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## **KORUS (Korea-US) FTA Investment Chapter**

Submitted by: Korea



**APEC**  
PHILIPPINES  
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**Trade Policy Dialogue on WTO-Plus Aspects of  
Recently Concluded Regional Trade  
Agreements and Free Trade Agreements  
Boracay, Philippines  
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# KORUS (Korea-US) FTA Investment Chapter

May 14<sup>th</sup>, 2015



MINISTRY OF  
TRADE, INDUSTRY & ENERGY

Hongsang AHN



## Overview

### History

- ▶ Announced Initiation of Negotiations on Feb 3<sup>rd</sup>, 2006
- ▶ After 8 official rounds of negotiations, concluded Apr 2<sup>nd</sup>, 2007
- ▶ After additional negotiations, signed Jun 30<sup>th</sup>, 2007 in Washington
- ▶ Gone into effect Mar 15<sup>th</sup>, 2012

### Status

- ▶ Korea's 8<sup>th</sup> FTA, U.S.'s 14<sup>th</sup> FTA
- ▶ U.S. : Korea's 2<sup>nd</sup> largest trade partner (after China)  
Korea : U.S.'s 6<sup>th</sup> largest trade partner, 3<sup>rd</sup> in Asia

## Composition & Scope

### 1. Composition

- ▶ Consists of 3 sections, related annexes and confirmation letters
- ▶ **(Section A)** Contains ▲ articles on investment liberalization that guarantee the rights of foreign investors, ▲ articles on investment protection that oblige the host country to protect such rights, and ▲ exceptions to these
  - **(Investment Liberalization & Protection)** NT, MFN and prohibition of Performance Requirements (PR), Minimum Standard of Treatment (MSOT), Losses and Compensation, Transfers, and Expropriation & Compensation
  - **(Exceptions)** Denial of Benefits, Non-Conforming Measures and Subrogation
    - ※ If a Party sets out existing measures in its Schedule of Annex I that do not conform to some or all of the obligations imposed by NT, MFN, PR and SMBD, such obligations do not apply to the party's measures

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## Composition & Scope

- ▶ **(Section B)** Details on Investor-State Dispute Settlement (ISDS) procedures related to breaches of obligations under Section A, of investment agreements, and of investment authorizations
- ▶ **(Section C)** Definitions
- ▶ **(Annexes & Confirmation Letters)** Mainly provide for exceptions
  - Expropriation, Taxation, Temporary Safeguards and Contact Rights
    - ※ Non-Conforming Measures for the Investment Chapter, along with those for the Services Chapter, are listed in a separate annex that applies to the agreement as a whole

### 2. Scope & Coverage

- ▶ No retroactive effect
- ▶ Applies to central, regional or local governments and non-governmental bodies in the exercise of powers delegated by central, regional, or local governments

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## Obligations

### 1. National Treatment (NT)

- ▶ **Includes best in-state treatment at the sub-central level**

※ Best **in-state** treatment grants to investors of the other party in a certain state (state A) treatment no less favorable than that granted to a citizen of state A. In contrast, best **out-of-state** treatment grants to investors of the other party in a certain state (state A) treatment no less favorable than that granted to a citizen of another state (state B). Thus, best in-state treatment ensures more favorable treatment than best out-of-state treatment

- ▶ **Applies to investments of the pre-establishment, establishment and acquisition phases**

### 2. Most Favored Nation Treatment (MFN)

- ▶ **Both sides agreed on Auto MFN**

- ▶ **Applies to investments of the pre-establishment, establishment and acquisition phases**

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## Obligations

### 3. Minimum Standard of Treatment (MSOT)

- ▶ **Generally means due process of law, which ensures fair & equitable treatment and full protection and security in accordance with customary international law**

### 4. Expropriation and Compensation

- ▶ **A government may expropriate or nationalize an investor's property only for ① public purposes, ② in a non-discriminatory manner, and ③ in accordance with due process of law**

- The agreement ensures that compensation equivalent to the fair market value or the expropriated investment when the expropriation took place is provided in a prompt, adequate and effective manner

- ▶ **Reasonable compensation should be provided for indirect expropriation that interferes with property rights to a degree equivalent to expropriation**

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## Obligations

### 5. Performance Requirements (PR)

- ▶ Neither Party may impose or enforce any of the following performance requirements in connection with the establishment, acquisition, expansion, management, conduct, operation or sale or other disposition of an investment
  - To export a given level of products, to achieve a given level of domestic content, to link imports to exports, to link exports to imports, to transfer technology and to supply exclusively to a specific region
  - However, a Party can require technology transfer and a certain level of exports when providing incentives
- ▶ Applies to investments of the pre-establishment, establishment and acquisition phases

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## Investor-State Dispute Settlement (ISDS)

### 1. Overview

- ▶ Grants investors the right to file for international arbitration against the host country of the investment if a loss is incurred as a result of the country's violation of an investment agreement or an investment authorization or its obligations under Section A
- ▶ International arbitration hearings are undertaken by an arbitral tribunal composed of three arbitrators
  - The investor and host country appoint one arbitrator each. However, if a tribunal has not been constituted within 75 days of the date after a claim is submitted, the Secretary General of ICSID appoints a national of a third country as the presiding arbitrator unless the disputing parties otherwise agree

### 2. Dispute Settlement Proceedings

- ▶ ① ICSID, ② UNCITRAL, ③ Other settlement proceedings

※ Use one of the above arbitral institutions

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## Investor-State Dispute Settlement (ISDS)

### 3. Effects of Arbitration Awards

- ▶ As a single-trial system, an arbitration award is binding and final, subject to review mechanisms provided in underlying arbitration rules
- ▶ Awards are confined to monetary damages, any applicable interest and restitution of property, and any given award may not be annulled by a Party

### 4. Claimant of Arbitration

- ▶ A foreign investor may submit to arbitration for a loss ① on its own behalf or ② on behalf of an investment company that the investor owns or controls
  - (Consolidation) If two or more claims have been submitted separately to arbitration by multiple investors for the same events, the government of the host party may seek a consolidation to prevent the government from responding to several awards about the same events

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## Investor-State Dispute Settlement (ISDS)

### 5. Int'l Arbitration & Domestic Filing Proceedings

- ▶ In order to file a claim to arbitration, an investor must submit a written waiver of any right to initiate or continue any proceedings before a court of the other party
- ▶ In the event of a breach of an obligation by the other party, an investor of the U.S. may file a claim with either a Korean court or an international tribunal, and may not choose a third institution thereafter
- ▶ A Korean investor may not file a claim with a U.S. court after initiating international arbitration proceedings against the U.S. government. However, the investor may bring an international arbitration even after filing a complaint with a U.S. court on the grounds that the complaint proceedings have ceased

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## Exceptions

### 1. Non-Conforming Measures

- ▶ Exceptions to certain obligations under the agreement are stipulated as follows :

- If a Party sets out existing measures as reservations that are not consistent with obligations imposed by ① NT, ② MFN, ③ PR, and ④ SMD, such obligations do not apply to the party's measures

### 2. Ratchet Mechanism

- ▶ The ratchet mechanism is applied to existing measures set out by each party as reservations (Annex I only)

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