National Chaos?: Would the Indirect Expropriation Provisions of the Korea-US FTA Destroy the Korean Land Use System?

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Abstract: There have been on-going debates and concerns over whether the Korean land use system, which was built on a theory of strong social obligation on property rights, will be destroyed by the indirect expropriation clause under Chapter 11 of KORUS-FTA. Most of these concerns, however, are exaggerated, as they fail to recognize the international trends of indirect expropriation clauses and the similarities among U.S., international, and Korean laws. This article explores how the KORUS-FTA indirect expropriation clause will affect the Korean land use system. It demonstrates that, although Chapter 11 of KORUS-FTA presents the risk of encroaching upon national sovereignty, the FTA may actually force Korea to enhance its standards governing property rights and make the land use system more systematic and consistent with the Korean Constitution. To do this, the article summarizes the history of indirect expropriation principles in international law and U.S. regulatory takings laws, and describes the Korean land use and legal systems. By means of comparison, it analyzes what types of conflicts may arise when two different legal systems collide in the course of mutual investment by two nations. The article concludes with a discussion of how the Korean land use system could be improved in the FTA era.

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I. INTRODUCTION

The Republic of Korea ("Korea") and the United States ("U.S.") signed the Korea-U.S. Free Trade Agreement ("KORUS-FTA") on June 30, 2007, and are now awaiting ratification by the Korean and U.S. legislatures. It is anticipated that if the FTA enters into effect, it will significantly reduce trade barriers and thereby expand the flow of trade and investment between both countries.

However, there has been huge public debate in Korea over the agreement. In particular, the inclusion of "indirect expropriation" in Chapter 11 of the FTA, by which a foreign investor may bring suit against a host government, has sparked great controversy. Many news media outlets and scholars have expressed concerns and even fear that the indirect expropriation clause will, *inter alia*, destroy much of the Korean land use system. They mainly argue that, 1) due to

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5 *See id.* ("Korea is the United States’ seventh largest goods trading partner, with two-way goods trade in 2006 valued at approximately $78 billion.")


7 *See id.*
the unique situation in Korea where social obligations on property rights are emphasized and the concept of public ownership to land is promoted, the Korean land use system requires more restrictions on property rights than the U.S. system, 2) that, as a result, there may be numerous Korean laws and regulations that constitute indirect expropriation under the FTA’s standards, and 3) therefore, foreign investors will cause much of the Korean system to collapse.\footnote{See id.} In addition, some legal scholars assert that since the notion of indirect expropriation goes beyond the scope of property rights protected by the Korean Constitution, it would seriously conflict with the Korean legal system.\footnote{See generally Min-ho Kim, Under The Current Korean Constitution, Whether Indirect Expropriation Is Constitutional or Not?, 96 JUSTICE 3 (2007) (arguing that indirect expropriation should be distinguished from regulatory takings in that with indirect expropriation, the property value reduced indirectly by all government actions which are not limited to the regulations aimed at the affected property, while with regulatory takings the property value is directly affected by government regulations adopted for the affected property. Such an expanded meaning of expropriation is not recognized in the Korean Constitution or legal system and therefore, the adoption of indirect expropriation should not be allowed.)}

Such criticism, however, is clearly exaggerated. It is true that the Korean land use system was built on the strong principle of favoring social obligations over private property rights.\footnote{See Jeeyeop Kim & Jongdae Jung, A Comparative Study of the Land Use Systems of Korea and the U.S. with a Focus on Property Rights under the Constitution, 42-4 NAT’L LAND PLANNING 7, 8-12 (2007); see also Kwun Sup Chung, A Legal Assessment on the Public Concept of Land Law in Korea, 18 LAND LAW 243 (2002).} It is also true that when Korea was pursuing rapid economic development under a strong central government, the Korean legislature and courts did not consider seriously for the constitutional requirement, which compels compensation for not only expropriation but also severe interference
equivalent to expropriation.\textsuperscript{11} In particular, while the United States has developed the concept of a “regulatory taking” over hundreds of years in order to strike a balance between necessary land use regulations and private property rights, Korea began to recognize the regulatory takings paradigm only after the Green Belt case of 1998.\textsuperscript{12} There, the Korean Constitutional Court held that the effect of a taking should be acknowledged when government regulation exceeds the ordinary social obligation that a property owner should endure for the public interest.\textsuperscript{13} Because the development of most Korean laws or institutions for land use control has been based mainly on the government’s police power rather than on a sound legal foundation,\textsuperscript{14} the Korean land use system may be vulnerable under the indirect expropriation provisions of Chapter 11.

Nevertheless, the impact of the FTA’s indirect expropriation provision would neither seriously conflict with the Korean legal and land use systems, nor be as disastrous or chaotic as the critics fear. In contrast to the common belief that the U.S. system protects property rights more than the Korean system does, the fundamental limits on property rights embedded in the Korean Constitution and legal system are not stricter than those in the United States. The Korean Constitution clearly mandates that just compensation be provided when a “restriction”, “condemnation” or “public use” occurs.\textsuperscript{15} Also, like the U.S. system, the Korean legal system requires that several legal principles be met in order for a land use regulation to be valid. In

\textsuperscript{11} See id. at 16-17.

\textsuperscript{12} See id. at 22-23.

\textsuperscript{13} See 89 HEON-MA(헌마) 214, 90 HEON-BA(헌바) 16, 97 HEON-BA(헌바) 78 BYEONGHAP(병합) (Const. Ct. 1998) [hereinafter Green Belt case].

\textsuperscript{14} See Kim & Jung, supra note 10, at 21-24.

\textsuperscript{15} See CONSTITUTION OF THE REPUBLIC OF KOREA [hereinafter KOR. CONST.], art. 23(3).
addition, Korea has been making efforts to improve the system since the 1990s.\textsuperscript{16} Built
fragmentally and unsystematically throughout Korea’s unique history, the Korean land use
system is now following a path that is not too different from the goals of U.S. takings laws.
Indeed, although the Korean courts have yet to accept the term “regulatory taking”, the Korea
Constitutional Court has used rationales and principles similar to those adopted by U.S. courts
and international tribunals.\textsuperscript{17} Furthermore, the historical trend in international law has been to
deer to a sovereign’s power to legislate for the public interest, as is evidenced in U.S. takings
laws.\textsuperscript{18} In this context, KORUS-FTA has added more specific and deliberate wording to the
Annex for Chapter 11 so as to reflect Korea’s approach to land use control.\textsuperscript{19} Consequently,
although some negative impact might be inevitable, it is unlikely that the Korean land use system
will be critically hampered by KORUS-FTA. Rather, a positive aspect of the agreement is that
KORUS-FTA will accelerate the movement toward improving the Korean land use system to
produce a more consistent and systematic structure.

The purpose of this paper, therefore, is to explore how the indirect expropriation clause
under Chapter 11 of KORUS-FTA will affect the Korean land use system. Although the judicial
decisions of Korea and the international tribunals do not have precedential weight, examining

\textsuperscript{16} See Kim & Jung, \textit{supra} note 10, at 24.

\textsuperscript{17} See Greenbelt case, \textit{supra} note 13; see also 95 HENO-BA(헌바) 49 (Const. Ct. 1999) [hereinafter Cap of Land
Ownership Law case]; 97 HEON-BA(헌바) 26 (Const. Ct. 1999) [hereinafter Public Facility case].

\textsuperscript{18} See J. Martin Wagner, \textit{International Investment, Expropriation and Environment Protection}, 29 GOLDEN GATE U.
L. REV. 465, 466 (1999); see also Michael G. Parisi, \textit{Moving Toward Transparency? An Examination Of Regulatory

\textsuperscript{19} See KORUS-FTA, \textit{supra} note 3, annex 11-B.
previous cases relating to indirect expropriation may provide some clues as to the future outcomes of similar claims under KORUS-FTA. Additionally, comparing the Korean and U.S. land use systems will give some sense of the types of conflicts that may arise when two different systems collide in the course of the two nations’ investing in one another. To do so, this paper will first trace how the meaning of indirect expropriation has developed in international law from BIT to KORUS-FTA. Next, it will describe the Korean land use and legal systems, and compare the Korean standards for indirect expropriation with U.S. regulatory takings paradigms. Based on these findings, it will discuss what conflicts are likely to impact the Korean land use system and how Korea should prepare for the FTA era.

II. INDIRECT EXPROPRIATION IN KORUS-FTA

The Expropriation and Compensation Clause of the KORUS-FTA’s Chapter 11 provides one of the most fundamental protections for foreign investors, along with ‘National Treatment,’ ‘Most Favored Nation Treatment,’ and ‘Minimum Standard of Treatment’ clauses. In short, it prohibits any form of expropriation by a State. A State, however, may directly or indirectly expropriate or nationalize investment if four requirements are met: 1) it is done for a public purpose, 2) in a non-discriminatory manner, 3) with prompt, full and adequate compensation, and 4) in accordance with due process. If a violation occurs, an individual investor may bring suit against the State party to the International Center for Settlement of Investment Disputes

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20 See KORUS-FTA, supra note 3, art. 11.3-11.6.
21 Id. art. 11.6.
22 Id.
(“ICSID”) or the United Nations Commission on International Trade Law (“UNCITRAL”) pursuant to the Investor-State Dispute Settlement mechanism under Chapter 11 Section B. The expropriation and compensation provision has been evolving since the late 1930s, when so-called the “Hull Formula” was proposed as an expropriation standard in international law. Today, almost every multilateral investment treaty agreement includes such a clause.


24 In response to the nationalization by the Mexican government of an American petroleum company in 1938, U.S. Secretary of State Cordell Hull posited that “prompt, adequate, effective” compensation should be required by international law. See Andreas F. Lowenfeld, INTERNATIONAL ECONOMIC LAW 397-402 (2002). This principle was incorporated into the U.S. standard on expropriation. See Restatement (Third) of Foreign Relations Law of the United States §712(1) (1987). In contrast, most developing countries, Latin American countries, and socialist countries in the 1960s preferred the Calvo Doctrine arguing that a State should have freedom in treating expropriation and compensation. See Vicki Been & Joel C. Beauvais, The Global Fifth Amendment? NAFTA’s Investment Protections And The Misguided Quest For An International “Regulatory Takings” Doctrine, 78 N.Y.U. L. REV. 30, 47-48 (2003).

25 Provisions with almost identical wording have been found in more than 1,500 BITs. See Daniel M. Price, NAFTA Chapter 11-- Investor-State Dispute Settlement: Frankenstein or Safety Valve?, 26 CAN-U.S. L.J. 1, 2 (Supp. 2001).
Direct expropriation is fairly recognized. However, distinguishing legitimate non-compensatory regulations that affect the value of property or an investment from indirect expropriation is not an easy task. The meaning of indirect expropriation is any government action, measure or regulation which has a similar effect to direct expropriation. In international law, it has been referred to as “creeping expropriation,” “de facto expropriation” or “constructive taking,” and is analogous to the U.S. concept of a regulatory taking. Thus, although a State may impose burdens or restrictions on property or investments for a public purpose, “if regulation goes too far it will be recognized as a taking.” Yet, as seen in the history of U.S. regulatory takings laws, there is no clear standard to follow in drawing the line between police power without compensation and a regulatory taking requiring compensation. The task has largely been left to the ad hoc decisions of tribunals. Moreover, since the decisions of international tribunals have no precedential value, it is more difficult to anticipate a decision in the international treaty context. Nevertheless, the trend of tribunals examining alleged instances

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26 Direct expropriation occurs when “an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.” KORUS-FTA, supra note 2, annex 11-B(2); see also, for example, Banco Nacional de Cuba v. Sabbatino, 307 F.2d 845 (2d Cir. 1962) (where the Cuban Government seized an American sugar and oil company.)

27 See KORUS-FTA, supra note 3, annex 11-B(3).


29 Indeed, the Iran-U.S. Claims Tribunal treats indirect expropriation as identical to a U.S. regulatory taking. See Allahyar Mouri, supra note 28, at 70-72.

30 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
indirect expropriation has been to defer to the State’s police power to protect or promote the public welfare.\textsuperscript{31} KORUS-FTA is not an exception to this trend.

A. Historical Evolution of the Standards on Indirect Expropriation

After the first Bilateral Investment Treaty (“BIT”) concluded between Germany and Pakistan in 1959, the United States launched its own BIT program by adopting the U.S. Model BIT, which was based on the U.S. international law standard on expropriation.\textsuperscript{32} The Model BIT adopted the language “indirect expropriation” and “measures tantamount to expropriation,”\textsuperscript{33} and the definition of investment was expanded to “every kind of investment.”\textsuperscript{34} This language was

\textsuperscript{31} See Parisi, supra note 18, at 385-386.


incorporated into the North American Free Trade Agreement (“NAFTA”). Yet, although the scope of indirect expropriation was expanded even further by use of the language “take a measure tantamount to nationalization or expropriation of such an investment,” NAFTA’s Chapter 11 did not contain any standard for identifying an indirect expropriation. Moreover, since the decisions of international tribunals do not have precedential value, there has been no consistency among the indirect expropriation cases. The significant legal standards the tribunals have used in 22 cases involving indirect expropriation claims so far can be summarized as: “1) the effects of the government action [Metalclad]; 2) reasonable reliance by the investor [Metalclad]; 3) degree of interference with a property right or the extent of the economic harm suffered [Pope]; 4) the duration of the economic harm [S.D. Myers]; and 5) the character of the government action [S.D. Myers].”

Many scholars have criticized NAFTA’s Chapter 11 provision for going beyond U.S. regulatory takings laws, and the U.S. government also realized that this broad definition of indirect expropriation could result in the undesirable situation of having a legitimate regulation for public welfare hindered by an individual investor under Chapter 11. At last, the United

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38 There are three major criticisms of NAFTA: first, Chapter 11 decisions adjudicating claims of alleged “denial of justice” in U.S. courts threaten the finality of judicial decisions; second, the specter of NAFTA liability deters governmental regulation of health, the environment, and other public interests; and third, NAFTA provides foreign
States enacted ‘The Bipartisan Trade Promotion Authority Act (“TPA”)’ in 2002 in order to protect government police power by narrowing the scope of indirect expropriation. In particular, the TPA requires that the indirect expropriation provisions of FTAs be “consistent with United States legal principles and practice.” 39 It also prohibits foreign investors from having more rights than domestic investors. 40 In this respect, the US-Chile FTA and the US-Singapore FTA were turning points in which the United States adopted more deliberate language in order to narrow the NAFTA’s expanded scope of indirect expropriation. 41 In these agreements, “take a measure” was removed and “tantamount to” was substituted with “equivalent to,” so as to keep the scope of indirect expropriation from expanding beyond customary international law. 42 In addition, by adding an annex which states that non-discriminatory regulations for public welfare, such as public health, safety, environment, will not amount to indirect expropriation, the new Chapter 11 ensured that a State’s legitimate police power, which had not been defined in international law, would not fall within the scope of indirect expropriation. 43 Furthermore, the “three-part test” from Penn Central Transportation Co. v. New York City 44 and the “all economic loss test” from

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40 Id. §3802(b)(3).
41 See Parisi, supra note 18, at 415-416.
42 See Muse-Fisher, supra note 33, at 506.
43 See id. at 523; see also Gary Sampliner, Arbitration of Expropriation Cases Under U.S. Investment Treaties: A Threat to Democracy or the Dog that Didn't Bite?, 18 ICSID REV. – FOREIGN INV. L.J. 1, 21-22 (2003).
Lucas v. South Carolina Coastal Council\textsuperscript{45} were incorporated to give a more object standard for determining indirect expropriation.\textsuperscript{46} Such provisions, as seen in U.S. regulatory takings laws, reflect the current trend and consensus that a State’s police power should not be deterred by a foreign investor.\textsuperscript{47}

B. U.S. Regulatory Takings Laws as Sources of Indirect Expropriation

U.S. regulatory takings laws have provided legal sources for interpreting the indirect expropriation provisions in the FTAs. Indeed, the standards adopted in Penn Central and Lucas have become the most critical tools for determining indirect expropriation in international tribunals and the TPA also encourages following U.S. legal principles and practices for purposes of the treaty.\textsuperscript{48} Thus it is likely that the FTA tribunals will refer largely to U.S. takings laws


\textsuperscript{46} See Parisi, supra note 18, at 417; see also, U.S.-Chile FTA, May 6, 2003, U.S.-Chile, annex 10-D, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA_Texts/Section_Index.html; see also Letter from Robert B. Zoellick, U.S. Trade Representative, to George Yeo, Minister of Trade and Industry Singapore (May 6, 2003), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file58_4058.pdf; see also Letter from George Yeo, Minister of Trade and Industry Singapore, to Robert B. Zoelick, U.S. Trade Representative (May 6, 2003), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/asset_upload_file58_4058.pdf

\textsuperscript{47} Parisi, supra note 18, at. 425.

\textsuperscript{48} See 19 U.S.C. §3802(b)(3)(D) (2004); for more discussion, see also Muse-Fisher, supra note 33, at 526-529.
when interpreting the provision, although it would be impossible for the current FTA standards to cover all of the U.S. regulatory taking laws.\footnote{One scholar anticipates that “the U.S. principles may ultimately shape the scope and extent of expropriation protection offered to investors.” \textit{See} Parisi, \textit{supra} note 18, at 425.}

While it would be impossible to summarize the U.S. regulatory takings laws in one page, the somewhat clear distinction between non-compensatory regulation and regulatory taking may be described through several remarkable cases. Most notably, the court in \textit{Lingle v. Chevron U.S.A. Inc.} classified regulatory takings laws into four categories.\footnote{See \textit{Lingle v. Chevron U.S.A. Inc.}, 544 U.S. 528.} The first and second are so-called ‘per-se takings’, such as in \textit{Lucas v. South Carolina Coastal Council}, when a land owner is deprived of 100\% economical beneficial value\footnote{See \textit{Lucas}, 505 U.S. 1003.}, and as in \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, where a permanent physical invasion occurred.\footnote{\textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419 (1982).} These two categorical cases are relatively clearly discerned. The third category concerns exaction cases where the government places a burden on property in return for issuing a building permit. This is reflected by the “essential nexus” test in \textit{Nollan v. California Coastal Commission}\footnote{\textit{Nollan v. California Coastal Commission}, 483 U.S. 825 (1987).} and the “rough proportionality” test in \textit{Dolan v. City of Tigard}.\footnote{\textit{Dolan v. City of Tigard}, 512 U.S. 374 (1994).} The last category is where the court considers balancing, factual circumstances, and ad hoc analyses in determining whether a regulatory taking has occurred, such as in the \textit{Penn Central} case.\footnote{\textit{See Penn Cent. Trans. Co.}, 438 U.S. 104; \textit{see also}, for example, Pope & Talbot v. Canada or S.D. Myers v. Canada, \textit{supra} note 34.} In addition to these four categories, interference
with the transfer of property ownership, as seen in *Hodel v. Irving*, may constitute regulatory taking.\(^{56}\) However, in *Tahoe-Sierra* a temporary 32-month moratorium did not amount to a regulatory taking.\(^{57}\)

Except for clear examples such as per-se takings, the U.S. courts still rely on the *Penn Central* court’s ad hoc, factual determination analysis based on the three-part test, rather than on any categorical rules for a regulatory taking.\(^{58}\) Nevertheless, it seems clear that the U.S. courts and the international tribunals have focused on the quality of the government’s action and its impact on the landowner, and that they agree that mere diminution of the property value alone is not sufficient to constitute a regulatory taking or indirect expropriation.\(^{59}\)

**C. The Indirect Expropriation Clause in KORUS-FTA**

Most importantly, through the use of more detailed language and footnotes, Korea has tried to avoid any adverse situations in which essential laws or legal tools to regulate land use could be hindered by a foreign investor. Moreover, in response to fear that the FTA may disrupt the Korean land use system, the language regarding indirect expropriation has been drafted with more care to reflect Korea’s emphasis of social obligations over property rights and promotion of the concept of public ownership to land in real estate policy. The Korean government tried to


\(^{58}\) Muse-Fisher, *supra* note 33, at 510.

adopt more safeguards so that legitimate and necessary regulations to control land use do not amount to indirect expropriation under the FTA.

Above all, the scope of “investment” protected has been significantly reduced by making sure that “market share, market access, expected gains, and opportunities for profit-making are not, by themselves, investments.”

Notably, ‘market share’ in *S.D. Meyers* and ‘market access’ in *Pope & Talbot* were considered to constitute protected investments.

In addition, although the basic structure and wording remain almost same as in the previous FTAs, *Penn Central’s* three-part test has been buttressed with additional language.

First, in the “reasonable investment-backed expectations” test, language has been added to the footnote to indicate that the reasonableness of an investment-backed expectation depends on “the nature and extent of governmental regulation in the relevant sector.” Such language ensures that investors may expect stricter regulations or the possibility of change of regulation especially when entering a heavily regulated sector. This test was also used in *Methanex* as one of the important standards for determining indirect expropriation.

Second, in testing “the character of the government action,” KORUS-FTA explains that a possible consideration to test would be whether a government regulation imposes a special sacrifice exceeding the normal burden to be endured for public interest on a particular investor or investment. This “special sacrifice” test is one of the major standards on which the Korean courts have relied in determining “interference

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60 KORUS-FTA, *supra* note 3, art. 11.28, footnote 13.

61 See *supra* note 34.

62 KORUS-FTA, *supra* note 3, annex 11-B

63 *Id.*, annex 11-B, footnote 18.

64 *Id.* annex 11-B(3)(a)(iii); see also *Methanex* Corp. v. United States, 44 I.L.M. 1345.

equivalent to expropriation” of Korean regulatory takings. Third, in the “rare circumstances” clause, “real estate price stabilization” has been added to the list of the legitimate public welfare objectives, which are not deemed to be indirect expropriation, along with “public health, safety, the environment.”

Stabilizing real estate and housing prices is one of the highest priorities that the Korean government has pursued to control real estate speculation, a serious social problem in Korea.

Merely considering these language changes and additions, it seems that the KORUS-FTA is armed with a stronger and clearer shield against indirect expropriation claims than are previous FTAs. Nevertheless, ambiguity still remains, inter alia, in the phrase “rare circumstances” where even legitimate, non-discriminatory measures or regulations imposed for the listed public objectives may constitute indirect expropriation.

### III. THE LEGAL SYSTEM FOR LAND USE CONTROL IN KOREA

General belief that the Korean land use system is much stricter than that of the United States results mainly from the different fundamental conceptions of property rights in each country. Traditionally, private property rights in the United States, inherited from English common law, were seen as absolute rights. It was only in the late nineteenth century that

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66 Id. annex 11-B(3)(b).


68 KORUS-FTA, supra note 3, annex 11-B(3)(b).

“American courts began to struggle with the problem of reconciling private property rights with the emerging social interest that demanded some sort of land use regulation.”\textsuperscript{70} In contrast, property rights in Korea are viewed more as a social obligation.\textsuperscript{71} Furthermore, the Korean national and local governments have been attempting to adopt the concept of public ownership to land not only to control real estate speculation, which is regarded as a serious social ill in Korea, but also to stabilize housing prices.\textsuperscript{72}

Nevertheless, the current Korean system for land use control is not appreciably stricter than that of the United States. Although the origin, history, and structure of the Korean land use system differ from that of the United States,\textsuperscript{73} the systems of both countries do share most of the

\textsuperscript{70} Id.

\textsuperscript{71} See generally Chung, supra note 10.


\textsuperscript{73} Korea’s modern legal and land use systems, established by the Japanese Colonial Government in the early 1900s, are based on civil law and a zoning system originated in Germany. Korea’s modernization began in the late nineteenth century as Korea, then the Chosun Dynasty, “first opened its door to foreign forces that claimed their respective interests” and “was soon followed by Japanese colonial rule (1910-1945).” Won-young Kwon & Kwang-joong Kim, \textit{URBAN MANAGEMENT IN SEOUL: POLICY ISSUES AND RESPONSES}, Seoul Dev. Instit. (2001), at 4. During this period, the Japanese Colonial Government created completely new legal, political, and economic systems in order to control the Korean colony and exploit its resources. \textit{See id.} at 7. The Japanese government created, among other things, modern land control laws, which became the foundation for Korea’s land use system. First, it established individual property ownership, which had not been granted to citizens until then because the King had owned all the land in the country and enacted the Chosun Eminent Domain Law in 1911. \textit{See} Yoonseok Woo, \textit{The Problems of the Current Compensation Laws and the Main Schemes of the Draft on the Property Compensation
basic, underlying principles for regulating land use. At the most basic level, the constitutions of both countries protect property rights and require compensation when takings occur for a public purpose.\footnote{See KOR. CONST., supra note 15, art. 23.} The use or enjoyment of property may be limited to some extent, however, so as not to interfere with the public welfare or objectives for which the government is granted authority to place some burden on property rights.\footnote{KOR. CONST., supra note 15, art. 15.} Any legislation affecting property rights must have a legitimate purpose and the means adopted must not exceed the goals of the legislation.\footnote{See U.S. CONST., amend. XIV.}

In Law, 70 HOUSING (2001). Second, it enacted the first land control law, the Urban District Building Control Law, in 1913 to regulate the basic form and materials of buildings. See Jeong-hee Moon & Byeong-ryeol Lee, A Study on the Thought of City Planning at the Aspect of Changes of City Planning Law in Korea, 49 NAT’L LAND PLANNING 5 (1987). Third, and most importantly, the Chosun Urban District Planning Act (the first modern land use law based on a zoning system originated in Germany) was enacted in 1934 mainly for the purpose of developing Japanese military bases to invade China. See id. at 8. After gaining independence in 1945, the first Korean government was established and the Constitution was enacted in 1948. The Constitution guaranteed private property rights for the first time in Korean history. See KOR. CONST., supra note 15, art. 15. However, the Chosun Urban District Planning Act continued in effect until 1962 when the Act was transformed into two primary land use laws in Korea: the Urban Planning Act and the Building Act. These two laws functioned as the most fundamental laws for Korea’s land use control until 2002 when the Urban Planning Act and the National Land Planning Act were incorporated into the National Land Planning and Utilization Act (“NLPUA”).

\footnote{See KOR. CONST., supra note 15, art.27(1) and U.S. CONST., amend. V & XIV; The U.S. Constitution does not create or guarantee property rights in itself. Rather, the Takings Clause and Due Process Clause protect infringement of such rights by other laws and regulations. See A.J. van der Walt, Constitutional Property Clauses: A Comparative Analysis 121, 124 (1999).}

\footnote{KOR. CONST., supra note 15, art. 23.}

\footnote{See U.S. CONST., amend. XIV.}
addition, the use or enjoyment of property may be limited by adjoining property owners based on nuisance or servitude.\textsuperscript{77}

Despite such similar foundational principles, property rights in Korea were frequently ignored by public goals and there was little effort to reflect the constitutional rights in the land use system.\textsuperscript{78} As a result, although the techniques and tools to implement the land use system have been extensively developed in Korea, a sound legal foundation has not been established and the system has been criticized as fragmented and unsystematic.\textsuperscript{79} However, Korea has been making efforts, particularly since the late 1990s, to make the system reasonable and systematic so as to reconcile the concept of individual property rights with the promotion of the public welfare.\textsuperscript{80} Indeed the Korean Constitutional Court declared unconstitutional three major laws that were adopted in late 1980s to implement the concept of public ownership to land,\textsuperscript{81} and first acknowledged of the existence of a “restriction” amounting to a taking in the \textit{Green Belt} case of 1998.\textsuperscript{82} Now some areas of the Korean land use system provide more protections for private land owners than the U.S. system does.

This section will provide an overview of the Korean land use system to give a sense of the similarities and differences from the U.S. system. To do this, it will first describe the basic

\textsuperscript{77} See CIVIL ACT, art. 216 - 219, 237, 239, 240, 241, 244.

\textsuperscript{78} See generally Kim & Jung, \textit{supra} note 10.

\textsuperscript{79} See id.

\textsuperscript{80} See id.

\textsuperscript{81} The three laws were “The Cap of Land Ownership Act,” “The Tax for Excess Income in Real Estate,” and “The Development Impact Fees.” See Byung Ro Min, \textit{The Guarantee and Limit of Property Rights in the Constitution}, 22 LAND LAW 279 (2006).

\textsuperscript{82} See Green Belt case, \textit{supra} note 13.
land use system, legal structure and principles. Then, it will explore the constitutional requirements in Korea for regulatory takings and examine how Korean courts interpret these requirements. Finally, it will compare the U.S. regulatory takings laws, the indirect expropriations under the FTA and the Korean system.

A. The Korean Zoning System

As in the United States, Korean land use control is based on a zoning system. Regulations to restrict or guide development activity, such as land use, FAR (Floor Area Ratio), height, or open space ratio, are applied according to the relevant zoning laws. The Korean zoning system, however, is much more complicated than the U.S. system. Specifically, there are three layers in the Korean zoning system: areas, districts and zones. The National Land Planning and Utilization Act (“NLPUA”), the primary land use law in Korea, divides the national land into urban, management, farm, and natural environment protection areas. The urban area is further

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83 See generally Soontak Seo, Improvement and its Limits for Land Use Regulations Reform, URBAN INFORMATION (Mar. 2003), at 3.

84 ‘Zoning Area’ is defined as an area designated under urban management plan by which land use, lot coverage ratio, floor area ratio, and height are regulated in order to lead to the economical, efficient use of national land and to promote public welfare. NLPUA, infra note 87, art. 2 §15.

85 ‘Zoning District’ is defined as an area designated by an urban management plan in order to promote aesthetic, landscape, and safety and to strengthen the land use in a zoning area by modifying the density regulations, such as land use, lot coverage ratio, floor area ratio, and height, under the designated zoning area. Id. art. 2 §16.

86 ‘Zoning Zone’ is designated to guide planned, gradual and comprehensive development and to prevent sprawl by amending density regulations. See id. art. 38 - 40.

87 NATIONAL LAND PLANNING AND UTILIZATION ACT [hereinafter NLPUA], art. 6.
divided into residential, commercial, manufacturing, and green areas.\textsuperscript{88} Zoning districts (such as landscape, aesthetics, height, fire-prevention, or preservation districts) and zones (such as Green Belt Zones or Urbanization Management Zones) may be overlapped to achieve a special purpose or to implement a specific project.\textsuperscript{89} Additionally, a local government may designate its own zoning areas, districts, or zones for various purposes through local ordinances.\textsuperscript{90}

When the zoning system was first adopted in the 1930s, it had only three zoning areas and five districts.\textsuperscript{91} Yet, they gradually increased in haphazard fashion to a 2004 figure of 324 zoning areas, districts, or zones under 121 laws, which have been designated and are operated by 14 ministries or government agencies.\textsuperscript{92} Such an unsystematic zoning system has resulted in much confusion and has caused inefficiency in implementing the system.\textsuperscript{93}

\textsuperscript{88} Residential Area is further classified into Residential-only, General Residential, Quasi-Residential; Commercial Area is further classified into Central Commercial, General Commercial, Retail, Distribution Commercial; Manufacturing Area is specified into Manufacturing-only, General Manufacturing, Quasi-Manufacturing. \textit{Id.} art. 36; Green Area includes Preservation Green, Production Green, and Natural Green Area. ENFORCEMENT DECREE OF NLPUA, art. 30. Management Area includes Preservation Management, Production Management, Planning Management. \textit{Id.} art. 36.

\textsuperscript{89} See NLPUA, \textit{supra} note 87, art. 37 and its ENFORCEMENT DEGREE, art. 31 (Zoning District includes Landscape, Aesthetic, Height, Fire-Prevention, Disaster Protection, Preservation, Facility Protection, Colony, Development Promotion, Specific Use Restriction, Leisure, and Remodeling District.)

\textsuperscript{90} See \textit{id.} art. 36, 37; \textit{see also} Seo, \textit{supra} note 83, at 3.

\textsuperscript{91} Three zoning areas were residential, commercial, and manufacturing, and five districts included natural environment protection, aesthetic, fire-prevention, discipline, and special district. See Moon & Lee, \textit{supra} note 73, at 14.

\textsuperscript{92} See Seo, \textit{supra} note 83, at 3-4 (according to this research, each lot has 5.8 zoning areas, districts, or zones in average.)

\textsuperscript{93} See \textit{id.} at 5-7.
for Green Belt Zone, the question of whether they are consistent with the Constitution has not been examined.

B. Legal Structure of the Korea Land Use System

Korea has hundreds of laws regulating land use for various purposes. They range from laws enacted by the central government to laws instituted at the local level. Although local governments in Korea have been allowed their autonomy to some extent since 1995, they are strongly bound by the central government. The National Assembly is the legislative body at the national level which enacts national laws, also known as Acts. The President has the power to adopt executive laws such as a Presidential Decree or an Enforcement Decree, and each Ministry may adopt more detailed regulations such as Enforcement Rules according to the upper-level laws. At the local level, each local government may enact ordinances and rules of their own, but they must be within the scope of the national laws above. Under this legal structure, there are three categories relating to land use control: general land use laws (such as the NLPUA and the Building Act, which regulate the basic land use and buildings’ form), development laws (which guide urban, housing or new town development), and the Civil Act (which governs the relationship among neighbors in using the property).

94 KOR. CONST., supra note 15, art. 40.

95 Id. art. 75.

96 For example, there are five layers of urban renewal law in Seoul City: the Urban and Residential Environment Improvement Act, enacted by the National Assembly, is the highest in this hierarchy, followed by its Enforcement Decree enacted by the President, the Enforcement Rule adopted by the Secretary of the Ministry of Construction and Transportation, and then the Seoul City Urban and Residential Environment Improvement Ordinance and its Enforcement Rule enacted by the City of Seoul.
1. General Land Use Law

The most fundamental laws for land use control are the NLPUA and the Building Act. All development and building activities must conform to these two laws. Basically, the NLPUA provides permitted land uses, density of building such as FAR and height, minimum lot size, open space ratio, etc., based on each zoning area, district, or zone.\(^97\) The NLPUA also governs the matters regarding public facilities and may require an exaction fee for specific developments.\(^98\) The Building Act focuses on the minimum quality of buildings for safety.\(^99\) In addition to these two laws, the District Unit Plan (“DUP”) regulates urban space more comprehensively and deals with more detailed controls for special areas such as environmentally or historically sensitive districts or sites.\(^100\) Not only can it restrict density, height, set-back and design, but it may also affect infrastructure, transportation planning, and even sign regulation.\(^101\) For example, once an urban renewal district that includes a zoning change has been designated, a DUP must be prepared in advance by the local government and the urban renewal project should follow the DUP’s regulations.\(^102\)

2. Development Laws

\(^{97}\) NLPUA, supra note 87, chap. 2 & 6.

\(^{98}\) Id. art. 49-54, 67.

\(^{99}\) BUILDING ACT, art. 1.

\(^{100}\) It was adopted in the late 1990s to overcome the inflexibility of the Urban Planning Act making it difficult to adapt to the rapid urban change and long-term planning.

\(^{101}\) NLPUA, supra note 87, chap. 4.

\(^{102}\) See id. art. 51, 52; see also URBAN AND RESIDENTIAL ENVIRONMENT ACT [hereinafter UREIA], art. 4.
The purpose of development laws is to facilitate development projects, such as urban redevelopment, housing redevelopment, new town development, and urban renewal projects.\textsuperscript{103} To achieve these goals, the government needs the power of eminent domain to condemn lands for development. The Constitution grants the government such power and, based on this constitutional authority, the Land Acquisition for Public Project and the Compensation Act ("LAPPCA") broadly grants the government the power of eminent domain for public purpose.\textsuperscript{104} This Act allows a lead party carrying out a public project to use the power of eminent domain,\textsuperscript{105} although it must compensate the loss that results from condemning or using private property according to the Constitution.\textsuperscript{106} This law lists per se public projects including military projects or the building of public facilities such as roads, railroads, airports and ports.\textsuperscript{107} The law also delegates the power of eminent domain to other laws which need the authority to accomplish

\textsuperscript{103} The first development law can be traced back to the Subdivision Readjustment Project adopted in 1934 by the Japanese Colonial Government and developed into the Subdivision Readjustment Project Act in 1966. This project was originally intended to modernize Korean cities for colonial rule, but was mainly used as a tool to supply land in cities for housing development until the 1980s. It focused on providing adequate roads and turning irregular-shaped lots into regular form, thereby modernizing residential districts, see Nam & et. al., \textit{The Direction for Old City Improvement with a focus on Residential District}, URBAN INFORMATION 4 (Sep. 2004); and it continued to work until 2000 when it was incorporated into the Urban Development Act. Meanwhile, it diverged into the Urban Redevelopment Act in 1976 for urban renewal in downtown areas and the Housing Site Development Promotion Act in 1980 for new town development in suburban areas since it could not deal with more active urban renewal or development projects.

\textsuperscript{104} See \textit{LAND ACQUISITION FOR PUBLIC PROJECT AND THE COMPENSATION ACT} [hereinafter "LAPPCA"].

\textsuperscript{105} \textit{Id.} art. 19.

\textsuperscript{106} \textit{Id.} art. 61.

\textsuperscript{107} \textit{Id.} art. 4.
their goals. 108 Thus the Urban and Residential Environment Act (“UREIA”)109 and the Urban Development Act (“UDA”)110 may use the power of eminent domain delegated by LAPPCA so long as the purpose is for pursuing the public interest.111 The lead party is not limited to

108 Id. art. 4.

109 UREIA was created by combining the three old urban renewal laws including the Urban Redevelopment Act, the Residential Environment Improvement Act, and the Housing Redevelopment Act. It contains every kind of urban renewal project, but the regulations have been made stricter to compensate for the weaknesses in the old laws. Among other things, it requires all local governments to adopt and amend “the Urban and Residential Environment Improvement Plan” every 10 years, see UREIA, supra note 102, art. 3, while the old laws allowed any project without a master plan depending on the local context. In addition, it has added a review process by the planning commission, and a requirement of affordable housing.

110 UDA was enacted as a primary law for urban development by combining the regulations relating to an urban planning project under the Urban Planning Act, the Housing Site Development Promotion Act for new town development and the Subdivision Project Act for the improvement of residential districts. It is distinguished from UREIA in that its main purpose is to develop a mixed-use city consisting of residential, commercial, industrial, and ecological uses. It is employed particularly for 1) an old downtown more than 10,000 m² (2.47 acres) of residential, commercial, or green zone, or manufacturing zone more than 30,000 m² (7.41 acres); 2) or rural areas of more than 300,000m². It was enacted mainly to supplement the Housing Site Development Promotion Act, whose main tool for land acquisition is eminent domain, and the Subdivision Project Act, which relies on the Title Exchange technique to implement a project; i.e., condemnation by eminent domain led to the residents’ strong resistance, while the Title Exchange was difficult to provide public facilities. Thus this law allows both tools for land acquisition. In addition, this Act opens the door to the private sector, who was not allowed to participate under the Housing Site Development Promotion Act, as a major lead party in a form of association or corporation. The designation of a district is decided by a local planning committee after a preliminary survey and public hearing, and a Master Plan including District Unit Plan which is established through a review process by the planning committee.

111 URBAN DEVELOPMENT ACT [hereinafter UDA], art. 21; UREIA, supra note 102, art. 38.
governmental bodies. It also includes various private parties. Indeed, most housing redevelopment projects have been led by Property Owners Associations (“POA”), which are organized by private property owners who are granted the power of eminent domain on behalf of the local government. Recently, several special laws aimed at developing new towns to achieve nationally balanced development grant even private companies this power. A legal suit has yet to be filed regarding the issue of whether urban renewal projects led by POAs or private parties fall within the meaning of a public purpose required for the use of eminent domain under the Constitution.

3. The Civil Act

Nuisance is the most fundamental restriction on the use and enjoyment of personal property embedded in U.S. common law. The Korean civil law system also recognizes nuisance as a primary limit on property rights under the Civil Act. Thus even when one abides by public regulations, the use or enjoyment of property must not interfere with the enjoyment of a neighbor’s use of his own property. For example, the Korean Supreme Court granted an

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112 UDA, supra note 111, art. 11; UREIA, supra note 102, art. 7-9.
113 See, for example, SPECIAL ACT ON THE DEVELOPMENT OF ENTERPRISE CITIES.
114 Only one legal case regarding the public purpose issue in urban renewal projects has been brought since 1963. See 4294 HAENGSANG(행상) 128 (Sup. Ct. 1963) (where a landowner claimed that developing a hotel, for which government was attempting to condemn his property, is not a public project for public purpose required to use the power of eminent domain under the Constitution.)
115 “Sic utere tuo ut alienum non laedas.” (“no one may use his/her property in such a way as to injure the person or property of another.”) Morton Gitelmanm, John R. Nolon & et al., supra note 69, at 34.
116 CIVIL ACT, art. 217.
injunction enjoining construction of a 24-story apartment building to a plaintiff who alleged that the adjacent development substantially would interfere with the plaintiff’s use of its property as a university. Nuisance has recently become a controversial issue, especially in litigation regarding the right to daylight or the right to a view. Indeed the Korean courts have awarded a plaintiff who claimed that his property would be damaged by the adjacent development’s blocking of daylight. The Korean courts recognize the daylight right as a protected legal right and the interference with that right may constitute nuisance if it goes beyond the extent that is ordinarily endured. Furthermore, although Korean courts have not formally recognized the right to a view in any decisions, they have left open the possibility that such right may be legally protected by nuisance laws. Such may be the case when a certain view is of such substantial value that the building was constructed in its location primarily for the view.

C. Fundamental Legal Principles Relating to Land Use Laws

To be constitutional, all land use control laws and tools comply with several fundamental principles, many of which are present in U.S. laws as well.

117 See 95 DA(다) 23378 (Sup. Ct. 1995) (the 24-story apartment building would significantly impede the university’s function beyond the extent which the plaintiff should endure because, among other things, the apartment building may block a meteorological observatory facility installed on the rooftop of the university building.)

118 See 2004 DA(다) 38792 (Sup. Ct. 2005) (where the Korean Supreme Court held that the plaintiffs’ properties were severely damaged by the adjacent development because the development significantly blocked the daylight and thus awarded 40% of the property value reduced by the development).

119 See 2000 DA(다) 44928,44935 (Sup. Ct. 2001); see also 98 다 56997 (Sup. Ct. 2000).

120 See 2003 DA(다) 64602 (Sup. Ct. 2004).

121 See id.
1. The Proportionality Doctrine

At the most basic level, the Constitution requires that the means adopted by government should not exceed the purpose to be realized by the means.\(^{122}\) This embraces the concept of substantive due process recognized by the U.S. Constitution, which requires that a burden imposed by the government substantially advance legitimate governmental goals,\(^{123}\) as well as the rough proportionality test in *Dolan*, where the court requires a showing of “the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development.”\(^{124}\) The Korean courts use this doctrine particularly to determine whether the degree of interference of government regulation amounts to a compensatory restriction. In the *Green Belt* case, the court ruled that if there was no way for a landowner to use his property, the law violated the proportionality doctrine even if the law itself had been enacted within the general police power.\(^{125}\) To determine whether the proportionality doctrine is violated, courts have relied on the “special sacrifice” test; that is, whether the duty imposed amounts to a special sacrifice exceeding the maximum limit that an individual may be caused to endure.\(^{126}\) This “special sacrifice” test has been incorporated into the *Penn Central* three-part test reflected in the FTA’s annex.\(^{127}\)

\(^{122}\) *See* KOR. CONST., *supra* note 15, art. 37(2); *see also* ADMIN. PROCED. ACT, art. 27.

\(^{123}\) *See* Agins v. Tiburon, 447 U.S. 255 (1980); *see also* Lingle, 544 U.S. 528.

\(^{124}\) *Dolan*, 512 U.S. 374.

\(^{125}\) *Green Belt* case, *supra* note 13.

\(^{126}\) *See generally* Min, *supra* note 81, at 286.

\(^{127}\) *See* KORUS-FTA, *supra* note 3, annex 11-B, 3(a)(iii).
2. The Trust Protection Doctrine

In Korea, a developer’s vested rights are protected by the trust protection doctrine which provides that a vested right should be granted once a developer has initiated a development project in reliance on a government permit or even promise to allow the permit. In the United States, even if a developer has invested substantial amounts of dollars for a development project based on a government’s permit or discretionary approval, subsequent changes of related zoning regulations may supersede the permit or the permit may be revoked under the vested rights doctrine. In Korea, however, the vested rights are more leniently granted to developers under the trust protection doctrine; once a development has been initiated in reliance on a permit or even on a reasonable belief that a permit will be issued, the developer may be protected under the doctrine. Thus, the Korean Supreme Court held that the denial of a subdivision permit was an unconstitutional violation of the trust protection doctrine in a case where the developer began preparing for construction after relying on a government officer’s statement that building a church would be permitted under the current law.

3. The Unjustified Nexus-Prohibition Doctrine

This doctrine prohibits the government from imposing on a property owner any burden or duty that is not directly related to implementing the police power. It applies to exaction cases where the government requires a landowner or developer to donate certain parts of land or pay a

128 See generally John R. Nolon & Patricia E. Salkin, LAND USE IN NUTSHELL, West Group (2006), at 126-27. (for example, in New York City, “a landowner acquires vested rights after a permit is approved and the landowner puts a “shovel in the ground” to begin work in reliance on the approval.”)

129 See ADMIN. PROCED. ACT, art. 4(2).

130 See 96 NOO(한) 18380 (Sup. Ct. 1997).
fee in return for issuing a permit. Thus the Korean Appellate Court held that requiring the 
exaction of a certain part of plaintiff’s property located outside of the property for the public road 
was invalid because the exaction was not directly related to the permit for the development the 
plaintiff sought.  

This doctrine is almost identical to the essential nexus test in Nollan where 
the court required a connection between the exaction imposed and the permit sought.  

D. Expropriation and Compensation Requirements in the Korean Constitution

The Korean Constitution guarantees property rights, but such rights may be limited for 
the purpose of public welfare.  Compared to the U.S. Constitution’s provisions regarding 
property rights, in which individual freedom is emphasized, the Korean Constitution places 
greater social obligations on property rights.  Thus, the Korean Constitution grants the 
government broad authority to enforce duties and restrictions on property rights. Article 23(1) 
ensures that while property rights are protected, the government may adopt any legislation to 
determine the contents and scope of these rights. Article 122 emphasizes once again that the 
government may place duties and restrictions on property rights to promote efficient, balanced 
use and development of national land, which is the foundation for all citizens’ lives and 
products.

131 See 96 NA(1-1) 7801 (Seoul Ct. App. 1996).
132 See Nollan, 482 U.S. 825.
133 KOR. CONST., supra note 15, art. 2.
134 See Myoung-Young Kim, supra note 72.
135 KOR. CONST., supra note 15, art. 23(1), (2).
136 Id. art. 23(1), 122.
However, limits on property rights must be for a legitimate purpose and the government may only encroach on fundamental rights, including property rights, in the name of national security, societal order, or public welfare.\textsuperscript{137} Even if limits on property rights are necessary, they must not exceed the fundamental concept of those rights.\textsuperscript{138} Moreover, the Constitution requires just compensation, as does the U.S. Constitution, if a taking occurs.\textsuperscript{139} It seems that the Korean Constitution grants more protection in that it requires compensation in cases of “restrictions,” as well as “condemnation” or “public use.”\textsuperscript{140} Yet such has not been the reality; the Korean courts interpreted this requirement too narrowly to accept that any regulations or laws amounts to a “restriction” requiring compensation.

The principle of U.S. regulatory takings is not complicated; “if regulation goes too far it will be recognized as a taking.”\textsuperscript{141} Thus the issue is when non-compensatory regulations “goes too far” to become compensatory takings. In contrast, the Korean courts have not recognized regulatory takings - ‘interference equivalent to taking’ in Korean terms - although the Korean Constitutional Court has adopted rationales similar to regulatory takings such as those in the Green Belt case in 1998.\textsuperscript{142} It should be noted that the court never ruled that the Green Belt Act was unconstitutional, but held that it was \textit{inconsistent} with the Constitution.\textsuperscript{143} This distinct between unconstitutional versus inconsistent with the Constitution is worth exploring further in

\begin{itemize}
\item \textsuperscript{137} Id., art. 37.
\item \textsuperscript{138} Id., art. 37.
\item \textsuperscript{139} Id., art. 23(3).
\item \textsuperscript{140} Id.
\item \textsuperscript{141} Pennsylvania Coal Co., 260 U.S. 393.
\item \textsuperscript{142} See Green Belt case, \textit{supra} note 13.
\item \textsuperscript{143} Id.
\end{itemize}
order to understand the Korean context in which the court may refrain from invalidating laws that violate the Constitution.

1. Takings and Compensation Provisions in the Korean Constitution

The Korean Constitution mandates that when a taking occurs, just compensation is required.\textsuperscript{144} Article 23 of the Korean Constitution provides that:

1) Property rights of all people shall be protected. The contents and limits of the rights shall be determined by law;
2) Property rights shall not interfere with public welfare;
3) Condemnation, use or restriction of property rights for public purpose shall be compensated in accordance with a law.\textsuperscript{145}

The structure of Article 23 is read as two parts; Sections 1 and 2 not only guarantee property rights but also grant legislators authority to enact necessary laws regarding the content and limits of property rights.\textsuperscript{146} Section 3 allows government ‘ takings’ of individual property for a public purpose only where compensation is provided.\textsuperscript{147} It is notable that Section 3 of Article 23 includes not only “condemnation” and “public use” but also “restriction” as types of compensatory governmental interferences with property rights.\textsuperscript{148} Yet the Constitution also requires that compensation be provided according to a relevant law.\textsuperscript{149} The Korean courts have

\textsuperscript{144} KOR. CONST., supra note 15, art. 23.

\textsuperscript{145} Id.

\textsuperscript{146} Id. art. 23(1), (2).

\textsuperscript{147} Id. art. 23(3); see also Bae Won Kim, The Guarantee and Restriction of Right to Land Property in Korean Constitution – Focused on the Cases of the Constitutional Court, 20 LAND LAW 17, 22 (2005).

\textsuperscript{148} KOR. CONST., supra note 15, art. 23(3).

\textsuperscript{149} Id.
been struggling with the issue of whether the Constitution in and of itself may grant compensation in the absence of a relevant law; i.e., whether a court may compensate a private party who alleges a “taking” even though the specific law does not have a compensation provision.\(^{150}\) This problem arises primarily from use of the word “restriction.” This is because the determination of what constitutes “condemnation” and “use” is relatively clear and such laws must include compensation provisions so as not to be held unconstitutional. Although it is apparent that the Constitution mandates compensation for “restrictions,” the Korean courts, as well as legislators, did not consider general restrictions for land use control to require compensation.\(^{151}\) It was believed that such restrictions fell within the scope of general police power for which the individual should endure the burden of contesting unless the law had a compensation requirement.\(^{152}\) Thus Korean courts did not accept takings arguments if there was no relevant law requiring compensation, even when the restriction was so severe as to render the property valueless.\(^{153}\) This strict interpretation was justified under the Korean political, economical situation until the early 1990s, when a strong government was leading rapid economic growth.\(^{154}\)


\(^{152}\) See *DAEPAN* (대판) 94 DA(다) 54511 (Sup. Ct. 1990) (re Green Belt District); *see also* *DAEPAN* (대판) 92 BOO(부) 14 (Sup. Ct. 1992) (re Military District).

\(^{153}\) See *id*.

However, the Korean Constitutional Court could no longer deny such arguments as, among other things, Korean society became more democratized and public concerns about property rights increased.\textsuperscript{155} Finally in 1998, the Court held that the Green Belt law was inconsistent with the Constitution for failing to provide compensation where the resulting financial burden of the government regulation was too much for the property owner to bear and required a “special sacrifice” beyond the general social obligation.\textsuperscript{156}

The Green Belt law was enacted in 1972 to prohibit urban sprawl under the Urban Planning Act.\textsuperscript{157} Despite strictly limiting the use of property, it did not contain a requirement for compensation.\textsuperscript{158} This case is a landmark decision in that the Korean court for the first time admitted that a “restriction” may rise to the level of a taking requiring compensation, although it never used the terms “interference equivalent to taking” or “regulatory taking.”\textsuperscript{159} The Court also reaffirmed the case in two subsequent decisions in 1999: in the Cap of Land Ownership Act case and the Public Facility case. In the Public Facility case, the plaintiff brought suit to the Constitutional Court alleging that his property had been taken.\textsuperscript{160} Although it had been designated a public road, construction had not been implemented for almost 10 years, resulting in moratorium on his property for that period.\textsuperscript{161} Despite the fact that the property’s use had

\begin{itemize}
\item \textsuperscript{155}See id.
\item \textsuperscript{156}See Green Belt case, supra note 13.
\item \textsuperscript{157}See Urban Planning Act [repealed and incorporated into NLPUA in 2002], art. 21.
\item \textsuperscript{158}See id.
\item \textsuperscript{159}See Kim & Jung, supra note 10, at 22-24.
\item \textsuperscript{160}See Public Facility case, supra note 17.
\item \textsuperscript{161}See id.
\end{itemize}
been strictly limited, compensation was not allowed until the construction actually began. The Court ruled that “the effect of taking should be admitted” because it excluded the property from any economical use for an extended period without compensation.

Nevertheless, the Court did not grant any remedies to the plaintiffs in either Green Belt or Public Facility case. Instead, it ordered the legislative body to amend the Act to include a compensation requirement. In answer to why it ruled that the law was not consistent with the Constitution, rather than declaring it unconstitutional, the court stated that the law was not unconstitutional itself, but needed to be amended to require a compensation for a case where a severe interference equivalent to expropriation occurs. The court also stated that it is the legislative body, not the judicial body, that should determine how to provide compensation and that has the duty to remove the unconstitutional element in the law. The court declared that the government cease from designating new green belt zones and that the petitioner wait to be compensated until the law is amended.

Why could the Court not award compensation to the plaintiff even though it admitted that the effect of a taking beyond the scope of a legitimate non-compensatory regulation had occurred? What was the Court’s justification for such a ruling? To answer these questions, it is worth examining two legal theories, both of which have been frequently referred to interpret Article 23 of the Korean Constitution.

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162 See id.
163 See id. [emphasis added].
164 See Green Belt case, supra note 13; Public Facility case, supra note 17.
165 See Green Belt case, supra note 13.
166 See id.
167 See id.
2. Two Theories – The Border Theory and The Separation Theory

These two theories were originated in Germany. The resemblance between the German and Korean Constitutions arises from the fact that the Korean Constitution was modeled after the German Constitution (Grundgesetz). Article 23 of the Korean Constitution is very similar in structure and in language to the German Constitution’s Article 14, which provides that:

1. Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law.
2. Property entails obligations. Its use should also serve the public interest.
3. Expropriation shall only be possible in the public interest. It may only be ordered by or pursuant to a law, which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts.\(^\text{168}\)

Both the German and Korean courts have interpreted this article as two distinct units: the first and second sections guarantee property rights, but place limits on them.\(^\text{169}\) Such limits do not require compensation because they are considered to fall within general police power for public welfare.\(^\text{170}\) The third section, however, mandates compensation when expropriation occurs.\(^\text{171}\) However, there may be a situation where a general police power to regulate the property rights reaches a degree equivalent to expropriation.


\(^{169}\) See Moonhyun Kim, supra note 150, at 3-4.

\(^{170}\) See id.

\(^{171}\) See id.
The Border Theory was developed by the Federal Court of Justice of Germany (Bundesgerichtshof) in 1952, where the court accepted “interference equivalent to expropriation,” thereby requiring compensation.\(^\text{172}\) It regards all three sections as one unit; that is, the distinction between non-compensatory and compensatory regulations is determined by the degree of interference.\(^\text{173}\) Thus, as in \textit{Pennsylvania Coal v. Mahon}, “if regulation goes too far,” it constitutes a compensatory taking called “interference equivalent to expropriation.”\(^\text{174}\)

The Federal Constitutional Court (Bundesverfassungsgericht), however, discarded the Border Theory and instead adopted the ‘Separation Theory’ in the \textit{Gravel Mining} case (\textit{Naßauskiesungsbeschließ}) in 1981.\(^\text{175}\) Under this theory, the third section of Article 14 is distinguished from the first and second sections; the first and second sections are “content provisions” where legislators decide the scope of property rights and restrictions by enacting legislation, while the third section is regarded as the “takings provision,” whereby the government actually takes property rights.\(^\text{176}\) The content provisions are abstract and general, while the takings provision is specific and individual.\(^\text{177}\) As a result, even interference causing an excessive burden to a property owner under the content provisions will not directly go to the takings provision. Rather, it merely remains the content provision, but constitutes an


\(^{173}\) See id.

\(^{174}\) See id.

\(^{175}\) BVerfG 1981, 58 BVerfGE 300 (F.R.G.) [hereinafter Gravel Mining case].

\(^{176}\) See Bae Won Kim, \textit{supra} note 147, at 25-26.

\(^{177}\) See id. at 6.
unconstitutional content provision requiring compensation in order to render it constitutional.\textsuperscript{178} As a result of this case, the German court began to narrow the scope of indirect expropriation.\textsuperscript{179}

The significance of these theories is directly related to the question of when compensation is required. Under the Border Theory, severe interference to property beyond general police power automatically triggers Article 14 Section 3, so that the court may directly require compensation based on the constitution even without relevant law.\textsuperscript{180} By contrast, under the Separation Theory, severe interference beyond general police power is not recognized as a taking; instead, it is regarded as an unconstitutional content provision that violates the proportionality doctrine.\textsuperscript{181} Any legislation which may impose limits on property rights must follow the proportionate principle and must not encroach on the fundamental concepts of the rights.\textsuperscript{182} Therefore the issue under the Separation Theory is not the degree of interference as under the Border Theory, but rather the legislation’s intent, purpose and structure.\textsuperscript{183} Thus if a regulation goes too far without a compensation requirement, the law itself is unconstitutional, but will not require direct compensation. Instead, the law will be held invalid and the action planned to be performed under the law cancelled. As a result, the scope of indirect expropriation is significantly narrowed.

\begin{itemize}
\item[\textsuperscript{178}] See Moonhyun Kim, \textit{supra} note 150, at 5.
\item[\textsuperscript{179}] See \textit{id.} at 8.
\item[\textsuperscript{180}] See \textit{id.} at 4.
\item[\textsuperscript{181}] See \textit{id.} at 8.
\item[\textsuperscript{182}] See Bae Won Kim, \textit{supra} note 147, at 21
\item[\textsuperscript{183}] See \textit{id.} at 6.
\end{itemize}
The Korean Constitutional Court finally admitted that there is a category of restriction which goes beyond general police power in the Green Belt case; but did not accept that the restriction was a kind of taking.\textsuperscript{184} Some Korean legal scholars have attempted to explain the Korean Constitutional Court’s decisions using the Separation Theory since this gives some answers as to why the court ordered the legislature to adopt a compensation provision instead of granting direct compensation to the petitioner.\textsuperscript{185} Indeed, the Green Belt court regarded the regulation not as a sort of “restriction” within the meaning of Article 23 Section 3 (takings provision), but merely as an unconstitutional element violating the proportionate doctrine under Article 23 Section 1 and 2 (content provisions).\textsuperscript{186}

However, unlike the German Constitution, the Korean Constitution explicitly requires in Section 3 of Article 23 that “restrictions” of property rights be compensated in accordance with law, and thus the theory cannot provide a complete answer. The definition of indirect expropriation under the Korean Constitution is much broader than that in the German Constitution.\textsuperscript{187} Therefore, the narrowed concept of indirect takings under the Separation Theory does not match the Korean legal system squarely.\textsuperscript{188} Nonetheless, the Court probably relied on this theory because it did not want to accept “interference equivalent to expropriation”, which the court should order direct compensation to the petitioner. Otherwise, it would have to face the undesirable outcome of having thousands of similar suits follow, which would lead to a chaotic

\textsuperscript{184} See Green Belt case, supra note 13.

\textsuperscript{185} See Hun-Hwan Ko, supra note 150, at 795; see also, for more discussion, Soowoong Han, The Constitutional Issues for New Interpretation on Property Rights, 32-2 JUSTICE 35 (1996).

\textsuperscript{186} See Green Belt case, supra note 13.

\textsuperscript{187} See Moonhyun Kim, supra note 150, at 16.

\textsuperscript{188} See id. at 14.
situation in which numerous government regulations could be held invalid and enormous amounts of the budget may be spent providing compensation. Indeed, the court expressed such concerns in the *Public Facility* case. It stated that if the court declared the law unconstitutional, thus making the law invalid, the government would lose a critical tool in its police powers and would no longer be able to control and regulate such areas. Therefore, it was desirable, the Court concluded, that the law should continue to have effect until it was amended. The Korean courts face a dilemma between legal rationale and practical reality.

E. Comparing the Analyses: U.S. Regulatory Takings Law, Indirect Expropriation in International Law and Korean Standards on Interference Equivalent to Expropriation

Although the court in *Public Facility* clearly stated that “effect of expropriation should be admitted if substantial loss of property value occurs when any possibility to use the property is excluded or a land owner may no longer use the initial use originally designated,” the Korean courts have not acknowledged regulatory takings as an act requiring just compensation even in the absence of a law containing compensatory provision. The court merely accepts that there is a sort of interference requiring compensation that goes beyond general police power and requires the legislature to amend the law by inserting a compensation clause. In contrast, U.S. regulatory takings and FTA indirect expropriation both require just compensation whenever

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189 *Public Facility* case, supra note 17.
190 See id.
191 See id.
192 See Green Belt case, supra note 13; *Public Facility* case, supra note 17.
interference reaches the level of a taking, regardless of whether the law has a compensation requirement or not.\(^{193}\)

Nonetheless, the Korean standards on indirect expropriation are almost identical to the FTA standards. Standards shared by both include the degree of economic impact, the reasonable investment-backed expectations and the character of government actions. Most of the fundamental principles of land use control in the United States are also found in Korean legal principles and some notable cases.

1. The Economic Impact of the Government Action

The significant pattern set by the above-mentioned FTA and U.S. takings law cases is somewhat clear, although the FTA cases do not have precedential value. Under U.S. law, even substantial loss of a property’s value alone does not automatically lead to a regulatory taking;\(^{194}\) all economically beneficial value must be deprived.\(^{195}\) To constitute a taking, KORUS-FTA clearly states, as the U.S. courts and the international tribunals have consistently held, that mere diminution of investment alone will not rise to the level of indirect expropriation.\(^{196}\) To constitute indirect expropriation, the tribunals have required a showing of total - or at least very

\(^{193}\) See U.S. Const., amend. V; KORUS-FTA, supra note 3, art. 11.6.

\(^{194}\) See Hadacheck v. Sebastian, 239 U.S. 394 (1915) (a zoning regulation causing around 90% loss of value is not a taking); but see Yancey v. U.S., 915 F.2d 1534 (Fed. Cir. 1990) (77% loss of property value constitutes a taking).


\(^{196}\) KORUS-FTA, supra note 3, annex 11-B(3)(a)(i).
substantial - and permanent loss of the investment.\textsuperscript{197} Particularly in a property case, the loss should affect the parcel as a whole, not just segments of the property.\textsuperscript{198}

In \textit{Penn Central}, the court rejected the plaintiff’s argument that a taking had occurred where he was deprived of air rights by the Historic Preservation law in New York City.\textsuperscript{199} The court rested its decision on the grounds that, \textit{inter alia}, the plaintiff still could use the existing building.\textsuperscript{200} This principle has also been extended to general property rights. In \textit{Andrus v. Allard}, the court held that a prohibition of the sale of eagle feathers did not constitute a taking since the owner could still use the feathers for other purposes.\textsuperscript{201} This test was also applied in \textit{Feldman v. Mexico} under NAFTA.\textsuperscript{202} In this case, the plaintiff alleged that his investment was indirectly expropriated because the Mexican government repealed a tax incentive for importing cigarettes.\textsuperscript{203} The court held, however, that it would not constitute indirect expropriation even if its investment loss occurred due to the government action, because the plaintiff could still gain revenue by selling other products.\textsuperscript{204}

In addition, a temporary impact does not amount to indirect expropriation. In \textit{Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency}, the court held that a 32-
month moratorium did not rise to the level of a regulatory taking. A NAFTA tribunal adopted a similar rationale in *S.D. Myers v. Canada*. There, the court held that a ban on importing PCB (Polychlorinated biphenyls) by the Canadian Government did not constitute indirect expropriation since the ban was only temporary. Consequently, in order to constitute indirect expropriation, the economic impact should be substantial and permanent. Thus the 100% loss of economic value in *Lucas* becomes the clearest example of the test. Additionally, indirect expropriation would be found where the ability to use, enjoy, or dispose of the property is deprived by government action as in *Tecmed v. Mexico*.

The same rationale is also found in the *Green Belt* and *Public Facility* cases in Korea. In the *Green Belt* case, the court held that if there is no way for property owner to use, dispose of the property or make economic value from it, it will amount to taking beyond normal social obligation for which the owner should bear. In *Public Facility*, the court also reasoned that the effect of expropriation beyond police power should be admitted were the actual use of property excluded.

2. Reasonable Investment-backed Expectations

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207 See *id*.

208 See Tecniacs Medioambientales Tecmed S.A. v. Mexico, ICSID Case No. ARB(AF)/00/2. 43 I.L.M. 133 (2004).


The U.S. courts take two steps in considering the reasonable investment-backed expectation prong. They first inquire whether there was an actual expectation that the property would not be affected by the regulation; second, if there was such an expectation, then they look to see whether the expectation was reasonable. Hence if one had known that there was a certain regulation affecting property or had voluntarily entered into a heavily regulated area, investment-backed expectation would not be reasonable. Additionally, the Penn Central court ruled that the historic preservation law did not affect the landowner’s investment-backed expectation since the owner initially expected to use the property as a railroad station. Furthermore, the fundamental principles on property, such as nuisance, should be anticipated by the property owner, and failing to do so would not be considered reasonable.

Following this principle, the KORUS-FTA also requires that stricter regulation be expected in heavily regulated areas or markets. It was clearly shown in Methanex, where the tribunal decided that Methanex should have expected stronger regulations when entering into California, the U.S. state with the strictest environmental regulations, and that the plaintiff’s investment-backed expectation was therefore unreasonable. In short, an investor’s expectation

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211 See Muse-Fisher, supra note 33, at 517-518.
216 KORUS-FTA, supra note 3, annex 11-B, footnote 18.
217 See Methanex Corp. v. United States, Final Award on Jurisdiction and Merits (2005), at Part IV, Ch.D, p.9.
in a heavily regulated area that there will be no change of law or regulation would not be considered reasonable under U.S. law.\textsuperscript{218}

In the \textit{Green Belt} case, the Korean Constitutional Court considered the rationale further. In determining the limits to action which a property owner should endure without compensation, the court considered whether there was a possibility for the owner to use the property as initially designated.\textsuperscript{219} The court ruled that the expectation of using the property as designated by zoning law is reasonable and denial of such use would interfere with the reasonable expectation.\textsuperscript{220} The court, however, made clear that a landowner’s expectation of using the property for future development or a mere expectation that the property’s value will increase are not reasonable investment-backed expectations.\textsuperscript{221}

3. The Character of the Government Action

The FTA ensures that any legitimate government regulatory actions to protect or promote public welfare would not fall within the indirect expropriation category.\textsuperscript{222} As such, the U.S. Supreme Court stated in \textit{Penn Central} that if a regulation can be characterized as promoting "health, safety, morals or general welfare" and is not discriminatory, it will be very difficult for a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{218} \textit{See} Been & Beauvais, \textit{supra} note 24, at 70; however, a sudden or unpredictable change of law may violate “the fair and equitable treatment” clause. \textit{See} MTD Equity Sdn. Bhd. V. Chile, ICSID Case No. ARB/01/7 (2004), at http://www.investmentclaims.com/decisions/MTD-Chile-Award-25May2004.pdf.
\item \textsuperscript{219} \textit{See} Green Belt case, \textit{supra} note 13.
\item \textsuperscript{220} \textit{See} id.
\item \textsuperscript{221} \textit{See} id.
\item \textsuperscript{222} KORUS-FTA, \textit{supra} note 3, annex 11-B(3)(b).
\end{itemize}
\end{footnotesize}
claimant to successfully establish that the regulation resulted in a compensable taking.\footnote{See Penn Cent. Co., 438 U.S. 104.} However, there is an exception where even a legitimate, non-discriminatory government regulation constitutes indirect expropriation: “extraordinary circumstances” in U.S. law and “rare circumstances” in FTA terms. The FTA does not have any standard for determining rare circumstances. Yet, under U.S. law, 100% loss of economic value as in \textit{Lucas} or a case affecting the transfer of property ownership amounts to an “extraordinary circumstance.”\footnote{See Kaiser Aetna v. U.S, 444 U.S. 164, 176(1979); see also Hodel v. Irving, 481 U.S. 704 (1987) (the character of the Government regulation is extraordinary since it actually abrogated the right to pass on property to one’s heirs).} Permanent physical invasion as in \textit{Loretto} may also be found to constitute a “rare circumstance” under KORUS-FTA.\footnote{See Loretto, 458 U.S. 419.} In \textit{Metalclad Corp. v. Mexico}, the court found indirect expropriation under NAFTA because, among other things, Metalclad was deprived of 100% of its investment by the Mexican government.\footnote{See Metalclad Corp. v. United Mexican States, Award (Aug. 30, 2000), 16 ICSID Rev.-Foreign Invest. L.J. 168, 179-81 (2001).} It constituted a rare circumstance.\footnote{See \textit{id}.} In addition, if a burden, which should be distributed among the general public, is unfairly placed on a few select individuals, it may amount to a rare circumstance; i.e., the government measures should be non-discriminatory.\footnote{See Armstrong v. United States, 364 U.S. 40, 49(1960); see also KORUS-FTA, supra note 3, art. 11.5(1) (“fair and equal treatment” provision in Article 11.5(1) prohibits unfair treatment to foreign investors under customary international law).}

The \textit{Green Belt} and the \textit{Cap of Land Ownership} courts in Korea adopted similar rationales. The \textit{Green Belt} court reasoned that although the Green Belt law had a legitimate
purpose to protect public welfare, the case before the bar violated the proportionality doctrine because the means adopted exceeded the goals pursued.\textsuperscript{229} In the \textit{Cap of Land Ownership} case, the court also held that the law must neither violate the proportionality doctrine nor abrogate the right to use and transfer the property.\textsuperscript{230} Thus it may be said that these two laws constituted “rare circumstances” making them indirect expropriation.

\section*{IV. IMPACTS ON THE KOREAN LAND USE SYSTEM}

Claims that NAFTA’s Chapter 11 would hinder a State’s sovereignty have not been as serious as the critics expected.\textsuperscript{231} It is also unlikely that the FTA’s indirect expropriation clause will adversely impact the Korean land use system. This does not mean, however, that any legal claim on indirect expropriation by a foreign investor would fail or that the Korean system is immune to an indirect expropriation attack. Although there is a possibility that a regulation or law to regulate land use will be challenged based on indirect expropriation, as shown in the previous chapters, the impact on the entire system would likely not be disastrous. The Korean land use system already shares principles analogous to those of the United States and is not much stricter than the U.S. system. In fact, some parts of the Korean system are more lenient to

\textsuperscript{229} See Green Belt case, \textit{supra} note 13.

\textsuperscript{230} See Cap of Land Ownership case, \textit{supra} note 17.

\textsuperscript{231} See generally Amy K. Anderson, \textit{Individual Rights and Investor Protections in a Trade Regime: NAFTA and CAFTA}, 63 WASH. & LEE L. REV. 1057 (2006) (arguing that concerns and criticisms over NAFTA Chapter 11 are exaggerated.); see also Amifar & Dreyer, \textit{supra} note 38 (arguing that “NAFTA’s Chapter 11 adjudication has hardly proven to be the threat to domestic judicial integrity or public interest regulation, or the source of ruinous state liability, or the haven for foreign investors seeking comparative advantage...”)

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investors in the U.S. system. For example, Korea provides more protection of vested rights of the individual developer based on the trust protection doctrine than in the United States, and it also grants the nuisance remedy more broadly going so far as to protect the right to daylight. Furthermore, the Korean legal system has adopted similar rationales to those of U.S. regulatory takings laws and international indirect expropriation.

Nevertheless, changes to the Korean land use system by KORUS-FTA will be inevitable. Korea will be forced to make the system more reasonable and systematic. In particular, three fundamental changes are anticipated: first, the Korean courts should establish a clear standard for interpreting the term “restriction” in the Korean Constitution. Although the Korean Constitution has a concept similar to that of a U.S. regulatory taking and the Korean Constitutional Court has used almost identical standards to U.S. regulatory takings laws, as well as indirect expropriation in the FTA, the Court resists recognizing the paradigm of a regulatory taking. Second, Korea has to prepare compensatory mechanisms for foreign investors. The existing tools for compensation may not work under the FTA because Korea has various tools other than “prompt, adequate, and efficient” compensation. Lastly, these fundamental changes will eventually impact the entire land use system in Korea. The enhanced standards on regulatory takings will force the zoning system and legal structure to be more systematic and thus other tools for land use control will be transformed following the new paradigms.

A. Change in the Way of Interpreting the Constitutional Requirements on Expropriation and Compensation

The Korean courts have been reluctant to admit ‘interference equivalent to taking,’ the Korean regulatory taking, although the Constitutional Court has recognized that “restriction”,

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which was not generally regarded as a compensatory regulation until 1998, may have the effect of expropriation requiring compensation under the Constitution. In so doing, the court has adopted the same rationales as the U.S. and international law on indirect expropriation. It seems that the court is concerned that if it recognizes it, the Korean land use system will face catastrophe whereby hundreds of billions dollar would be spent in compensation and most of the land use regulations may be held invalid.\textsuperscript{232} Thus the court borrowed the German theory, which does not exactly match the Korean legal system, to justify the rulings. This also shows that the Korean land use system has inherent deficiencies without a strong legal foundation.

However, KORUS-FTA will not allow the current situation to perpetuate. Most of all, the FTA will provoke alteration of the Korean standard on indirect expropriation. Korea has two options; the first is to admit that the Korean legal system recognizes ‘interference equivalent to taking’ and thus the court has the authority to award compensation directly to a petitioner even in the absence of a relevant law; the second is to declare that the Korean Constitution does not have a regulatory takings paradigm and continue to rely on the legislative body to include a compensation provision for any regulations that may go beyond a “special sacrifice.” In the FTA era, the first option would be the better scheme for Korea.

The Korean constitutional requirement on expropriation and compensation is more similar to that of United States than the German requirement. In particular, the governmental regulations and activities requiring compensation are broadly defined. The Korean Constitution requires compensation not only for “condemnation” and “public use” but also for “restrictions,”

\textsuperscript{232} See also Public Facility case, supra note 17; see also Young-kang Park, A Study on the Compensation Finance of Unimplemented Urban Facilities, 16 LAND LAW 94 (2000) (As a result of the Public Facility decision, it is expected that the Korean Government would need $124 billion for compensating the lands affected.)
while the German Constitution narrowly defines a compensatory regulation only with the term “expropriation.” Thus, the Separation Theory as applied to the narrow definition of expropriation does not serve for interpreting the Korean Constitution. The Constitutional structure also supports this argument. As previously mentioned, the Korean Constitution Article 23 may be viewed as two parts: the content provision under Article 23(1) and (2) where property rights are guaranteed and the legislature may place duties on these rights, and the takings provision under Article 23(3) whereby the government may expropriate property with compensation. Here, “restriction” is in the same section of Article 23(3) along with “condemnation” and “public use” as a compensatory government’s activity. Hence if “restriction” goes beyond non-compensatory police power, why should it go to Article (1) and (2) for the content provisions? Thus the Separation Theory arguing that any regulation violating the proportionality doctrine should be interpreted not under Article 23 Section (3) but under Sections (1) and (2) does not work for the Korean Constitution. Furthermore, since the Korean Constitutional Court itself stated that the content provisions under Article 23(1) and (2) should not encroach on the fundamental concept of property rights, compensation for a regulation that has a similar effect to expropriation should be provided under Article 23(3). Therefore, it is apparent that the current rulings of the Korean Constitutional Court in Green Belt and Public Facility have the logical flaws and it would be more reasonable for the court to admit for an ‘interference equivalent to expropriation,’ compensation should be provided under Article 23(3), which is identical in concept to the U.S. regulatory takings laws.

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233 See Jung, supra note 172, at 79-80; see also Moonhyun Kim, supra note 150, at 14.

234 See Bae Won Kim, supra note 147, at 32.
Nevertheless, if the courts resist admitting this and continue to rely on the content provisions even for such restrictions having similar effect to taking, Korea will be unable to avoid the situation where foreign investors are treated differently from domestic investors or citizens under KORUS-FTA. Throughout modern Korean history, the focus the Korean government has been mainly on economic growth. To rapidly achieve this goal, the direction of Korean policy on land use control has been to make compensation for interference with property rights as infrequently as possible. The legislature did not seriously consider the compensation requirement as unnecessary to the private property rights and governmental goals. As a result, many zoning systems and land use laws have been adopted without providing for compensation. Additionally, it has been difficult for an individual claimant to seek compensation. Although it may be apparent that private property is being indirectly expropriated by a law, compensation will not provided unless the law includes a compensation requirement. The only way to plead compensation is to appeal to the Korean Constitutional Court. However, even if the Court finds that the law is unconstitutional, it may not grant compensation by itself. Instead the claimant must wait until the law is amended to include a compensation clause. Furthermore, the Constitutional Court does not have authority to force the legislative body to amend the law if the legislature does not want to. Consequently, the compensation mechanism for indirect expropriation in Korea does not work efficiently and property rights have fallen victim in the name of public objectives.

235 See Kwan-ho Kim, KORUS FTA and Indirect Expropriation: Implications for the Korea’s Property Rights Protection System, 16-1 J. OF REG. STUDIES 37, 62 (2007).

236 Id.

237 See Kor. Const., supra note 15, art. 40.

238 See generally Kim & Jung, supra note 10.
This mechanism, however, will obviously not be allowed under Chapter 11 of KORUS-FTA. If, in order not to violate Chapter 11, Korea adopts a different tool for foreign investors to provide adequate compensation in accordance with the FTA, a situation will result whereby foreign investors gain advantage over domestic investors. Foreign investor may be compensated immediately whereas domestic investors would still have to rely on the Constitutional Court and wait until a compensation provision is added.

B. Change in the Means of Compensation

In addition, the means of compensation should be restructured. FTA requires that compensation “be paid without delay” and “be equivalent to the fair market value of the expropriated investment immediately,” while the Korean compensation mechanism provides otherwise. The Korean Constitutional Court stated in the Public Facility case that compensation does not need to be only monetary and legislators may adopt alternatives to alleviate damages such as the cancellation of the alleged action or the right to request that the government purchase the affected property. Particularly, the new Green Belt Act, amended as a result of the Green Belt case, grants the right to request the government to purchase the property from a claimant whose property value has been significantly reduced. In addition, Korea has various tools to compensate for property condemned for the purpose of urban renewal or redevelopment projects. For example, the Property Exchange tool provides landowners whose property is condemned for public projects with new

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239 KORUS-FTA, supra note 3, art. 11-6(2)(a), (b).

240 See Public Facility case, supra note 17.

241 See Act on Special Measures for Designation and Management of Areas of Restricted Development, art. 16.
property produced from the development in lieu of monetary compensation. However, this remedy may not be admissible under the FTA, which requires that compensation be paid promptly. More seriously, to discourage real estate speculation, the Korean government prohibits the transferring of title acquired by compensation for condemned property for five to ten years in certain districts where speculation is strongly anticipated. This restriction will conflict with a provision in the FTA requiring that compensation “be fully realizable and freely transferable.” Therefore, Korea needs to prepare for a case where a foreign investor seeks compensation in the same situation described above.

C. Improvement of the Land Use System for a More Systematic Structure

The changes of the underlying principles regarding the interpretation of indirect expropriation and the compensation mechanism will likely accelerate the transformation of the Korean land use system. Among other things, the Korean zoning system and general land use laws should be systemized and further examined to ensure consistency with the property rights requirements under the Constitution. Also, the relationship between public regulations and private restrictions, such as nuisance and servitude, should be clarified.

Basically, no land use laws or regulations should allow indirect expropriation under Annex 11-B, Section 3(b). However, due to the use of the ambiguous term “rare

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242 See LAPPDA, supra note 104; In addition, the Land Disposition Plan and the Title Exchange have been used in urban and housing redevelopment project for compensating the condemned properties. See UREIA, supra note 102; UDA, supra note 111.

243 See HOUSING ACT, art. 41.

244 KORUS-FTA, supra note 3, art. 11.6(2)(d).

245 See id. annex 11-B(3)(b).
circumstances” under Annex 3(b), there remains a possibility that even a non-discriminatory legitimate regulation for a public purpose enacted in accordance with due process may constitute indirect expropriation. Thus, the question is whether a “rare circumstance” that is “extremely severe or disproportionate in light of purpose or effect” exists.\(^{246}\) Judged solely under this test, there are several laws or regulations in Korea which may be found to constitute indirect expropriations under the international standards, and several zoning areas, districts, or zones, which may amount to a per-se taking involving a100% loss of economic value. For example, although the Green Belt Act was held inconsistent with the Constitution, many parts of the Green Belt zones still remain in effect and could be found to constitute indirect expropriation. Likewise, in the Urbanization Management Zone, the government may impose a moratorium for more than the extent to which U.S. courts or international tribunal may find indirect expropriation;\(^{247}\) and the Protection Zone for Military Facility may prohibit any economical activities within the zone but does not have a compensation provision.\(^{248}\)

Of course, these existing restrictions will not by themselves constitute indirect expropriation under the Reasonable Investment-backed Expectation test in Annex 3(a)(ii) because investors should know or should have known the regulations or restrictions exist. Failing to do so would not be reasonable regardless of how severe the consequences are. However, new such zones may no longer be designated and ultimately these regulations may be affected by the Ratchet Effect, whereby domestic investors or citizens raise the standard for indirect expropriation given to foreign investor under the FTA.\(^{249}\) Otherwise, the FTA, as many critics

\(^{246}\) Id.

\(^{247}\) NLPUA, supra note 87, art. 39. (in the district, moratorium for five to ten years may be imposed.)

\(^{248}\) See PROTECTION OF MILITARY FACILITIES ACT.

\(^{249}\) See, for discussion on the Ratchet Effect, Been & Beauvais, supra note 24, at 129-132.
have pointed out, will inevitably be criticized as unfair to domestic investors by providing a competitive advantage to foreign investors.\textsuperscript{250} Therefore, the current zoning and general land use law system need to be reexamined for consistency with the constitutional requirements for compensation and, furthermore, with the FTA’s indirect expropriation. The legislature also will have to deliberate more than it used to on how a law imposing a duty or restriction on property may be enacted in balance with the property rights.

Additionally, the relationship between public regulations and nuisance should be clarified. As shown in the previous section, the Korean courts have not established a clear legal standard for whether nuisance prevails over public regulations on land use control. As a result, very broad nuisance remedies including the right to daylight have been awarded even in as-of-right developments. Considering the fact that even final judicial decisions may be challenged by foreign investors,\textsuperscript{251} awards based on nuisance may be attacked by foreign investors who are ordered to compensate neighbors despite having abided by public regulations for the claimed development.

V. CONCLUSION

There is no doubt that Korea is facing huge challenges in the FTA era. It is anticipated that all aspects of Korean society will be affected by KORUS-FTA, the land use system in particular. Yet it is not likely that the FTA will critically damage, much less destroy, the Korean

\textsuperscript{250}See Amirfar & Dreyer, supra note 38, at 41.

land use system as many critics fear. As seen in the sections above, the trend of indirect expropriation in international law, as well as under U.S. regulatory takings laws, has been toward deferring to a State’s police power to protect or promote public welfare, while the trend in Korea has been toward allowing more protection over property rights than ever before. As a result, the scope of indirect expropriation in FTAs, which was expanded the most by NAFTA, has been getting closer to that of the U.S. regulatory takings laws. At the same time, Korea's acknowledgment of the notion of indirect expropriation has expanded to a scope similar to that of U.S. regulatory takings laws. Moreover, the Korean approach to land use control is not altogether different from that of the United States. Due to Korea’s pursuit of rapid economic development led by strong central governments until the 1980s, internal inconsistencies have accumulated in the basic legal principles that underlie the legal and land use systems. Regardless of the FTA, therefore, the Korean land use system is in need of reform in order to attain a more systematic and workable structure. Although Chapter 11 of KORUS-FTA presents the risk of encroaching upon national sovereignty, Korea may utilize the FTA as a powerful tool to improve
its land use system toward more advanced and democratic structure. 252

To do so, the Korean courts should establish more sound legal rationales for land use control and should admit that the Korean legal system recognizes regulatory takings. Most critics opposing such movement rely on the fact that acknowledging regulatory takings under the current land use system would significantly burden the Korean government by causing it to pay hundreds of billions of dollars in compensation to those affected. This, however, cannot be a reason to justify the current flawed system. There is no doubt that making efforts to correct the long twist in the Korean legal system for land use control is an important task, and balancing property rights with public interest should be the starting point. KORUS-FTA may become the impetus for it.

252 “While this recognition is accompanied by a partial loss of national sovereignty, reformers in developing countries nevertheless see these investment treaties as powerful tools for the modernization of the domestic administrative legal system, providing effective external checks and discipline on deficiencies and shortcomings which may be difficult to agree upon and to implement at the domestic level.” Rudolf Dozler, The Impact of International Investment Treaties On Domestic Administrative Law, 37 N.Y.U. J. INT’L L. & POL. 953, 971-72 (2005).