

CHAPTER 11 INVESTMENT

Section A: Investment

ARTICLE 11.1: SCOPE

1. This Chapter shall apply to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party;
 - (b) covered investments; and
 - (c) with respect to Article 11.9, all investments in the territory of the Party.
2. For greater certainty, this Chapter shall not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement.

ARTICLE 11.2: RELATION TO OTHER CHAPTERS

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.
2. A requirement by a Party that a service supplier of the other Party post a bond or other form of financial security as a condition of the cross-border supply of a service does not of itself make this Chapter applicable to measures adopted or maintained by the Party relating to such cross-border supply of the service. This Chapter shall apply to measures adopted or maintained by the Party relating to the posted bond or financial security, to the extent that such bond or financial security is a covered investment.
3. This Chapter shall not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter 8 (Financial Services).

ARTICLE 11.3: NATIONAL TREATMENT

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded in like circumstances, by that regional level of government to investors, and to investments of investors, of the Party of which it forms a part.

ARTICLE 11.4: MOST-FAVoured-NATION TREATMENT³⁵

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of investments.

ARTICLE 11.5: MINIMUM STANDARD OF TREATMENT³⁶

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” shall not require treatment in addition to or beyond that which is required by that standard, and shall not create additional substantive rights. The obligation in paragraph 1 to provide:

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

³⁵ For greater certainty, the treatment referred to in this Article does not encompass Investor-State Dispute Settlement procedures or mechanisms such as those included in Section B.

³⁶ Article 11.5 shall be interpreted in accordance with Annex 11-A.

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

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

ARTICLE 11.6: LOSSES AND COMPENSATION

1. Notwithstanding Article 11.12.5(b), each Party shall accord to investors of the other Party, and to covered investments, with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife, treatment no less favourable than that it accords, in like circumstances, to:

- (a) its own investors and their investments; or
- (b) investors of any non-Party and their investments.

2. Notwithstanding paragraph 1, if an investor of a Party, in the situations referred to in paragraph 1, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor with restitution, compensation, or both as appropriate, for such loss. In the event of providing both restitution and compensation, their combined value shall not exceed the loss suffered. Any compensation shall be prompt, adequate, and effective, in accordance with Articles 11.7.2, 11.7.3 and 11.7.4, *mutatis mutandis*.

3. Paragraph 1 shall not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 11.3 but for Article 11.12.5(b).

ARTICLE 11.7: EXPROPRIATION AND COMPENSATION³⁷

1. Neither Party shall expropriate or nationalise a covered investment either directly or indirectly through measures equivalent to expropriation or nationalisation (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and
- (d) in accordance with the principle of due process of law as embodied in the principal legal systems of the world.

2. The compensation referred to in paragraph 1(c) shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (hereinafter referred to as the “date of expropriation”);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realisable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c), converted into the currency of payment at the market rate of exchange prevailing on the date of payment, shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date; plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

³⁷ This Article shall be interpreted in accordance with Annexes 11-A and 11-B.

5. This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with Chapter 13 (Intellectual Property Rights).

ARTICLE 11.8: TRANSFERS³⁸

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

- (a) contributions to capital, including the initial contribution;
- (b) profits, dividends, capital gains and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
- (c) interest, royalty payments, management fees and technical assistance and other fees;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made in accordance with Articles 11.6 and 11.7; and
- (f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorised or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1, 2 and 3, a Party may prevent or delay a transfer or a return in kind through the equitable, non-discriminatory and good faith application of its laws and regulations relating to:

- (a) bankruptcy, insolvency or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offences;

³⁸ For greater certainty, Annex 11-C shall apply to this Article.

- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

ARTICLE 11.9: PERFORMANCE REQUIREMENTS

1. Neither Party shall, in connection with the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, impose or enforce any requirement or enforce any commitment or undertaking.³⁹

- (a) to export a given level or percentage of goods or services;
- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use or accord a preference to goods produced in its territory or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
- (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party shall condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

- (a) to achieve a given level or percentage of domestic content;

³⁹ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

- (b) to purchase, use or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.⁴⁰

4. Paragraph 1(f) shall not apply:

- (a) when a Party authorises use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
- (b) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.⁴¹

5. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), 1(c) and 1(f), and 2(a) and 2(b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (a) necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement;

⁴⁰ For greater certainty, nothing in paragraph 1 shall be construed to prevent a Party, in connection with the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, from imposing or enforcing a requirement or enforcing a commitment or undertaking to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory, provided that such activity is consistent with paragraph 1(f).

⁴¹ The Parties recognise that a patent does not necessarily confer market power.

- (b) necessary to protect human, animal or plant life or health; or
- (c) related to the conservation of living or non-living exhaustible natural resources.

6. Paragraphs 1(a), 1(b) and 1(c), and 2(a) and 2(b) shall not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

7. Paragraphs 1(b), 1(c), 1(f) and 1(g), and 2(a) and 2(b) shall not apply to government procurement.

8. Paragraphs 2(a) and 2(b) shall not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

9. For greater certainty, paragraphs 1 and 2 shall not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

10. This Article shall not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement. For the purposes of this Article, private parties include designated monopolies or state enterprises, where such entities are not exercising delegated government authority.

ARTICLE 11.10: SENIOR MANAGEMENT AND BOARDS OF DIRECTORS

1. Neither Party shall require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority or less than a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

ARTICLE 11.11: DENIAL OF BENEFITS

1. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit

transactions with the enterprise or that would be violated or circumvented if the benefits of this Chapter were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantive business operations in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise. If, before denying the benefits of this Chapter, the denying Party knows that the enterprise has no substantive business operations in the territory of the other Party and that persons of a non-Party, or of the denying Party, own or control the enterprise, the denying Party shall, to the extent practicable, notify the other Party before denying the benefits. If the denying Party provides such notice, it shall consult with the other Party on request of the other Party.

ARTICLE 11.12: NON-CONFORMING MEASURES

1. Articles 11.3, 11.4, 11.9 and 11.10 shall not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedule to Annex I;
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I; or
 - (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Articles 11.3, 11.4, 11.9 and 11.10.

2. Articles 11.3, 11.4, 11.9 and 11.10 shall not apply to any measure that a Party adopts or maintains with respect to sectors, sub-sectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party shall, under any measure adopted after the date of entry into force of this Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 11.3 and 11.4 shall not apply to any measure that is an exception to, or derogation from, the obligations under Article 13.1.6 as specifically provided in that Article.

5. Articles 11.3, 11.4 and 11.10 shall not apply to:

- (a) government procurement; or
- (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

ARTICLE 11.13: SPECIAL FORMALITIES AND INFORMATION REQUIREMENTS⁴²

1. Nothing in Article 11.3 shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that covered investments be legally constituted under its laws or regulations, provided that such formalities do not materially impair the protections afforded by the Party to investors of the other Party and covered investments in accordance with this Chapter.

2. Notwithstanding Articles 11.3 and 11.4, a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any information that is confidential from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

ARTICLE 11.14: SUBROGATION

1. Where a Party or an agency authorised by a Party has granted an indemnity, a guarantee or a contract of insurance against non-commercial risks with regard to an investment by one of its investors in the territory of the other Party and when payment has been made under this indemnity, guarantee or contract of insurance by the former Party or the agency authorised by it, the latter Party shall recognise the rights of the former Party or the agency authorised by the former Party by virtue of the principle of subrogation to the rights of the investor.

⁴² For transparency purposes only, Annex 11-D sets out an illustrative list of Australian residency requirements. If Korea considers that any residency requirement applied by Australia, regardless of whether or not listed in Annex 11-D, is likely to materially impair the protections afforded by Australia to investors or covered investments of Korea, the Parties, upon request of Korea, shall promptly enter into consultations and endeavour to arrive at a mutually satisfactory resolution of the matter.

2. Where a Party or an agency authorised by a Party has made a payment to its investor and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party or agency authorised by the Party making the payment, pursue those rights and claims against the other Party.

Section B: Investor-State Dispute Settlement

ARTICLE 11.15: CONSULTATION AND NEGOTIATION

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third party procedures.

ARTICLE 11.16: SUBMISSION OF A CLAIM TO ARBITRATION

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

- (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim:
 - (i) that the respondent has breached:
 - (A) an obligation under Section A;
 - (B) an investment authorisation; or
 - (C) an investment agreement; and
 - (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim:
 - (i) that the respondent has breached:
 - (A) an obligation under Section A;
 - (B) an investment authorisation; or
 - (C) an investment agreement; and

- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (notice of intent). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Agreement, investment authorisation or investment agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of, or request for, arbitration (notice of arbitration):

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Agreement.

6. The claimant shall provide with the notice of arbitration:

- (a) the name of the arbitrator that the claimant appoints; or
- (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

ARTICLE 11.17: CONSENT OF EACH PARTY TO ARBITRATION

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Agreement.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

- (a) Chapter II (Jurisdiction of the Centre) of the ICSID Convention and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
- (b) Article II of the New York Convention for an "agreement in writing."

ARTICLE 11.18: CONDITIONS AND LIMITATIONS ON CONSENT OF EACH PARTY

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

2. No claim may be submitted to arbitration under this Section unless:

- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Agreement; and
- (b) the notice of arbitration is accompanied:
 - (i) for claims submitted to arbitration under Article 11.16.1(a), by the claimant's written waiver; and
 - (ii) for claims submitted to arbitration under Article 11.16.1(b), by the claimant's and the enterprise's written waivers,

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 11.16.1(a)) and the claimant or the enterprise (for claims brought under Article 11.16.1(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

ARTICLE 11.19: SELECTION OF ARBITRATORS

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. If a tribunal has not been constituted within 75 days of the date a claim is submitted to arbitration under this Section, the Secretary-General, on request of a

disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed. The Secretary-General shall not appoint a national of either Party as the presiding arbitrator unless the disputing parties otherwise agree.

4. For the purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

- (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) a claimant referred to in Article 11.16.1(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
- (c) a claimant referred to in Article 11.16.1(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

ARTICLE 11.20: CONDUCT OF THE ARBITRATION

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 11.16.3. If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. At the request of a disputing party, and unless the disputing parties otherwise agree, the tribunal may determine the place of meetings, including consultations and hearings, taking into consideration appropriate factors, including the convenience of the parties and the arbitrators, the location of the subject matter, and the proximity of evidence. The preceding sentence is without prejudice to any appropriate factors a tribunal may consider under paragraph 1.

3. Unless the disputing parties otherwise agree, English and Korean shall be the official languages to be used in the entire arbitration proceedings, including all hearings, submissions, decisions, and awards.

4. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement. On request of a disputing party, the non-disputing Party should resubmit its oral submission in writing.

5. After consulting the disputing parties, the tribunal may allow a party or entity that is not a disputing party to file a written *amicus curiae* submission with the tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the tribunal shall consider, among other things, the extent to which:

- (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge, or insight that is different from that of the disputing parties;
- (b) the *amicus curiae* submission would address a matter within the scope of the dispute; and
- (c) the *amicus curiae* has a significant interest in the proceeding.

The tribunal shall ensure that the *amicus curiae* submission does not disrupt the proceeding or unduly burden or unfairly prejudice either disputing party, and that the disputing parties are given an opportunity to present their observations on the *amicus curiae* submission.

6. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favour of the claimant may be made under Article 11.26:

- (a) such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment;
- (b) on receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor;
- (c) in deciding an objection under this paragraph, the tribunal shall assume to be true the claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred

to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute;

- (d) the respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 7.

7. In the event that the respondent so requests within 45 days of the date the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 6 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

8. When it decides a respondent's objection under paragraph 6 or 7, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

9. A respondent may not assert as a defence, counterclaim, or right of set-off, or for any other reason, that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract, except with respect to any subrogation as provided for in Article 11.14.

10. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 11.16. For the purposes of this paragraph, an order includes a recommendation.

11. In any arbitration conducted under this Section, on request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the date the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the date the 60 day comment period expires.

12. Paragraph 11 shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 13 or Annex 11-E.

13. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for the purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 11.26 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

ARTICLE 11.21: TRANSPARENCY OF ARBITRAL PROCEEDINGS

1. Subject to paragraphs 2, 3 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 11.20.4 and 11.20.5 and Article 11.25;
- (d) minutes or transcripts of hearings of the tribunal, where available; and
- (e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Without prejudice to Article 22.2 (Essential Security) and Article 22.4 (Disclosure of Information), nothing in this Section requires a Party to furnish or allow access to information, the disclosure of which:

- (a) would impede law enforcement;
- (b) would be contrary to its law regarding treatment of official information or matters relating to personal privacy; or

(c) it considers to be contrary to its essential security interests.

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
- (c) a disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1;
- (d) the tribunal shall decide any objection by a disputing party regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may:
 - (i) withdraw all or part of its submission containing such information; or
 - (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c),

in either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under subparagraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under subparagraph (d)(ii) of the disputing party that first submitted the information; and

- (e) on request of a disputing Party, the Joint Committee shall consider issuing a decision in writing regarding a determination by the tribunal that information claimed to be protected was not properly designated. If the Joint Committee issues a decision within 60 days of such a request, it shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that decision. If the Joint Committee does not issue a decision within 60 days, the tribunal's determination

shall remain in effect only if the non-disputing Party submits a written statement to the Joint Committee within that period that it agrees with the tribunal's determination.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

ARTICLE 11.22: GOVERNING LAW

1. Subject to paragraph 3, when a claim is submitted under Article 11.16.1(a)(i)(A) or Article 11.16.1(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 11.16.1(a)(i)(B) or 11.16.1(a)(i)(C), or Article 11.16.1(b)(i)(B) or 11.16.1(a)(i)(C), the tribunal shall apply:

- (a) the rules of law specified in the pertinent investment authorisation or investment agreement, or as the disputing parties may otherwise agree; or
- (b) if the rules of law have not been specified or otherwise agreed:
 - (i) the law of the respondent, including its rules on the conflict of laws;⁴³ and
 - (ii) such rules of international law as may be applicable.

3. A decision of the Joint Committee declaring its interpretation of a provision of this Agreement under Article 21.3.3(c) shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

ARTICLE 11.23: INTERPRETATION OF ANNEXES

1. Where a respondent asserts as a defence that the measure alleged to be a breach is within the scope of an entry set out in Annex I or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the Joint Committee on the issue. The Joint Committee shall submit in writing any decision declaring its interpretation under Article 21.3.3(c) to the tribunal within 60 days of delivery of the request.

2. A decision issued by the Joint Committee under paragraph 1 shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with

⁴³ For the purposes of this subparagraph, the "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

that decision. If the Joint Committee fails to issue such a decision within 60 days, the tribunal shall decide the issue.

ARTICLE 11.24: EXPERT REPORTS

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, on request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

ARTICLE 11.25: CONSOLIDATION

1. Where two or more claims have been submitted separately to arbitration under Article 11.16.1 and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and

- (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 11.16.1 have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a tribunal previously established under Article 11.19 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that:
 - (i) that tribunal, on request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and
 - (ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 11.16.1 and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and

- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 11.19 shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 11.19 be stayed, unless the latter tribunal has already adjourned its proceedings.

ARTICLE 11.26: AWARDS

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

2. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. Subject to paragraph 1, where a claim is submitted to arbitration under Article 11.16.1(b):

- (a) an award of restitution of property shall provide that restitution be made to the enterprise;
- (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
- (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

4. A tribunal may not award punitive damages.

5. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
6. Subject to paragraph 7 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
7. A disputing party may not seek enforcement of a final award until:
 - (a) in the case of a final award made under the ICSID Convention:
 - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
 - (ii) revision or annulment proceedings have been completed; and
 - (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 11.16.3(d):
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
 - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.
8. Each Party shall provide for the enforcement of an award in its territory.
9. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a panel shall be established under Article 20.8 (Establishment of Panel). The requesting Party may seek in such proceedings:
 - (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Agreement; and
 - (b) in accordance with Article 20.11 (Panel Report), a recommendation that the respondent abide by or comply with the final award.
10. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph 9.
11. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for the purposes of Article I of the New York Convention.

ARTICLE 11.27: SERVICE OF DOCUMENTS

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex 11-H.

Section C: Definitions

ARTICLE 11.28: DEFINITIONS

For the purposes of this Chapter:

Centre means the International Centre for Settlement of Investment Disputes (ICSID) established by the ICSID Convention;

claimant means an investor of a Party that is a party to an investment dispute with the other Party;

disputing parties means the claimant and the respondent;

disputing Party means a Party against which a claim is made under Section B (Investor-State Dispute Settlement);

enterprise means an enterprise as defined in Article 1.4 (Definitions), and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organised under the law of a Party, and a branch of an enterprise of a Party located in the territory of a Party and carrying out business activities there;

ICSID Additional Facility Rules means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*;

ICSID Convention means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, 18 March 1965*;

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments and loans;⁴⁴
- (d) futures, options and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing and other similar contracts;
- (f) intellectual property rights;
- (g) licences, authorisations, permits and similar rights conferred pursuant to domestic law;^{45,46} and
- (h) other tangible or intangible, movable or immovable property and related property rights, such as leases, mortgages, liens and pledges.⁴⁷

For the purposes of this Agreement, a claim to payment that arises solely from the commercial sale of goods and services is not an investment, unless it is a loan that has the characteristics of an investment;

investment agreement means a written agreement⁴⁸ between a national authority⁴⁹ of a Party and a covered investment or an investor of the other Party,

⁴⁴ Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt are less likely to have such characteristics.

⁴⁵ Whether a particular type of licence, authorisation, permit or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licences, authorisations, permits and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the licence, authorisation, permit or similar instrument has the characteristics of an investment.

⁴⁶ The term “investment” does not include an order or judgment entered in a judicial or administrative action.

⁴⁷ For greater certainty, market share, market access, expected gains and opportunities for profit-making are not, by themselves, investments.

⁴⁸ “Written agreement” means an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties. For greater certainty:

on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government;

investment authorisation means an authorisation that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party;^{50,51}

investor of a non-Party means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party;

investor of a Party means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making or has made an investment in the territory of the other Party, provided, however, that a national who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality;

-
- (a) a unilateral act of an administrative or judicial authority, such as a permit, licence, or authorisation issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and
 - (b) an administrative or judicial consent decree or order,

shall not be considered a written agreement.

⁴⁹ For the purposes of this definition, “national authority” means an authority at the central level of government.

⁵⁰ For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

⁵¹ For greater certainty, decisions made by the Treasurer under Australia’s foreign investment policy, including the *Foreign Acquisitions and Takeovers Act 1975*, are not encompassed within this definition. For Korea, the Parties recognise that, as of the date of signature of this Agreement, Korea has no foreign investment authority that grants investment authorisation.

New York Convention means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, 10 June 1958;

non-disputing Party means the Party that is not a party to an investment dispute;

protected information means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law;

respondent means the Party that is a party to an investment dispute;

Secretary-General means the Secretary-General of ICSID; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

ANNEX 11-A
CUSTOMARY INTERNATIONAL LAW

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 11.5 results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 11.5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

ANNEX 11-B EXPROPRIATION

The Parties confirm their shared understanding that:

1. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment.
2. Article 11.7.1 addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.
3. The second situation addressed by Article 11.7.1 is indirect expropriation, where an action or a series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
4. The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:
 - (a) the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations;⁵² and
 - (c) the character of the government action, including its objectives and context.⁵³
5. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.^{54,55,56}

⁵² For greater certainty, whether an investor's investment-backed expectations are reasonable may include consideration of the nature and extent of governmental regulation in the relevant sector.

⁵³ For Korea, a relevant consideration could include whether the investor bears a disproportionate burden such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest.

⁵⁴ For greater certainty, the list of "legitimate public welfare objectives" in paragraph 5 is not exhaustive.

ANNEX 11-C TRANSFERS

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining temporary safeguard measures in accordance with the laws and regulations of the Party with regard to payments and capital movements:

- (a) in the event of serious balance-of-payments or external financial difficulties or threat thereof; or
- (b) where, in exceptional circumstances, payments and capital movements between the Parties cause or threaten to cause serious difficulties for the operation of monetary policy or exchange rate policy in the Party concerned.

2. The measures referred to in paragraph 1:

- (a) shall not exceed a period of one year, however, if extremely exceptional circumstances arise such that a Party seeks to extend such measures, the Party will coordinate in advance with the other Party concerning the implementation of any proposed extension;
- (b) shall be consistent with the Articles of Agreement of the International Monetary Fund;
- (c) shall avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
- (d) shall not exceed those necessary to deal with the circumstances described in paragraph 1;
- (e) shall be temporary and phased out progressively as the situation described in paragraph 1 improves;
- (f) shall not be confiscatory;
- (g) shall promptly be notified to the other Party;
- (h) shall be applied on a national treatment basis;

⁵⁵ For greater certainty and without limiting the scope of paragraph 5, such regulatory actions to protect public health include regulation, supply and reimbursement with respect to pharmaceuticals, diagnostics, vaccines, medical devices, health-related aids and appliances and blood and blood products.

⁵⁶ For Korea, real estate price stabilisation (through, for example, measures to improve the housing conditions for low-income households), does not constitute indirect expropriation.

- (i) shall ensure that the other Party is treated as favourably as any non-Party;
- (j) shall not constitute a dual or multiple exchange rate practice;
- (k) shall not restrict payments or transfers for current transactions, unless the imposition of such measures complies with the procedures stipulated in the Articles of Agreement of the International Monetary Fund; and
- (l) shall not restrict payments or transfers associated with foreign direct investment.

ANNEX 11-D
ILLUSTRATIVE LIST OF AUSTRALIAN RESIDENCY REQUIREMENTS⁵⁷

Sector	Requirement
All	At least two of the directors of a public company must be ordinarily resident in Australia.
Professional services: Accounting, auditing and book-keeping services	At least one equity partner in a firm must be a permanent resident.
Research and development services: R&D services on social sciences and humanities	Permanent residency requirement for psychologists (Western Australia).
Maritime transport services: International transport (freight and passengers)	Part X of the <i>Competition and Consumer Law 2010</i> requires that every ocean carrier who provides international liner cargo shipping services to or from Australia shall, at all times be represented by a person who is an individual resident in Australia (but not necessarily an Australian citizen) and has been appointed by the ocean carrier as the ocean carrier's agent for the purposes of Part X.

⁵⁷ This table is provided for transparency purposes only. The information contained in this table is drawn from Australian commitments under the General Agreement on Trade in Services and Australia's May 2005 Revised Services Offer under the WTO Doha Development Agenda negotiations.

ANNEX 11-E
POSSIBILITY OF A BILATERAL APPELLATE MECHANISM

Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 11.26 in arbitrations commenced after they establish the appellate body or similar mechanism.

ANNEX 11-F
SUBMISSION OF A CLAIM TO ARBITRATION

Korea

1. Notwithstanding Article 11.18.2, an investor of Australia may not submit to arbitration under Section B a claim that Korea has breached an obligation under Section A either:

- (a) on its own behalf, under Article 11.16.1(a); or
- (b) on behalf of an enterprise of Korea that is a juridical person that the investor owns or controls directly or indirectly, under Article 11.16.1(b),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in any proceedings before a court or administrative tribunal of Korea.

2. For greater certainty, where an investor of Australia or an enterprise of Korea that is a juridical person that the investor owns or controls directly or indirectly makes an allegation that Korea has breached an obligation under Section A before a court or administrative tribunal of Korea, that election shall be final, and the investor may not thereafter allege that breach, on its own behalf or on behalf of the enterprise, in an arbitration under Section B.

ANNEX 11-G
FOREIGN INVESTMENT POLICY

A decision by Australia with respect to whether or not to refuse, or impose orders or conditions on, an investment that is subject to review under Australia's foreign investment policy shall not be subject to the dispute settlement provisions of Section B.

ANNEX 11-H
SERVICE OF DOCUMENTS ON A PARTY UNDER SECTION B

Australia

Notices and other documents in disputes under Section B shall be served on Australia by delivery to:

Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
Barton ACT 0221 Australia

Korea

Notices and other documents in disputes under Section B shall be served on Korea by delivery to:

Office of International Legal Affairs
Ministry of Justice of the Republic of Korea
Government Complex, Gwacheon
Korea

ANNEX 11-I
TAXATION AND EXPROPRIATION

The determination of whether a taxation measure, in a specific fact situation, constitutes an expropriation requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including the factors listed in Annex 11-B and the following considerations:

- (a) the imposition of taxes does not generally constitute an expropriation. The mere introduction of a new taxation measure, or the imposition of a taxation measure by more than one jurisdiction within a Party in respect of an investment, generally does not in and of itself constitute an expropriation;
- (b) a taxation measure that is consistent with internationally recognised tax policies, principles, and practices should not constitute an expropriation. In particular, a taxation measure aimed at preventing the avoidance or evasion of taxation measures generally does not constitute an expropriation;
- (c) a taxation measure that is applied on a non-discriminatory basis, as opposed to a taxation measure that is targeted at investors of a particular nationality or at specific taxpayers, is less likely to constitute an expropriation; and
- (d) a taxation measure generally does not constitute an expropriation if it was already in force when the investment was made and information about the measure was publicly available.