

Investment Treaty Arbitration

in 20 jurisdictions worldwide

2014

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Korea

Beomsu Kim and John M Kim

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Background

1 What is the prevailing attitude towards foreign investment?

As Korea emerges as a more prominent player in the global markets, the general attitude towards foreign investment is increasingly positive. The government's creation of agencies and laws to promote and assist foreign investors, and to streamline investment processes, shows a clear attempt to attract more investments into the country. The business environment encourages foreign investments and is welcoming towards investors. For example, specifically designated foreign investment zones, free economic zones and free trade zones have been created by the Korean government to foster investment and trade; tax incentives are offered to foreign investors and the past 20 years have seen a liberalisation of the securities market with a lifting of regulatory ceilings on foreign investments in various markets and industries.

2 What are the main sectors for foreign investment in the state?

Historically, the manufacture of tangible goods was the main sector for foreign investment in South Korea, including chemical goods manufacturing, machine and equipment manufacturing, transportation machinery and electrical or electronic goods production. In recent years, the intangible goods and services industries increasingly attracted foreign investment, and further growth is expected in the coming years based on the current figures. Banking and finance, insurance, real estate and business services, research and development facilities, logistics centres and regional headquarters of multinational corporations are the areas of particular note.

3 Is there a net inflow or outflow of foreign direct investment?

The past 10 years have seen a general growth of direct investments, both inbound and outbound. There has been a net outflow of foreign direct investments is noted, without great changes in any specific trends thus far. As for the first half of 2013, the outflow was US\$16.22 billion and the inflow was US\$7.998 billion, resulting in a net outflow of US\$8.222 billion. For the year 2012, the outflow was US\$39.01 billion and the inflow was US\$16.286 billion. For the year 2012 there was a net outflow of US\$22.724 billion.

4 Describe domestic legislation governing investment agreements with the state or state-owned entities.

The Act on Contracts to which the State is a Party applies to all contracts entered into by the Korean government or any of its agencies or branches. The scope of the procurement contracts applies generally to commodities, construction work and services as necessitated by Presidential Decree, and potential government purchase of agricultural, fishery or livestock for the purposes of stabilisation of such industries. Such contracts are overseen by a designated public

official, and may be jointly concluded by officials of other relevant domestic government agencies or local governments.

Additionally, the Financial Investment Services and Capital Markets Act (FSCMA) regulates foreign investments in government bonds, monetary stabilisation bonds, national housing bonds, other public bonds and public-purpose company stocks, as part of the legislation governing investment into the securities markets. Among other areas, the FSCMA governs registration requirements for foreign investors with the proper regulatory bodies, reporting guidelines and procedures, public disclosure of foreign investments by the Financial Supervisory Service and any caps on foreign investment by industry and form of financial instrument.

International legal obligations

5 Identify and give brief details of the bilateral or multilateral investment treaties to which the state is a party also indicating whether they are in force.

Korea's bilateral investment treaty programme is extensive, with 89 treaties executed to date and the majority of those entered into force. While there are currently no multilateral investment treaties in force, Korea announced the commencement of the negotiation for a trilateral trade and investment agreement with Korea, China and Japan in November 2012. A positive outlook has been forecast from its inception, and joint research has recently been conducted for this agreement. Negotiations began in May 2013, and if implemented the Treaty is expected to provide strong support for and promote investment among the three countries, and increase the relatively low rate of trade between them. This agreement will not limit the exchanges between the three nations to trade and investments, but will also extend to cultural exchanges and human resources. The trilateral investment agreement will include protections for fair and equitable treatment, full protection and security of investors, national treatment, most-favoured nation treatment and swift and just compensation in cases of expropriation.

Korea has proceeded positively with the execution of free trade agreements as a means of policy implementation to encourage the continual growth of the Korean economy and to become an advanced trading country. FTAs generally include provisions for the protection of investments between the contracting states and, as such, are broader instruments that also cover what BITs often provide for in the way of investor protections. The Korean government adopted the FTA Road Map for 2003, utilising it as a base from which to negotiate FTAs with major economic partner countries. As result, a total of eight FTAs (with 45 contracting parties such as Chile, Singapore, EFTA, ASEAN, India, the EU, Peru and the USA) were put into effect as of the end of 2012, and execution and ratification of FTAs with Turkey and Colombia are in progress. The Korea–USA FTA became effective on 15 March 2012. The Korean government signed the basic agreement and commodity trading agreement for an FTA with Turkey on 1 August 2012, and

the national assembly has ratified it. The Korea–Colombia FTA was officially signed on 21 February 2013.

Korea became an observer to the Energy Charter Treaty on 17 December 2002, when its application was approved by the Energy Charter Conference at its 11th meeting.

As part of a regional collaboration, Korea participated in a Regional Comprehensive Economic Partnership (RCEP), for which Korea announced the commencement of negotiation at the East Asia Summit held on 20 November 2012.

Although it is not a bilateral or multilateral investment treaty, it is important to note that Korea is also a party to the Agreement on Government Procurement (GPA), a plurilateral agreement on government procurement through the World Trade Organization (WTO) since 1 January 1997. Signatories to the Agreement undertake to provide national and non-discriminatory treatment to goods, services and suppliers of the other signatories, ensuring through detailed procedures a fair chance to compete for government contracts. While Korea made no specific reservations when becoming a party to the GPA, annexes 1 and 2 of Korea's GPA lists certain areas and situations regulated by government agencies where GPA does not apply, such as agriculture, fishery and livestock industries under certain conditions. Annexes 3–5 list other exemptions that do not fall under government agency purview. All such industries and categories exempted from the GPA are listed and updated on the WTO page on appendices and annexes (http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm#kor).

6 Is the state party to the ICSID Convention?

Korea is a signatory party to the ICSID Convention as of 18 April 1966. The deposit of ratification took place on 21 February 1967, and the Convention entered into force on 23 March 1967. Contextually, Korea's first BIT with Germany was signed in 1964 and entered into force in 1967, and included a provision for disputes to be submitted before an arbitral tribunal. While no specific arbitration conventions or rules were named in the Korea–Germany BIT, the provision naming arbitration as the method of dispute resolution may have encouraged Korea's signing of the ICSID Convention.

7 Does the state have an investment treaty programme?

The Korean government has actively pursued investment treaties throughout every geographic region. Further, there are domestic government agencies that govern and oversee foreign investments into Korea to support the operational investment treaties. All investment treaties are currently negotiated and signed by the Ministry of Trade, Investment and Energy (MOTIE). The MOTIE has been restructured and renamed several times under different presidential administrations since the inception of its predecessor agency in 1948. It was previously the Ministry of Commerce, Industry and Energy (1998–2008) and Ministry of Knowledge and Economy (MKE) (2008–2013) but was finally given to its current name in 2013 at the start of President Park Geun-hye's new presidential administration. Unlike the MKE, the MOTIE also took over the negotiations for BITs and FTAs as well as creation of policies for foreign investment and international trade, which was previously performed by the Ministry of Foreign Affairs and Trade.

As discussed above, the Korean government has also proceeded positively with the execution of FTAs as a means of implementing the policy to create continual growth in the Korean economy and to increase Korea's prominence in international trade. The adoption of the FTA Road Map for 2003 has aided in the negotiation for FTAs with numerous countries, and also provides for promotion and protection for foreign investors into Korea.

Regulation of inbound foreign investment

8 Does the state have a foreign investment promotion programme?

Korea has implemented regimes to protect foreign investors, beginning with the liberalisation of foreign investment policies as early as the early 1980s, which has gradually progressed to further liberalisation of the Korean securities markets. Except as otherwise prescribed by the Acts of the Republic of Korea, a foreigner may conduct, without restraint, various investment activities in Korea. Foreigners are restricted from foreign investments in the following cases: where it threatens the maintenance of national safety and public policy; where it has harmful effects on public hygiene or the preservation of the environmental or is against Korean morals and customs; and where it violates the Acts and subordinate statutes of the Republic of Korea.

In addition, the Korean legislature has passed laws to protect foreign investment. Under the Foreign Investment Promotion Act (FIPA), with respect to proceeds from stocks, bonds or other security instruments, including dividends and proceeds from sales of such security instruments, the liquidation of the principal, interest, and service charges paid and the remittance thereof to foreign countries are guaranteed in accordance with the details of the permission or report of the foreign investment contract, or the licencing agreement in effect at the time of remittance. This gives foreign investors the assurance that any gains from their investment into the Korean economy will be transferable out of Korea and gives bargaining rights to the investor and its domestic partner.

Currently, the Korean Trade-Investment Promotion Agency (KOTRA) exists as a government agency that supports foreign direct investments into Korea and acts as a resource for foreign investors and domestic partners alike. The MOTIE, along with KOTRA and the agencies under it, are the main government bodies that exist specifically to promote, protect and regulate foreign investments.

9 Identify the domestic laws that apply to foreign investors and foreign investment, including any requirements of admission or registration of investments.

A series of domestic laws apply specifically to foreign investors and foreign investments, as well as those that apply to foreign investors and investments into the industries regulated by those laws. Registration requirements with the government entity that oversees the administration of any of the domestic laws, along with additional reporting requirements, apply to foreign investors.

Domestic laws on foreign investment

FIPA was first enacted in 1998 to encourage foreign direct investments, following the 1997 Asian financial crisis. FIPA provides protection for foreign investments, supports a foreign investment stimulation plan, lays out foreign investment procedures and creates incentives such as tax abatement and exemptions for foreign investments. Contemporaneously, the Korean government also expanded the liberalisation of the securities market and phased out ceilings on foreign direct investment into the securities market as part of the effort to boost the economy. Recently, FIPA was amended in order to improve the existing foreign investment system and to further promote foreign investment in the service sector (Act No. 10232, promulgated on 5 April 2010 and taken into force on 6 October 2010).

FIPA is designed to facilitate foreign investment by increasing investor convenience and providing support to foreign investors. FIPA serves as the foundational law for foreign investment, and its subordinate statutes include the Enforcement Decree of the Foreign Investment Promotion Act, the Enforcement Rule of the Foreign Investment Promotion Act and the Regulations on Foreign Investment and Technology Introduction. The subordinate statutes

prescribe the matters delegated in FIPA and any necessary matters for the enforcement of FIPA, including clarifying restrictions on foreign investments, laying out reporting and permission-seeking procedures for foreign investments and outlining necessary licensing agreements and other procedures.

Further, the Foreign Exchange Transaction Act governs matters concerning those Korea-bound transactions which are not covered by FIPA. For foreign investments, taxes may be abated or exempted under conditions as prescribed by the Restriction of Special Taxation Act, Enforcement Decree of the Restriction of Special Taxation Act, Enforcement Rule of the Restriction of Special Taxation Act, and Regulations on Tax Abatement or Exemption on Foreign Investment.

In addition to the above, the following acts and statutes apply to foreign investments:

- Consolidated Public Notice for Foreign Investment (notified by the Ministry of Trade, Industry and Energy);
- Financial Investment Service and Capital Markets Act (FSCMA) and Enforcement Decree of the FSCMA (notified by the Financial Services Commission); and
- Regulation on Financial Investment Business (RFIB) and Detailed Rules of RFIB (notified by the Financial Supervisory Service).

Domestic requirements for foreign investment

Pertinent procedures and regulations for foreign investors consist of foreign investment notification, registration of incorporation or business, registration of a foreign-invested company and remittance of investment funds. The procedures applied to foreigners are basically the same procedures Koreans and Korean business entities are expected to follow, with the exception of two additional steps: reporting of foreign investment notification and registration of a foreign-invested company. When a foreign investor registers a privately owned business, a 'registration of incorporation' is not required.

The process of reporting a foreign investment requires:

- designating a reporting person, who may be a foreign investor or a domestic agent;
- selecting a delegated agency, such as the headquarters or branches of domestic banks, domestic branches of delegated foreign banks, KOTRA or Korea Business Centres of KOTRA; and
- obtaining the certificate of completion of foreign investment notification, which is issued immediately as FIPA calls for no delay in the processing period.

Registration of foreign investors and reporting for foreign investments must be timely. Reporting for most foreign direct investments is required prior to the investment, including among other instances the acquisition of new or existing stocks, of 10 per cent or more equity share per foreign investor, long-term loans or procurement contracts and joint research and development agreements. In certain circumstances, reporting can be done within 30 days of the investment, such as an acquisition of stocks following a merger or via a transfer of stocks, reduction in the number of stocks and when there is a change or cancellation in registration of a foreign-invested business. Registration of foreign investors should generally be done 30 days from the date of the investment.

10 Identify the state agency that regulates and promotes inbound foreign investment.

KOTRA is the overarching agency, under which Invest KOREA (IK), Korea's national investment promotion agency, was established with the purpose of supporting the entry and successful establishment of foreign businesses into Korea. With assistance extending to comprehensive post-establishment services, IK helps foreign corporations

to maximise the benefits of the Korean investment environment to ensure their rapid settlement in Korea.

Korea's foreign direct investment promotion regime

IK implements government policies on foreign investment that have been formulated by the MOTIE and is coordinated by the Foreign Investment Committee, which is chaired by the Minister of Strategy and Finance.

In addition, the MOTIE is the agency that oversees the administration of the FIPA, which regulates certain reporting and registration procedures and restrictions on foreign investments in Korea. For inbound investments into the securities markets, the Financial Services Commission (FSC) and Financial Supervisory Services (FSS) are agencies that administer certain reporting and registration processes and regulate foreign investments. Foreign investors are required to register with and report any over-the-counter trading that is selectively permitted to foreigners under the Regulation on Financial Investment Business (RFIB) to the FSS. The FSC may have the power to restrict foreign investors' ownership of debt, equity securities or derivatives of a certain issuer, a specific class of securities or holdings in a specific business sector, if such restrictions are deemed necessary for the stability of the Korean financial market or for investor protection. The class of securities or business sectors subject to restrictions are noted in the FSCMA.

Foreign investors are required to:

- report investments to the MOTIE;
- transfer funds to the Korean company or organisation;
- register the corporation or private company with the MOTIE, along with information about the business, which is also a requirement for Korean investors; and
- register the corporation or business as a foreign-invested company.

In practice, the MOTIE has delegated relevant authorities and responsibilities to other institutions including foreign exchange banks as well as KOTRA, which is in charge of day-to-day operations related to the foreign investments.

11 Identify the state agency that must be served with process in a dispute with a foreign investor.

In Korea, there is no formal requirement for a foreign investor to report its current dispute status to any state agency. As for the state agency that must be served, article 2 of the Act on Litigation to which the state is a party provides that, in cases of litigation in which the state is a party or an intervenor, the Minister of Justice shall represent the state. Therefore, the Minister of Justice is the proper party to be served in disputes where the state is a party.

Investment treaty practice

12 Does the state have a model BIT?

Korea has a model BIT, however, it is not set in stone. It is not disclosed to the public in its entirety and is not a comprehensive treaty document. Therefore, it serves the purpose of an internal guideline for government officials when entering into a new BIT or FTA, rather than a form treaty that has been pre-approved by the legislature.

13 Does the state have a central repository of treaty preparatory materials? Are such materials publicly available?

In principle, the treaty preparatory materials are not disclosed to the public, and the treaty itself is not disclosed until after its effectuation. However, the Ministry of Foreign Affairs has regularly disclosed historic diplomatic documents related to diplomatic activities to the public since 1994 under the Rules on Preservation and Disclosure of Diplomatic Documents established and promulgated by the

ordinance of the Ministry of Foreign Affairs on 28 July 1993. The diplomatic documents are eligible for disclosure after the lapse of 30 years from the preparation thereof, as historical records. Also, pursuant to the Official Information Disclosure Act, which has been in force since January 1998, a diplomatic document may be disclosed prior to the lapse of 30 years from its preparation in forms such as inspection, copy and reproduction if there is a specific request for disclosure of such document by an individual.

Unlike diplomatic documents, parliamentary records are disclosed and can be found at the National Assembly's website (<http://www.assembly.go.kr/main.acl>). If the National Assembly requests the examination and inspection of the relevant materials prior to the execution of a treaty as an exception, such materials are subject to a 'non-disclosure' inspection, and the relevant lawmakers should not disclose matters examined through such inspection to the public.

The MOTIE runs a separate website for FTAs, where one can easily find at least the status of the execution of certain FTAs, for example whether it is at negotiation stage or research stage (www.ftahub.go.kr/kr/).

While extensive preparatory materials may be available on Korean-language websites of the government agencies and branches, translated versions of the materials or databases may not be as readily available on English-language websites. Additionally, as the preparatory materials or guidelines are most likely created in the Korean language, many English translations of such materials carry a disclaimer of potential unintended errors or inaccuracies in translation.

14 What is the typical scope of coverage of investment treaties?

Investment treaties typically define who is considered an investor, and include specific requirements of affiliation to the party states, as well as what qualifies as an investment and the types of protections afforded the contracting parties. Generally, an investment is defined as the investment of an investor who is a national or registered entity of the territory of the party states, which existed as of the date of effectuation of the treaty or was established, acquired or expanded thereafter. For example, article 11.28 of the Korea–United States FTA provides that:

the 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 natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

Similar language is used in the majority of bilateral investment treaties Korea has entered into to describe the qualifications of an investor.

The definition of an investment, as used in bilateral investment treaties, is generally defined broadly. Most of the earlier treaties are less descriptive in defining what qualifies as an investment, yet are encompassing of any asset that may carry monetary value. Those treaties more recently entered into in the past two-to-three decades, and those that have been amended in recent years, are slightly more descriptive, yet use general terms to include both tangible and intangible properties and rights, both moveable and immoveable, and for intellectual property rights and trade secrets.

Treaties delve into the types of protections available to investors from the contracting states, in extensive detail.

15 What substantive protections are typically available?

National treatment is generally included. In this regard, whether investments made prior to the execution of the treaty can also be protected is debated, and depends on whether the matter is

specifically addressed in the BIT or relevant treaty. However, most of the FTAs which Korea has entered into are drafted to include pre-treaty investments by including the language 'with respect to establishment and acquisition'. Yet it is important to review the specific language of each treaty, for in relation to the Korea–China BIT, investments with respect to the 'establishment and acquisition' are excluded from the covered investment, excluding investments made prior to the treaty.

Most-favoured nation treatment, minimum standard of treatment, losses and compensation thereof, subrogation, expropriation and compensation, full protection and security and fair and equitable treatment are the commonly allotted protections. There are often provisions for settlement of disputes among foreign investors into Korea in addition to provisions for dispute settlement between the contracting state and the investor. Additionally, provisions for repatriation or transfer of profits and proceeds from the investment out of the state where the investment was made are clearly stated.

Umbrella clause is also typically included in Korea's investment treaties. However, based on the disclosed excerpts of the Korean Model BIT, there is a provision that the BIT shall be applicable only to agreements entered into with a central government, under the influence of the Korea–United States FTA:

Each contracting Party shall observe the provisions of this Agreement as well as any specific investment agreement between an authority at the central level of government of a Party and investors of the other Contracting Party that may have entered into force.

16 What are the most commonly used dispute resolution options for investment disputes between foreign investors and your state?

The only investor–state dispute arbitration brought against the government of Korea (in 1984) was filed under the rules of ICSID. To date, apart from the ongoing *Lone Star* dispute (see question 18) before ICSID, no other known foreign investor dispute has been filed against the government of Korea, and thus ICSID remains the only forum used. However, most of the BITs (and FTAs) allow both parties to the dispute to choose ICSID, ICC or UNCITRAL arbitration.

17 Does the state have an established practice of requiring confidentiality in investment arbitration?

No, due to the lack of past investment arbitrations, no established practice pertaining to confidentiality exists. Further, most of the BITs (and FTAs) contain no specific confidentiality provisions and therefore the confidentiality requirement should be subject to the rules governing the procedure that the parties choose, for example ICSID rules, UNCITRAL rules, ICC rules. However, despite these provisions, there is a high demand from the Korean public for transparency and disclosure of the procedure in the *Lone Star* dispute.

Investment arbitration history

18 How many known investment treaty arbitrations has the state been involved in?

Interestingly, there has been only one investor–state dispute claim against the Korean government to date. In 1984, Colt Industries Operating Corporation filed an arbitration claim before ICSID against the Korean government (ICSID Case No. ARB/84/2), which was eventually settled between the parties, and the order noting the discontinuance was issued on 3 August 1990. However, this case was a dispute arising out of licensing agreements on the production of weapons, and thus was not an investor–state dispute based on an investment treaty.

The Korean government is defending its first investment treaty arbitration, brought by *Lone Star Capital Investments* and other

Update and trends

The Korean government is defending its first investment treaty arbitration, brought by LoneStar Capital Investments and other claimants, before ICSID (<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>). As it is the first arbitration of its kind in Korea, it has stirred up extensive discussions in both the media and among scholars. However, it is early in the arbitration and the pertinent issues to be addressed and the potential impact on foreign investments in Korea remains unknown.

claimants, before ICSID (<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded>).

- 19** Do the investment arbitrations involving the state usually concern specific industries or investment sectors?

As of yet there is no precedent and this is an area to be observed as disputes arise in the future.

- 20** Does the state have a history of using default mechanisms for appointment of arbitral tribunals or does the state have a history of appointing specific arbitrators?

Again, there is no precedent and this is an area to be observed as disputes arise in the future.

- 21** Does the state typically defend itself against investment claims? Give details of the state's internal counsel for investment disputes.

Since Korea is currently facing its first investment treaty dispute, there is no precedent that indicates typical protocol. However, the Ministry of Justice is taking charge of the first investment treaty arbitration that the Korean government is involved in, and the government is actively defending itself.

Enforcement of awards against the state

- 22** Is the state party to any international agreements regarding enforcement, such as the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards?

Korea is a signatory party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) since 1973, and has relied on it for the enforcement of arbitration awards. While there have been no arbitral awards against the Korean government to date, it is expected that the enforcement of any such future awards will be enforced in accordance with the New York Convention.

- 23** Does the state usually comply voluntarily with investment treaty awards rendered against it?

There is no precedent as to this issue.

- 24** If not, does the state appeal to its domestic courts against unfavourable awards?

There is no precedent as to this issue.

- 25** Give details of any domestic legal provisions that may hinder the enforcement of awards against the state within its territory.

As Korea is a signatory to the New York Convention, a Korean court may refuse to enforce awards based on public policy, which is one of the grounds set forth in the Convention to set aside an arbitral award. The Korean courts have, although not often, refused to enforce commercial arbitral awards based on violation of Korea's public policies.

However, the New York Convention is applicable to other arbitral awards, including those resulting from arbitration cases where the investor and the state has chosen UNCITRAL as a dispute resolution option rather than ICSID.

As for an award rendered under the ICSID Convention, although it states under article 54(3) that the enforcement of an award should be pursuant to a national law on the enforcement of judgments within the territory of the state in which such enforcement of the award is sought, it will not allow any refusal of the enforcement of an award based on domestic provisions. Therefore, any domestic laws, including the Korean Arbitration Act, will not be grounds to refuse enforcement.

There is no general provision under Korean law governing sovereign immunity, and sovereign immunity is not a ground for resisting arbitral award under the Korean Arbitration Act or under the New York Convention. A number of cases decided by the Supreme Court have involved the Republic of Korea or Korean government entities as parties in arbitration cases without any issue being raised as to their capacity to enter into arbitration agreements, per se, however, there are no clear court precedents regarding the issue of sovereign immunity with respect to investor state disputes. In Korea, there are developing debates about whether the state agreeing to an arbitration agreement implies that it has waived its sovereign immunity rights. The prevailing opinion is that if the state's action is in the field of a private sector, such waiver can be easily implied. However, there is no clear court or statutory precedent as to this point.

On the other hand, according to article 192 of the Korean Civil Execution Act, compulsory execution against the State shall be effected by seizure of the national funds. The effect of this law is to limit the object to be seized to the national funds only and not other assets of the state.

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Insurance & Reinsurance	Tax Controversy
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Labour & Employment	Telecoms and Media
Licensing	Trade & Customs
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