic regulations be based on objective and transparent criteria. As such, in the case of licensing, the requirements should not in themselves be a restriction on the supply of service.⁸⁷ Under the GATS, however, international standards are taken into account only if when determining whether a regulation or a standard nullifies or impairs specific commitments in a manner that violates objective and transparent criteria.⁸⁸ On the other hand, the TPP refers to international standards in determining whether a measure is applied in an objective and transparent manner, even when the measure does not necessarily nullify or impair other commitments.⁸⁹ Therefore, the TPP presumably places a higher burden on the parties to meet objective and transparent criteria in introducing and maintaining regulatory measures.

Finally, unlike the KORUS-FTA, the TPP has a set of provisions in Annex 10-A that apply only to legal services.⁹⁰ In Annex 10-A, the TPP parties recognize that transnational legal services play an essential role in facilitating trade and investment, and in promoting economic

⁸² *Id.* at art. 10.8(1), (3).

⁸³ *Id.* at art. 10.8(1), (3).

⁸⁴ *Id.* at art. 10.8(2) (“[w]ith a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, while recognising the right to regulate and to introduce new regulations on the supply of services in order to meet its policy objectives, each Party shall endeavour to ensure that any such measures that it adopts or maintains are: (a) based on objective and transparent criteria, such as competence and the ability to supply the service; and (b) in the case of licensing procedures, not in themselves a restriction on the supply of the service.”).

⁸⁵ *Id.* at art. 10.8(2).

⁸⁶ GATS, *supra* note 28, at art. VI.

⁸⁷ *Id.* at Part II, art. VI(4)(a)–(c); TPP, *supra* note 49, at art. 10.8(2).

⁸⁸ GATS, *supra* note 28, at Part II, art. VI(5)(b).

⁸⁹ TPP, *supra* note 56, at art. 10.8(2)–(3).

⁹⁰ *Id.* at Annex 10-A; Although KORUS-FTA has an annex regarding legal services at the end of the service chapter, it applies to all professional services, not exclusively to legal services. *See* KORUS-FTA, *supra* note 13, at Annex 12-A.

growth and business confidence.⁹¹ If a party regulates or seeks to regulate foreign lawyers and transactional legal practices, Annex 10-A states the party shall encourage its relevant bodies to consider the following issues whether and how:

1. Foreign lawyers may practice foreign law;
2. Foreign lawyers may prepare for and appear in commercial arbitration, conciliation and mediation proceedings;
3. Local ethical, conduct and disciplinary standards are applied to foreign lawyers in a manner that is no more burdensome for foreign lawyers than the requirements imposed on domestic (host country) lawyers;
4. Alternatives for minimum residency requirements are provided for foreign lawyers;
5. The following modes of providing transnational legal services are accommodated on (i) a temporary fly-in, fly-out basis; (ii) through the use of web-based or telecommunications technology; (iii) by establishing a commercial presence; (iv) and through a combination of fly-in, fly-out and one or both of the other modes in (ii) and (iii);
6. Foreign lawyers and domestic (host country) lawyers may work together in the delivery of fully integrated transnational legal services; and
7. A foreign law firm may use the firm name of its choice.⁹²

By listing different types of domestic regulatory measures, the TPP encourages the parties to come to terms with these measures through negotiations between the parties and among relevant domestic bodies.⁹³ Although negotiations are not mandatory, the list shows that the TPP parties attempted to further trade in legal services by continuing the GATS's effort to come to terms with domestic regulatory measures and lower the second-generation barriers.

⁹¹ TPP, *supra* note 56, at Annex 10-A(9).

⁹² *Id.* at Annex 10-A(10).

⁹³ *Id.*

III. SOUTH KOREA'S THREE-STAGE LIBERALIZATION MODEL IN LEGAL MARKET OPENING

Contrary to the TPP, the KORUS-FTA does not contain a specific provision listing potential domestic regulatory measures. However, the United States and South Korea also attempted to come to terms with domestic regulatory measures and lower the second generation barriers during the negotiation and implementation stages.⁹⁴ Because the text of the TPP and the KORUS-FTA are similar concerning trade in legal services, examining South Korea's legal market opening process may provide a helpful guide for the TPP parties in implementing their legal market opening commitments under the TPP.

A. THE KOREAN LEGAL SERVICE MARKET BEFORE THE KORUS-FTA

Until recently, the South Korean legal market was completely closed to foreign service suppliers.⁹⁵ Internally, the South Korean government closely controlled the number of Korean lawyers by setting the national bar passage rate extremely low.⁹⁶ Each year, only .25% to 5% of the exam takers passed the bar.⁹⁷ For this reason, the number of lawyers in South Korea in the 1980s was around 2,230, constituting only 0.0058% of the South Korean population.⁹⁸ Two decades later, this number increased only to around 4,699,⁹⁹ which was still merely 0.0099% of the entire population.¹⁰⁰ This scarcity allowed Korean lawyers to enjoy high social status and privileges.¹⁰¹

⁹⁴ See Jason Park, *The Legal Hermit Kingdom: The Korean Legal Industry And Its Opening*, U.S.-KOREA Y.B. 89, 90 (2009), http://uskoreainstitute.org/wp-content/uploads/2010/05/2009_Yearbook_Park.pdf.

⁹⁵ See *id.*

⁹⁶ *Id.* at 91.

⁹⁷ *Id.*; Jasper Kim, *Socrates v. Confucius: An Analysis of South Korea's Implementation of the American Law School Model*, 10 ASIAN-PAC. L. & POL'Y J. 322, 337–38 (2009).

⁹⁸ *A Report on the Status of Korean Attorneys (Hanguk-Byeon-ho-sa Baekseo)*, KOREAN BAR ASS'N 5 (2009), <http://img.koreanbar.or.kr/plan/WP/%EC%A0%9C1%EC%9E%A5%20%EB%B3%80%ED%98%B8%EC%82%AC%20%ED%98%84%ED%99%A9.PDF>; In the 1980s, South Korean population was 38.12 million. *Korean Statistical Information Service*, POPULATION CENSUS, http://kosis.kr/eng/statisticsList/statisticsList_01List.jsp?vwcd=MT_ETITLE&parentId=A (last visited Mar. 20, 2016).

⁹⁹ KOREAN BAR ASS'N, *supra* note 99.

¹⁰⁰ In the 2000s, South Korean population was 47.01 million. *Statistical Information Service*, POPULATION CENSUS,

In the 1990s, South Korea liberalized various service sectors including advertising, film, and engineering.¹⁰² Nevertheless, the legal market still remained closed.¹⁰³ The South Korean government believed that the legal service industry was in an “infant stage,” and Korean law firms had not yet developed the capacity to compete with foreign law firms.¹⁰⁴ Meanwhile, demands for legal services involving international transactions continuously increased.¹⁰⁵ From 1965 to 1997, South Korean economy grew rapidly with an average growth rate of 8.1%.¹⁰⁶ The growth was largely based on exports,¹⁰⁷ and therefore, international transactions took a substantial part of South Korea’s economic activities.¹⁰⁸ Korean law firms, however, were relatively less experienced or specialized in cross-border transactions.¹⁰⁹ Consequently, Korean corporations relied heavily on foreign law firms, located in the place of their partner’s business for legal advice.¹¹⁰

In 1996, the government took the first step to liberalize the legal service market by amending the Korean Attorney-at-Law Act and abolishing the nationality requirement to practice law in Korea.¹¹¹ This amendment had little practical impact as records show that the Korean Ministry of Justice did not issue a single license for a foreign attorney.¹¹² The actual steps to market opening were therefore taken only after South

http://kosis.kr/eng/statisticsList/statisticsList_01List.jsp?vwcd=MT_ETITLE&parentId=A (last visited Mar. 20, 2016).

¹⁰¹ Kim, *supra* note 98, at 347; Matthew J. Wilson, *U.S. Legal Education Methods and Ideals: Application to the Japanese and Korean Systems*, 18 CARDOZO J. INT’L & COMP. L. 295, 336 (2010).

¹⁰² Kim, *supra* note 98.

¹⁰³ Jeanne John, *The KORUS FTA on Foreign Law Firms and Attorneys in South Korea—a Contemporary Analysis on Expansion into East Asia*, 46 NW. J. INT’L L. & BUS. 237, 241 (2009).

¹⁰⁴ Michael J. Chapman & Paul J. Tauber, *Liberalizing International Trade in Legal Services: A Proposal for an Annex on Legal Services Under the General Agreement on Trade in Services*, 16 MICH. J. INT’L L. 941, 952–53 (1995) (“proposing four other reasons for host countries to restrict access to foreign attorneys, including: (1) lack of national loyalty and shared cultural values; (2) lack of necessary competence to practice domestic law; (3) inability to redress injury to citizens by foreign attorneys; and (4) lack of reciprocal access to foreign legal markets.”).

¹⁰⁵ *Id.* at 954.

¹⁰⁶ *Id.*

¹⁰⁷ John, *supra* note 104, at 274.

¹⁰⁸ *Id.*

¹⁰⁹ Park, *supra* note 95, at 94.

¹¹⁰ *Id.*

¹¹¹ John, *supra* note 104, at 246.

¹¹² *Id.*

Korea signed bilateral agreements with the European Union and the United States in 2011 and 2012, respectively.¹¹³

B. UNITED STATES-SOUTH KOREA FREE TRADE AGREEMENT ON LEGAL SERVICES

Pursuant to the KORUS-FTA on trade in services, South Korea agreed to open its legal service market in three stages over a five-year period.¹¹⁴ In the first stage, South Korea allowed United States law firms to establish a representative office in Korea and provide legal advice on their jurisdiction's law and public international law.¹¹⁵ In the second stage, South Korea permitted the representative offices to enter into specific cooperative agreements with Korean law firms to handle cases jointly and share profits.¹¹⁶ In the final stage, South Korea allowed United States law firms to enter into a joint venture with Korean law firms and employ Korean licensed lawyers as partners or associates.¹¹⁷ In the final stage, South Korea allowed United States law firms to enter into a joint venture with Korean law firms and employ Korean licensed lawyers.¹¹⁸ At the same time, South Korea reserved the right to impose restrictions on the proportion of voting shares or equity interests of the joint venture firms.¹¹⁹ South Korea also reserved the right to place restrictions on: (1) the certification, registration, admission, and supervision of foreign country licensed lawyers or foreign law firms; (2) the formation of partnerships or any other type of relationship between foreign law firms and Korean lawyers or Korean law firms; (3) the foreign law firms' hiring of any types of Korean lawyers and professionals; and (4) the senior management or the board of directors of legal entities supplying foreign legal consulting services.¹²⁰ These measures concern domestic

¹¹³ *South Korea*, EUROPEAN COMM'N, <http://ec.europa.eu/trade/policy/countries-and-regions/countries/south-korea/> (last updated Nov. 6, 2015); *New Opportunities for U.S. Exporters Under the U.S.-Korea Trade Agreement*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta> (last visited Mar. 11, 2016).

¹¹⁴ KORUS-FTA, *supra* note 13, at Korea Annex II, ¶ 2.

¹¹⁵ *Id.* at Korea Annex II, ¶ 2(a).

¹¹⁶ *Id.* at Korea Annex II, ¶ 2(b).

¹¹⁷ *Id.* at Korea Annex II, ¶ 2(c).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at Korea Annex II, ¶ 1(a)–(d).

regulatory issues and potentially may act as the “second-generation barriers” as highlighted by the TPP, WTO, and the World Bank.¹²¹

C. DEVELOPMENT OF SOUTH KOREA’S THREE-STAGE LIBERALIZATION MODEL

The KORUS-FTA entered into force on March 15, 2012. Following the market-opening schedule, the South Korean government allowed foreign law firms to establish representative offices in South Korea.¹²² Two years later, as an implementation of the second stage, the government allowed foreign law firms to enter into project-based cooperation and fee-sharing with Korean law firms.¹²³ Currently, nearly thirty international law firms have established branch offices in Seoul.¹²⁴ However, the size of these branch offices is minuscule; 50% of these offices have only one or two residing foreign legal consultants as of November 2015.¹²⁵ Foreign law firms may have made a strategic choice to “wait-and-see” until the final stage liberalization takes place.¹²⁶ This may be because foreign law firms have decided not to expand their office as they are not as optimistic about market gains in the Korean legal sector even after the final stage of liberalization.¹²⁷

In August 2015, the Ministry of Justice submitted a revised draft of the Foreign Legal Consultant Act to implement the final stage market opening.¹²⁸ Under the proposed bill, foreign law firms would be allowed to establish joint ventures with Korean counterparts and hire Korean lawyers.¹²⁹ The foreign law firms must have been in operation for at least three years and assume unlimited liability for the joint venture law

¹²¹ Borchert, *supra* 27, at 2.

¹²² Kim Ji-Young, *KORUS-FTA entered into force: legal market opening has begun*, YONHAPNEWS (Mar. 13, 2012), <http://www.yonhapnews.co.kr/bulletin/2012/03/12/0200000000AKR20120312150100004.HTM> L.

¹²³ *Id.*

¹²⁴ Clifford Chance, Simpson Thatcher, Jones Day, Sullivan & Cromwell, Clearly Gottlieb & Hamilton, Paul Hastings, Covington & Burling, Squire Sanders, Sheppard Mullin, DLA Piper, Linklaters, Freshfields, Allen & Overy, Kirkland & Ellis, Park & Associates, Cohen & Gresser, Kobre & Kim. *Id.*

¹²⁵ Jung Jin Whan, *Four Years Since Legal Market opening*, HANKYUNG LAW & BIZ (Nov. 10, 2015), <http://www.hankyung.com/news/app/newsview.php?aid=2015111017131>.

¹²⁶ *Id.*

¹²⁷ Chang Young-Jin, *The Third Stage Legal Market Opening*, FIN. NEWS (Aug. 15, 2015), <http://m.media.daum.net/m/channel/view/media/20150805172303086>.

¹²⁸ *Id.*

¹²⁹ *Id.*

firm.¹³⁰ Moreover, foreign law firms will not be allowed to hold more than a 49% ownership share of the joint venture law firm.¹³¹ Under this scheme, the joint law firm is also not allowed to provide legal services on Korean domestic litigation, government affairs, intellectual property, employment relations, and inheritance.¹³² These proposed restrictions have caused the Ministry of Justice and foreign law firms to disagree on many issues as listed in the table below.¹³³

| Issues | Ministry of Justice of Republic of Korea | Foreign Law Firms |
|---|--|--|
| Ownership interests | Limiting foreign ownership to 49% (max) | At the joint venture entities' discretion |
| Number of partners | Korean attorney > foreign attorney | At the joint venture entities' discretion |
| Joint Venture entity (foreign law firm) | The foreign law firm headquarter | Foreign law firm's Seoul office |
| Joint Venture entity (Korean law firm) | Minimum 5-years operation | Eliminated |
| Liability | Unlimited liability of the foreign law firm (headquarter) | Foreign practice-legal insurance |
| Scope of Practice (Joint law firm) | Korea-EU FTA same, following the list of non-opening areas | Contradicting the purpose and object of the FTA-should be eliminated |
| Employment of Korean attorneys | Only joint law firm can hire Korean attorneys | Foreign law firms employ Korean attorneys by itself without entering into a joint venture law firm |
| Structure of the joint law firm | Requiring two senior partners and senior foreign lawyers | At the joint law firm's commercial discretion |

¹³⁰ *Id.*

¹³¹ Jung Jin Whan, *Four Years Since Legal Market opening*, HANKYUNG LAW & BIZ (Nov. 10, 2015), <http://www.hankyung.com/news/app/newsview.php?aid=2015111017131>; Foreign Legal Consultant Act, Act. No. 9524, Mar. 25, 2009, *translated by* The Korean Bar Association, (S. Kor.).

¹³² Foreign Legal Consultant Act, Act. No. 9524, Mar. 25, 2009, *translated by* The Korean Bar Association, (S. Kor.).

¹³³ *Id.*

The draft amendment included all measures that the Ministry of Justice proposed.¹³⁴ The US law firms and interested entities strongly opposed to the measures and criticized the proposal. One partner at a Seoul office stated, “the actual market opening takes a much different track than what has been initially contemplated.”¹³⁵ The President of the American Bar Association (“ABA”) also sent a letter to the Ministry of Justice of South Korea and expressed concern that the draft amendment’s restrictive measures contradict the object and purpose of the KORUS-FTA.¹³⁶ The letter stated that the restrictions would diminish the market value of foreign law firms’ commercial presence in South Korea and discourage law firms to stay in the market.¹³⁷ The Ministry of Justice of South Korea, however, responded that the restrictions were contemplated from the beginning of the negotiation and are legally allowed under the KORUS-FTA as the Korean government effectively reserved its rights in Annex II (2)(C).¹³⁸ The Ministry further asserted that the restrictions were inevitable in the early stage to ensure a smooth transition allowing local Korean law firms to continue operating in this changing environment.¹³⁹

On January 7, 2016, Ambassadors from the United States, the United Kingdom, the European Union, and Australia made a protest visit to the National Assembly of Korea and expressed their concerns about the draft amendment.¹⁴¹ The Ambassadors stated that the proposed restrictions, including the 49% of foreign ownership limitation, were a

¹³⁴ *Id.*

¹³⁵ Ock Hyun-ju, *Foreign envoys protest limits on foreign law firms*, KOREA HERALD (Jan. 10, 2015), <http://www.koreaherald.com/view.php?ud=20160118000978>; Jung Jin Whan, *Four Years Since Legal Market opening*, HANKYUNG LAW & BIZ (Nov. 10, 2015), <http://www.hankyung.com/news/app/newsview.php?aid=2015111017131>.

¹³⁶ Letter from William C. Hubbard, ABA President, to the Int’l Legal Affairs Div. of the Ministry of Justice of the Republic of Kor. (May 7, 2015), http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2015may7_foreignlegalconsultact_c.pdf.

¹³⁷ Massimo Geloso Grosso, *Managing Request-Offer Negotiations under the GATS: The Case of Legal Services* 9 (OECD, Working Paper No. 2, 2004).

¹³⁸ *Id.*

¹³⁹ After the amendment, South Korean law firms less worried about the market opening. One partner at a large South Korean law firm stated that the markets for foreign law firms and Korean law firms do not overlap because foreign law firms cannot accept Korean cases by themselves but only through a joint venture law firm. Young-gil Chua, *M&A Legal Markets in South Korea*, ETODAY (Oct. 15, 2015), <http://www.etoday.co.kr/news/section/newsview.php?idxno=1215967>; Ock Hyun-ju, *Foreign envoys protest limits on foreign law firms*, KOREA HERALD (Jan. 10, 2015), <http://www.koreaherald.com/view.php?ud=20160118000978>.

¹⁴¹ *Ripper Port visits and joint venture law*, JTBC (Jan. 11, 2016), http://news.jtbc.joins.com/article/ArticlePrint.aspx?news_id=NB11145592.

violation of the object and the purpose of the KORUS-FTA.¹⁴² They also argued that the measures were inappropriately imposed to protect Korean domestic law firms.¹⁴³ The ambassadors urged the National Assembly to adopt a bill that opens up South Korea's legal market "more completely."¹⁴⁴

In response, the Korean Bar Association stated that the protest visit was a violation of South Korea's sovereignty rights,¹⁴⁵ forcing the National Assembly to "discriminate against local law firms for the sake of foreign law firm . . . is beyond their authority."¹⁴⁶ The South Korean government also re-emphasized that these restrictions were allowed under the KORUS-FTA because the Korean government reserved the right to impose such restrictions in the third stage opening.¹⁴⁷ South Korea also maintained that three-stage liberalization was a strategic choice made by the government that looked at various precedents of legal market liberalization including from Singapore, Germany, and Japan.¹⁴⁸ As such, South Korea especially wanted to avoid German practice where most of domestic German law firms have been taken over by large American and British law firms after full liberalization.¹⁴⁹ Ten days later, the United States Ambassador to South Korea met with the Committee Chair and again expressed his concern about the potential diplomatic and trade disputes that could arise if South Korea insisted on including the proposed restrictions.¹⁵⁰ Despite these attempts, the National Assembly passed the draft amendment on February 4, 2016, with 190 votes in favor and five abstentions (excluding not present).¹⁵¹

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Hyun-ju, *supra* note 141.

¹⁴⁵ *Id.*

¹⁴⁶ Kim Ji-Young, *KORUS-FTA entered into force: legal market opening has begun*, YONHAPNEWS (Mar. 13, 2012), <http://www.yonhapnews.co.kr/bulletin/2012/03/12/0200000000AKR20120312150100004.HTM> L.

¹⁴⁷ *Id.*

¹⁴⁸ Young-gil Chua, *M&A Legal Markets in South Korea*, ETODAY (Oct. 15, 2015), <http://www.etoday.co.kr/news/section/newsview.php?idxno=1215967>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ KOREAN BAR ASS'N, *supra* note 99.

D. AFTERMATH OF THE THREE-STAGE IMPLEMENTATION OF THE KORUS-FTA ON LEGAL SERVICES

Although the final stage of the liberalization turned out to be more restrictive than foreign suppliers expected, it still changed the equilibrium of the Korean legal service market. However, assessing the actual impact of the market opening is beyond the scope of this paper. Based on the government reports and news articles, however, this paper highlights a number of changes that have occurred during the three-stage period.

First, foreign law firms have quickly expanded their presence in the mergers and acquisitions (“M&A”) market in which they already had competitive advantage before liberalization.¹⁵² For example, in 2015, fourteen out of the twenty largest M&A transactions in South Korea were completed by foreign law firms.¹⁵³ According to Bloomberg, among the top twenty law firms that provided services to 945 M&A cases, fourteen of them were foreign law firms.¹⁵⁴ In one M&A transaction, known to be the largest transaction made in South Korea,¹⁵⁵ clearly Gottlieb (US) and Freshfields (UK) represented the Korean seller and the buyer respectively, each with one Korean law firm at its side.¹⁵⁶ The legal fees that these foreign law firms collected are considered to be five to ten times more than that of the South Korean law firms.¹⁵⁷

Second, the area of international dispute settlement is likely to be more dominated by foreign law firms than it is currently.¹⁵⁸ In the patent dispute between Samsung and Apple in the United States from 2012 to 2014, Samsung did not select a South Korean law firm but instead was represented by a US law firm, Quinn Emanuel LLP..¹⁵⁹ The situation is

¹⁵² Chua, *supra* note 149; 韓 법률 시장 파고드는 외국 로펌들, 작년 대형 M&A 10건 중 6건 맡아, translated in Kim Asagi, *Foreign Law Firms in Korea Six of 10 large M & A Deals*, CHOSUN ILBO (April 27, 2016, 3:00 A.M.), http://news.chosun.com/site/data/html_dir/2016/04/26/2016042602319.html.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (“the MBK Partners, the largest private equity firm in South Korea, purchased South Korea’s large wholesale corporation, Homeplus, at 6.7 billion dollars”).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Jin Whan, Jung, *Four Years Since Legal Market opening*, HANKYUNG LAW & BIZ, Nov. 10, 2015, <http://www.hankyung.com/news/app/newsview.php?aid=2015111017131>.

similar in initial-public-offerings (“IPO”) in markets outside of South Korea.¹⁶⁰

Meanwhile, large Korean law firms have begun structural reforms such as specializing service areas and making client services more transparent.¹⁶¹ The managing partner of Kim & Chang, the largest law firm in South Korea, stated in a press interview that in order to remain competitive, Kim & Chang has intensified specialization and promoted comprehensive client services.¹⁶² The firm also created specialized teams to work closely and flexibly with foreign law firms.¹⁶³ At the same time, many partners at large Korean law firms have begun to establish their own boutique law firms in areas such as M&A transactions and international arbitration.¹⁶⁴ This is viewed as the first step to create a joint venture law firm with a foreign law firm’s Seoul office.¹⁶⁵

In addition, considerable numbers of Korean lawyers in Seoul relocated themselves to different cities and rural areas.¹⁶⁶ Traditionally, lawyers in South Korea were overwhelmingly concentrated in the capital city of Seoul.¹⁶⁷ Although relocation is largely driven by the high market competition in Seoul, in effect, this has resulted in making legal services more accessible to people living in other parts of South Korea.¹⁶⁸

South Korean law firms are also seeking new opportunities in foreign legal markets, particularly in other Asian countries such as Vietnam, Cambodia, Laos, and Indonesia.¹⁶⁹ One Korean law firm named Ji-Pyeong has six foreign offices abroad, which is the largest in number among Korean law firms.¹⁷⁰ Other medium and small-sized law firms

¹⁶⁰ *Id.*

¹⁶¹ *A Report on the Status of Korean Attorneys (Hanguk-Byeon-ho-sa Baekseo)*, KOREAN BAR ASS’N 5 (2009), <http://img.koreanbar.or.kr/plan/WP/%EC%A0%9C1%EC%9E%A5%20%EB%B3%80%ED%98%B8%EC%82%AC%20%ED%98%84%ED%99%A9.PDF>.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Jung Jin Whan, *Four Years Since Legal Market opening*, HANKYUNG LAW & BIZ (Nov. 10, 2015), <http://www.hankyung.com/news/app/newsview.php?aid=2015111017131>.

¹⁶⁸ *Id.*

¹⁶⁹ Chua, *supra* note 149.

¹⁷⁰ *Id.*

also express interest in entering foreign markets through partnerships with foreign law firms.¹⁷¹

IV. EVALUATING SOUTH KOREA'S THREE-STAGE LIBERALIZATION MODEL

This paper evaluates South Korea's three-stage liberalization model by conducting interviews with five Korean law professors and partners at large law firms and law schools. Some of the interviewees directly participated in developing the three-stage model and amending South Korea's Foreign Legal Consultant Act.¹⁷² At the outset, the interviewees shared a view that South Korea's three-stage liberalization model is effective in initiating a legal market opening. However, it may not liberate the market further, even after the final stage, if the government imposes restrictive domestic measures.

A. INTERVIEWEE PERSPECTIVES ON THE THREE-STAGE LIBERALIZATION MODEL

One interviewee stated that when South Korea initially contemplated liberalization in the mid-2000s, the government envisioned developing an institutional framework.¹⁷³ The government also intended gradual liberalization in order for domestic Korean law firms to remain competitive and adjust to a new market environment.¹⁷⁴ Korean lawyers likewise had substantial interest in keeping the market closed.¹⁷⁵ During the negotiation stage, the South Korean government carefully drafted the language to reserve its right to impose regulatory measures.¹⁷⁶ With this background, the South Korean government developed a three-stage liberalization model.¹⁷⁷ In this respect, the interviewee stated that South

¹⁷¹ KOREAN BAR ASS'N, *supra* note 162.

¹⁷² The interviews took place in South Korea between January 7 and 16, 2016. Each interview lasted for approximately two hours. The interviewees wish to remain anonymous. For citation purposes, the respective interviews will hereinafter be referred to as INT10012, INT10023, INT10034, INT10041, INT10050, INT10054, and INT10067.

¹⁷³ Interview 10012.

¹⁷⁴ Interview 10041.

¹⁷⁵ Interview 10012.

¹⁷⁶ Interview 10012; Interview 10034; KORUS-FTA, *supra* note 13, at Korea Annex II, ¶ (2)(c).

¹⁷⁷ KORUS-FTA, *supra* note 13, at Korea Annex II, ¶ (2)(c).

Korea, from the beginning, had not intended nor conditioned a full-fledged liberalization of legal service market.¹⁷⁸

Some interviewees pointed out that South Korea's unique legal market situation should be considered in evaluating the liberalization process.¹⁷⁹ South Korea's case is unique in that there are many Korean-national, or Korean-speaking, US-licensed attorneys practicing both in South Korea and in the United States.¹⁸⁰ Therefore, the interviewee stated that the South Korean legal industry had a reasonable concern about a potential large influx of Korean-speaking, US-licensed attorneys when the domestic market opened.¹⁸¹ These "foreign lawyers" look just like South Korean lawyers who could easily develop a client basis.¹⁸² Although the law limits their practice areas, it is likely that they provide services in the areas beyond the permitted scope.¹⁸³

Another interviewee stated that the legal market situation in South Korea has changed significantly since the time the three-stage model was developed in mid-2000s.¹⁸⁴ South Korean law firms are no longer in an "infant stage." They have grown both in size and capacity to remain competitive in a liberalized legal market.¹⁸⁵ South Korean lawyers also do not enjoy the same privileges and social status since the advent of the three-year law school system, which has generated approximately 1,500 lawyers each year.¹⁸⁶ Thus, they have less incentive to keep the market closed. Moreover, Korean law firms are no longer in an "infant stage."¹⁸⁷ As situations change, the three-stage liberalization model initially designed a decade ago should also change to allow more liberalization than the currently envisioned third stage market opening.

Considering individual measures included in the final stage opening, some interviewees stated that the government imposed foreign ownership control to prevent foreign law firms from entering into a joint venture with Korean law firms and using them as their branch offices.¹⁸⁸ For similar reasons, the government required foreign law firms to have at

¹⁷⁸ Interview 10012; Interview 10034.

¹⁷⁹ Interview 10012; Interview 10034.

¹⁸⁰ Interview 10034.

¹⁸¹ Interview 10012; Interview 10034.

¹⁸² Interview 10012; Interview 10034.

¹⁸³ Interview 10012; Interview 10034.

¹⁸⁴ Interview 10012.

¹⁸⁵ Interview 10012.

¹⁸⁶ Interview 10012; Interview 10034.

¹⁸⁷ Interview 10012; Interview 10034.

¹⁸⁸ Interview 10034; Interview 10050.

least three-years of normal operation in their home jurisdiction and maintain at least five foreign legal consultants who have practiced in their home country for five years or more to be qualified as a joint venture partner.¹⁸⁹

Some interviewees viewed these requirements as incompatible with market competition principles.¹⁹⁰ They believe such restrictions do not serve the interests of Korean clients or Korean lawyers.¹⁹¹ These interviewees stated that unless there are outweighing non-economic concerns, allowing pure market competition would lower the service fees and increase the quality of legal services.¹⁹²

Similarly, one interviewee stated that a measure requiring foreign legal consultants to have at minimum three-years of practice in the jurisdiction where they obtain a license is questionable.¹⁹³ When a foreign legal consultant passes the bar exam through a legitimate institution and provides legal advice on that jurisdiction's law, there seems to be no reason for a host country to impose such a time requirement.¹⁹⁴ Moreover, the interviewee stated that a few years of experience would probably not make a young lawyer more qualified to practice in South Korea.¹⁹⁵ Ultimately, Korean clients—not the government through regulations—will make decisions on which foreign legal consultants they want to hire. These clients are in a better position to assess which foreign legal consultants are qualified to provide legal services.¹⁹⁶

Finally, all interviewees agreed that the three-stage liberalization model is effective in *initiating* market opening. However, if too many restrictive regulatory measures are imposed, the model will not contribute to substantial liberalization. During the negotiation phase of the KORUS-FTA, foreign law firms anticipated that after the third stage opening, they would be able to provide a “one-stop service” through a joint venture law firm by providing legal services on both Korean law and foreign law.¹⁹⁷ The enacted restrictive measures, however, have

¹⁸⁹ Interview 10034; Foreign Legal Consultant Act, Act. No. 9524, Mar. 25, 2009, *translated by* The Korean Bar Association, (S. Kor.).

¹⁹⁰ Interview 10034; Interview 10067.

¹⁹¹ Interview 10067.

¹⁹² *Id.*

¹⁹³ Interview 10023.

¹⁹⁴ Interview 10023.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ Interview 10012; Interview 10034; Interview 10054.

denied such incentives.¹⁹⁸ The measures also offset the market benefits by requiring foreign law firms to “come under” the South Korean government’s regulations and supervision.¹⁹⁹ Even before the three-stage liberalization, foreign law firms were providing legal advice to Korean corporations from their branch offices in Hong Kong and other nearby countries.²⁰⁰ Regardless, the interviewees agreed that the actual impact of the third stage opening will only be seen once the bill is implemented in 2017.²⁰¹

B. IMPLICATIONS OF SOUTH KOREA’S THREE-STAGE LIBERALIZATION MODEL

Under the TPP and the KORUS-FTA, party countries have attempted to come to terms with domestic regulatory measures to remove or lower the second-generation barriers on foreign lawyers.²⁰² South Korea’s case illustrates struggles that the parties may experience when negotiating on domestic regulatory measures. The TPP countries can use South Korea’s example as a guide when implementing their own legal market opening commitments.

Based on South Korea’s case, the three-stage model enables a country to initiate market opening when there is a strong interest in the legal profession.²⁰³ A gradual liberalization reduces anxieties that domestic lawyers may have and prevents market turbulence.²⁰⁴ It also allows the government to assess and manage the market liberalization process.²⁰⁵ Yet, if the final stage opening includes restrictive measures, such as ownership control and qualification requirements, the three-stage model may not contribute much to the actual market opening.²⁰⁶ This is because foreign law firms might not find the final stage opening attractive as the regulatory restrictions negate the expected market benefits.²⁰⁷

¹⁹⁸ Interview 10034; Interview 10054.

¹⁹⁹ Interview 10034, Interview 10054.

²⁰⁰ Interview 10034.

²⁰¹ Interview 10012; Interview 10034; Interview 10054.

²⁰² See *supra* Part IV.

²⁰³ Interview 10054.

²⁰⁴ *Id.*

²⁰⁵ Jin Whan Jung, *Four Years Since Legal Market Opening*, HANKYUNG LAW & BIZ (Nov. 10, 2015), <http://www.hankyung.com/news/app/newsview.php?aid=2015111017131>.

²⁰⁶ *Id.*

²⁰⁷ See *supra* notes 56–61 and accompanying text.

Based on South Korea's example, this is especially true when the host country has already undergone a de facto market opening. In South Korea, Korean clients have long used foreign services for their exports and other cross-border transactions.²⁰⁸ There has also been a significant number of foreign legal consultants practicing in South Korea as employees of South Korean law firms.²⁰⁹ As such, if the final stage market opening places regulatory restrictions, lawyers will not find additional incentives to enter the market because there is no additional market benefit to gain *in practice*.²¹⁰

This de facto market opening and its effects are also recognized in academia as the "boundary-blurring effect."²¹¹ The boundary-blurring effect states that when the government regulation of transnational law practice is ambiguous, "the de facto market boundary between foreign and local law firms is constructed through a series of boundary-blurring processes."²¹² This in turn makes it difficult for the government to "make or enforce any substantive policy to clarify the market boundary between the two types of law firms."²¹³ In South Korea, even before foreign law firms were allowed to establish representative offices in Seoul, a boundary-blurring effect occurred. In the 1990s, South Korea sent a considerable number of students each year to study law in the United States.²¹⁴ Consequently, South Korea has an atypically large number of Korean-United States attorneys practicing in South Korea.²¹⁵ Absent regulations often times, these "Korean" foreign legal consultants in South Korea could interact directly with Korean clients, and sometimes provide legal services on Korean law.²¹⁶

Until recently, the South Korean government did not actively regulate foreign lawyers' activities in South Korea. Although South Korea's Foreign Legal Consultant Act ("FLC")²¹⁷ required foreign

²⁰⁸ See *id.*

²⁰⁹ See *supra* notes 61–65 and accompanying text.

²¹⁰ Jasper Kim, *Socrates v. Confucius: An Analysis of South Korea's Implementation of the American Law School Model*, 10 ASIAN-PAC. L. & POL'Y J. 322, 339 (2009).

²¹¹ *Id.*

²¹² Sida Liu, *Globalization as Boundary-Blurring: International and Local Law Firms in China's Corporate Law Market*, 42 LAW & SOC'Y REV. 771, 773 (2008).

²¹³ *Id.*

²¹⁴ Kim, *supra* note 212, at 337–38.

²¹⁵ Interview 10054.

²¹⁶ Young-gil Chua, *M&A Legal Markets in South Korea*, ETODAY (Oct. 15, 2015), <http://www.etoday.co.kr/news/section/newsview.php?idxno=1215967>.

²¹⁷ *Id.*

lawyers to be registered to practice in South Korea, only 89 foreign lawyers out of a thousand did so.²¹⁸ Most non-registered foreign lawyers, however, still hold themselves out as foreign legal consultants.²¹⁹ However, some of these foreign legal consultants have not even passed the bar in the United States. Some have only completed a Juris Doctor program.²²⁰ Due to a lack of government regulation, therefore, foreign lawyers could arguably *do more* in their practice than permitted.²²¹ This lack of regulation in turn created further *de facto* market opening.²²² Consequently, when the South Korean government introduced restrictive regulatory measures, foreign legal service suppliers did not find additional market incentives other than the ones they already had.²²³ At the same time, the restrictions placed an additional burden on them to come under the host country's institutional framework.²²⁴ Therefore, the foreign lawyers did not find the third stage market opening attractive.

This shows that if a host country desires to generate the market benefits of trade in legal services, it should consider whether there has been a *de facto* market opening that created market incentives *in practice*, although not *in law*. When a host country imposes regulatory measures, therefore, it should make sure that the measures do not remove market incentives that are *in addition to* the ones existing under a *de facto* market opening. At the same time, if a host country desires to achieve a conservative market opening, it can skillfully introduce regulatory measures that will only allow the same level of market access as the one that already existed under a *de facto* market opening, while removing additional incentives for foreign service suppliers to enter the market.

Although South Korea's legal market opening seemed to be the latter, its conservative three-stage liberalization model still generated some additional market benefits. First, foreign law firms that established a representative office in Seoul are now physically present in South Korea. Therefore, they can provide more localized legal services to their

²¹⁸ *Id.*

²¹⁹ "Are you a lawyer?" Rebellion controversy over US lawyer qualifications: "Welcoming the Mutual Life Plan", THE L (Feb. 3, 2016), <http://thel.mt.co.kr/newsView.html?no=2016020315538290843>.

²²⁰ Interview 10054.

²²¹ *Id.*

²²² Kim, *supra* note 212, at 337–38.

²²³ Interview 10056; Interview 10054.

²²⁴ Interview 10056.

existing clients.²²⁵ This enables them to develop closer relationships with South Korean clients and expand service areas.²²⁶ Foreign law firms can be more aware of the domestic market situations and corporate practices in South Korea.²²⁷ Furthermore, clients can now obtain legal services at a lower cost due to the competition among foreign law firms.²²⁸

Second, the three-stage liberalization model promotes certainty in laws and regulations to be applied and enforced on foreign legal service suppliers. Over the three-stages, South Korea created necessary boundaries as to the scope and types of legal practice permitted to foreign lawyers.²²⁹ The South Korean government also held a number of public hearings to clarify regulatory concerns.²³⁰ This process can be understood as boundary making.²³¹ As a result, the KORUS-FTA has essentially institutionalized the foreign lawyers' market practice that already existed in the shadow making clear what areas of law and to what extent foreign lawyers can provide legal services. One example shows that in 2015, the Korean Bar Association brought a case for the first time against a Korean law firm that employed foreign lawyers who were not registered under the FLC.²³² In the future, more reports are likely to be made to clarify the terms and requirements under the FLC.²³³

Legal certainty also helps foreign law firms provide better services to their clients doing business internationally.²³⁴ Often, lawyers have difficulty in advising these clients because there is not "a uniform regulatory system or a universal code of ethics."²³⁵ Multi-jurisdiction and multi-rules complicate foreign lawyers' practice in cross-border legal matters.²³⁶ For example, international law firms having clients in Brazil are often perplexed by the law that prohibits Brazilian lawyers from creating a formal alliance with foreign legal consultants because there is no clear guideline as to how the law will be interpreted and enforced in

²²⁵ Kim, *supra* note 212, at 337–38.

²²⁶ Nari Shin, *Wise-spread illegal practice by foreign lawyers*, DONGA (July 4, 2015), <http://news.donga.com/3/03/20150724/72680460/1>.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ KORUS-FTA, *supra* note 13, at Korea Annex II.

²³⁰ KORUS-FTA, *supra* note 13, at Korea Annex II.

²³¹ Kim, *supra* note 212, at 324.

²³² Shin, *supra* note 228.

²³³ Interview 10054.

²³⁴ DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY 2* (1995).

²³⁵ Shin, *supra* note 228.

²³⁶ *Id.*

practice.”²³⁷ The same is true for foreign law firms providing legal advice to clients in South Korea. As the three-stage liberalization process not only sets boundaries for laws and regulations but also allows gradual implementation of them, foreign law firms may be able to provide more accurate and detailed legal advice to their clients concerning business in South Korea.

The three-stage liberalization model also promotes negotiations between party countries to develop rules and regulations on trade in legal services. As stated earlier, both the KORUS-FTA and the TPP follow the general structure of the GATS and developed further the rules related to domestic regulation. This developing process is identified as “California Effect,” first introduced by David Vogel,²³⁸ which states “trade and agreements . . . affect not only the flow of goods among nations, but also the movement of regulations across national boundaries. Nations are thus increasingly importing and exporting standards as well as goods.”²³⁹ Accordingly, parties entering into a trade agreement have a first-mover advantage in developing a legal framework on trade in legal services. Recognizing this California Effect, Beth Simmons, an international affairs scholar at Harvard University, stated, “the dominant regulator in a market has the potential to change the market and regulatory situation for the rest of the world.”²⁴⁰

Overall, South Korea’s three-stage liberalization model represents a successful attempt to balance the interests of different groups in the context of the country’s unique legal market situation. It created an institutional framework that facilitated the liberalization process, yet at the same time, subsided domestic resistance by adopting a step-by-step market opening approach. At the same time, the South Korean experience also demonstrated that if too many restrictions are applied, the actual liberalization effect may not occur, especially when

²³⁷ *Id.*

²³⁸ See David Vogel, *Environmental Regulation and Economic Integration* 3 (Oct. 1999) (unpublished manuscript), http://www.iatp.org/files/Environmental_Regulation_and_Economic_Integrat.pdf.

²³⁹ VOGEL, *supra* note 236, at 2. See generally, Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, (date, time), https://dash.harvard.edu/bitstream/handle/1/3382976/international_politics.pdf?sequence=2.

²⁴⁰ Dominique Sinopoli & Kai Purnhagen, *Reversed Harmonization or Horizontalization of EU Standards?—Does WTO Law Facilitate or Constrain the Brussels Effect?* (Law & Governance Grp., Wageningen Working Paper, 2016) (quoting Beth Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, in DYNAMICS OF REGULATORY CHANGE: HOW GLOBALIZATION AFFECTS NATIONAL REGULATORY POLICIES 42–71 (David Vogel & R. A. Kagan, eds., 2004)).

there has been a de facto market opening. Given the similarities between the TPP and the KORUS-FTA texts on trade in legal services, South Korea's case can be used as a helpful guide²⁴¹ when the TPP countries as well as the other GATS member states develop and implement their commitments to liberalization of trade in legal services.

V. CONCLUSION

Liberalization of trade in legal services is an ongoing process in Asia. The texts of the TPP and the KORUS-FTA on legal services show how Asian party countries have continued the GATS's multilateral effort to come to terms with domestic regulatory measures. South Korea's three-stage liberalization process is an example of the party countries' struggle to negotiate on domestic regulatory measures. It shows that the existence of domestic regulatory barriers can significantly undermine the liberalization process, although it may still generate some market benefits.

Based on the South Korea case, this paper concludes that the three-stage liberalization model is effective in initiating the liberalization process, but its actual impact on legal market opening may be undermined, if the host country imposes restrictive domestic regulatory measures in the final stage. This is especially true when the host country has experienced a de facto legal market opening through a boundary-blurring process. This is because domestic regulatory measures can negate additional market incentives *other than* those that existed under the de facto market opening, and by taking those incentives away, fail to attract foreign legal service suppliers' interests in entering the host country's legal service market.

Nevertheless, even a conservative market opening such as in South Korea may still generate a number of benefits including reducing uncertainty in laws and regulations, encouraging market reforms, creating additional market gains, and allowing the parties to seize a first-mover advantage in developing an international legal framework. Therefore, South Korea's legal market opening process and its three-stage liberalization model can be a helpful guide for the TPP parties and the WTO member states to consider various factors involved in the

liberalization process and make strategic decisions in implementing their own commitments.