The Foreign Investment Regulation Review

Fourth Edition

Editor
Brian A Facey

Law Business Research

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Brian A Facey

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PUBLISHER
Gideon Roberton

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Nick Barette

BUSINESS DEVELOPMENT MANAGER
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EDITOR'S PREFACE

I am pleased to present the fourth edition of *The Foreign Investment Regulation Review*. This year's edition features contributions from 46 authors from 21 countries. Our contributors provide important insight into the regulatory framework for foreign investment review in their respective countries, as well as an overview of current trends and developments in this field.

In 2015, global foreign investment increased to its highest level since the global economic crisis began in 2008. The primary factor in the global growth of foreign investment was the significant increase in cross-border mergers and acquisitions.

Within this context, foreign investment reviews will continue to present complex issues for businesses, regulatory authorities and legal counsel. Legal practitioners and companies seeking to do business internationally will benefit by familiarising themselves with the regulatory frameworks outlined in this treatise. Of particular importance, this edition provides readers with practical guidance to navigate investments in major jurisdictions by anticipating key timing and substantive issues. It also brings to the readers' attention key policy or 'soft' considerations when investing in a particular jurisdiction. We hope this edition will assist investors and businesses being acquired to better evaluate and manage the legal and political risks associated with investments that may be subject to foreign investment review, ultimately reducing transaction uncertainty and delay.

I would like to express my gratitude to each author and law firm involved in this project for the commitment of both their expertise and their time.

Please note that the views expressed in this book are those of the authors, and not those of their firms, any specific clients, the editor or the publisher.

Brian A Facey
Blake, Cassels & Graydon LLP
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Chapter 13

KOREA

Jaemin Jeon and Haneul Jung[1]

I INTRODUCTION

Korea is one of the top 10 economies in the world in terms of total trade volume. Korea's highly skilled workforce and leading industries establish Korean economy as the heart of the value chain in north-east Asia. Korea is also one of the most attractive places for long-term investment. Over the past six decades, Korea has proved itself to be one of the most resilient economies in the world. Korea has overcome – rapidly and effectively – devastating wars, sociopolitical turmoil and financial crises in such ways that the world has rarely witnessed.

Following the 1997 financial crisis, during which the Korean government requested a standby arrangement from the International Monetary Fund, Korean laws concerning foreign investment have been dramatically revised. Recognising that the financial crisis was due in part to an overreliance on foreign debt and to a less than welcoming attitude towards foreign direct investment, the Korean government took drastic measures to reform the Korean laws concerning foreign investment. Prior to that reform, foreign portfolio investors were subject to strict quantitative limits on share purchases. The aggregate limit for all foreign investments in shares of companies listed on the Korea Stock Exchange was 55 per cent of all issued and outstanding shares; moreover, no single foreign shareholder could own more than 50 per cent of a listed company's shares. After the reform, these limitations were removed so that foreign investors can, in principle, acquire all of the outstanding shares of a listed company in Korea, with certain exceptions. The reform also allowed foreign investors to establish or acquire Korean securities firms, investment and trust companies and merchant banks. In addition, the Korean government implemented the privatisation of a number of major state enterprises, including Korea Telecom, Korea Electric Power Corporation, Korea Gas Corporation, and Korea Tobacco and Ginseng Corporation.

Now, foreign investment is limited only in a few sectors or industries, including basic utilities such as telecommunications and broadcasting, postal services, central bank, etc.,

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1 Jaemin Jeon is a partner and Haneul Jung is a senior foreign attorney at Shin & Kim.

or in certain state-owned enterprises. It is expected that Korea will continue to liberalise its foreign investment-related laws and regulatory systems to further encourage and promote foreign investment in Korea. This trend is likely to continue with Korea's enthusiastic participation in regional trade agreements. So far, Korea has either ratified or concluded 16 free trade agreements (FTAs) and other regional trade agreements. Five additional free trade agreements, including mega FTAs such as the Trans-Pacific Partnership and Regional Comprehensive Economic Partnership, are currently under negotiation. Most of these regional trade agreements contain commitments by Korea to make extensive market access concessions.

II FOREIGN INVESTMENT REGIME

i Overview

Korea upholds the principle of equal treatment and equal application of tax regulations. No restriction on overseas remittance of dividends, liquidation proceeds, etc. is applicable to foreign investment. Any differential treatment in relation to foreign investment is explicitly codified in law, as discussed below.

From regulatory perspectives, there are two ways a foreign investor can make a foreign investment in Korea: (1) a foreign direct investment in accordance with the Foreign Investment Promotion Act (FIPA); and (2) an acquisition of shares (e.g., portfolio investment) in accordance with the Foreign Exchange Transaction Act (FETA). In this regard, since the Korean government has shown a greater preference for foreign direct investment when compared with other forms of investment (including share acquisition under the FETA), a greater level of protection is offered to foreign direct investment under the FIPA than to share acquisition under the FETA.

The FIPA applies in cases where a foreign investor invests a minimum of 100 million won in a target company and satisfies one of the following requirements: the investor (1) owns 10 per cent or more of the equity interest in the company; (2) has a right to appoint officers; (3) enters into a contract with the company to produce or procure certain materials or products for a period longer than one year; or (4) enters into a contract with the company to produce or procure technology or research. Among the various advantages under the FIPA, the FIPA grants a foreign investor and a foreign-invested company 'national treatment' and allows certain tax benefits, as well as guaranteeing the remittance of income, proceeds and other amounts in accordance with any contractual agreements between the foreign investor and other parties. Additionally, the government (national or local) may provide cash grants, as well as possibly supplying industrial sites within designated foreign investment zones. Finally, any foreign direct investment made pursuant to the FIPA is not subject to any potential governmental suspension of foreign exchange transactions – an action that may be taken pursuant to the FETA during times of war, natural calamities, conflicts or critical and sudden changes in domestic or international economic circumstances.

For those investments not governed by the FIPA, the FETA will apply. Under the FETA, if the Korean government determines it to be necessary because of the outbreak of natural calamities, wars, armed conflict or grave and sudden changes in domestic or foreign economic circumstances, or other situations equivalent thereto, it may temporarily suspend payment, receipt or the whole or part of a transaction to which the FETA applies; or impose an obligation for safekeeping, depositing or selling the means of payment in or to certain Korean governmental agencies or financial institutions. Furthermore, if the

Korean government determines that the international balance of payments and international finances face, or are likely to face, serious difficulty, or that the movement of capital between Korea and abroad will cause or is likely to cause serious obstacles in carrying out its currency policies, exchange rate policies and other macroeconomic policies, it may take measures to require any person who intends to perform capital transactions to obtain permission or to require any person who performs capital transactions to deposit part of the payments received in such transactions at certain Korean governmental agencies or financial institutions, subject to certain limitations in each case. In terms of benefits, the primary difference between share acquisitions under the FETA and foreign direct investments under the FIPA is that there is no minimum investment requirement under the FETA. Accordingly, the foreign investor may establish a subsidiary in Korea without having to satisfy the 100 million won paid-in-capital threshold required under the FIPA.

ii General foreign investment restrictions

Korea still maintains a number of foreign investment restrictions, most notably in the following business categories: (1) cultivation of grains and other food crops; (2) beef cattle breeding; (3) coastal fishing; (4) basic inorganic chemical production; (5) nuclear generation; (6) power generation; (7) power transmission and supply; (8) collection, transportation and handling of radioactive waste; (9) meat wholesaling; (10) inner harbour passenger or freight transport; (11) regular or special aerial transport; (12) newspaper publication; (13) magazine and periodical publication; (14) radio broadcasting; (15) terrestrial broadcasting; (16) programme provider; (17) cable broadcasting; (18) satellite and other broadcasting; (19) cable communications; (20) mobile communications; (21) satellite communications; (22) electronic communications; (23) news; and (24) certain special types of domestic banks and agricultural, fishery and livestock cooperatives.

From a foreign investor's perspective, the most significant foreign investment restrictions apply to certain state-owned enterprises, telecommunications and broadcasting.

State-owned enterprises

Pursuant to Articles 18 and 19 of the Improvement of Managerial Structure and Privatisation of Public Enterprises Act, a foreign investor's shareholding ratio in each of the following public companies is limited to 15 per cent: (1) Korea Tobacco and Ginseng Corporation; (2) Korea Telecommunications Corporation; (3) Korea Gas Corporation; (4) Korea Heavy Industry and Construction Co, Ltd; (5) Incheon International Airport Corporation; and (6) Korea Airports Corporation. Under Article 19(1) of the same Act, this statutory limitation for foreign ownership can be strengthened. That is, each of the foregoing public companies may adopt a provision in its articles of incorporation to apply a foreign ownership ceiling below 15 per cent. Any foreign investor directly or indirectly holding more than 15 per cent (or a ratio prescribed by the relevant public-company articles of incorporation) of shares in one of the foregoing public companies is required to 'immediately' dispose of the shares in excess of this ceiling. Even before the disposal, the foreign investor can exercise its voting right only up to the 15 per cent (or as otherwise prescribed) of the shares in the public company concerned.

Telecommunications

Article 8 of the Telecommunications Business Act limits the maximum aggregate foreign shareholdings in a network service provider to 49 per cent of the total issued and outstanding

shares of the network service provider. If a foreigner, together with certain affiliates, is the largest shareholder of a Korean company or a foreign shareholder's shareholding ratio (together with certain affiliates) is equal to or more than 15 per cent of the total issued and outstanding shares of the Korean company, the shareholding by the relevant Korean company will be regarded as foreign shareholding for the purpose of calculating the 49 per cent statutory ceiling. However, this presumption of foreign shareholding would not extend to a shareholder controlled by foreign investors based in a state that has concluded a free trade agreement with Korea. If the 49 per cent ceiling is breached, the Minister of Science, ICT and Future Planning may issue an order to the breaching foreign shareholder to dispose of the excessive shares within six months. Even before the disposal, the foreign investor can exercise its voting right only up to the 49 per cent of the shares in the network service provider concerned.

Broadcasting

Foreign ownership in terrestrial broadcasting business operators is generally prohibited under the Broadcasting Act of Korea. However, certain foreign investors that have the 'aim and objective' of promoting 'education, sports, religion, charity or international friendship' may engage in limited investment activities upon obtaining relevant approvals from the Korea Communications Commission. Foreign ownership is limited to 20 per cent for (1) a programme provider engaged in general programming or (2) a cable television (CATV) relay broadcasting business operator (i.e., CATV, which relays terrestrial broadcasting). If the programme provider is engaged in specialised news report programming, foreign ownership is limited to 10 per cent. Foreign shareholding is permitted up to 49 per cent in (1) satellite broadcasting business operators and (2) in system operators (excluding CATV relay broadcasting business operators, as mentioned above) and programme providers (excluding programme providers engaged in general programming or specialising in news report programming).

As with telecommunications, the presumption of foreign shareholding would not extend to a shareholder controlled by a foreign investor based in a state that has concluded a free trade agreement with Korea.

iii Special foreign investment restrictions

Under the Enforcement Decree of the FIPA, foreign investment may be subject to further review and an approval process by the Korean government if the investment is viewed as being a 'threat to national security'. Foreign investments having ties with countries sanctioned by the UN Security Council may come under close scrutiny and are likely to become subject to such national security restrictions.

Under the FIPA's Enforcement Decree, a threat to national security exists in the context of corporate control over a domestic company if: (1) a foreign investment poses a risk of impeding the production of defence products; (2) there is a high possibility that the products or technology manufactured or owned by the target company will be converted for military use; (3) a foreign investment poses a risk of disclosing classified information prohibited under relevant laws and regulations; or (4) a foreign investment generates concerns of materially impeding international peace and security.

III TYPICAL TRANSACTIONAL STRUCTURES

Direct foreign investment in Korea is governed by the FIPA. The Korean Commercial Code (KCC) also applies to all commercial transactions in Korea. Collectively, Korea's foreign investment regime affords foreign investors treatment virtually equal to that afforded domestic investors in a corporate transaction. Generally speaking, therefore, foreign investors are not necessarily required to devise special transactional structures when investing in Korea. Of course, there are inherent strategic concerns a foreign investor must consider given the cross-border nature of foreign investment.

i Foreign investment vehicles

Types

A foreign investor can consider the following three types of establishments as its presence in Korea: (1) a liaison (or representative) office; (2) a branch office; and (3) a subsidiary.

The concept of 'liaison office' as stipulated in Korean tax law is different from that generally understood by foreigners. Under Korean tax law, a liaison office means the business place in Korea that is utilised solely for non-income-generating liaison activities such as (1) purchase of goods, (2) storing or displaying goods not for sale, (3) market research or other similar activities of a preliminary or auxiliary nature. Since a liaison office, by definition, acts only for its home office and does not generate income in Korea, it is not subject to corporate income tax and need not file corporate income tax return in Korea. However, it is required to withhold payroll income tax as an employer with respect to employees who are paid by the liaison office. If the liaison office generates any income from its activities, it will be subject to Korean tax. Since a liaison office, by definition, has no income derived from a Korean source, it must be funded by its head office through the remittance of operating funds. In principle, the repatriation of operating funds back to the home office is allowed. If the intended scope of activities in Korea exceeds the liaison activities described above, the foreign investor should instead establish a branch office or a subsidiary.

To provide goods or services through a permanent establishment in Korea, a branch office or subsidiary should be established. Registration with the local court will allow a foreign investor to hold its assets in Korea in the branch's name. This improves the control the head office has over its assets and makes it much easier to replace employees and transfer assets, compared with a liaison office. A branch is subject to corporate income tax on its Korean-source income, and corporate income tax returns should be filed at the end of each relevant fiscal year. Korean tax law requires a branch to keep a double-entry bookkeeping system for taxable income. A Korean branch has to file VAT returns quarterly. In general, the Korean VAT system is similar to that in effect in many European countries. When the branch provides goods or services in Korea, it is required to collect VAT from the purchaser at the flat rate of 10 per cent of the goods and service price (output VAT). On the other hand, when the branch buys goods or service, it has to pay VAT at 10 per cent to the supplier (input VAT). The difference between output VAT and input VAT should be paid to the appropriate tax office quarterly. If input VAT exceeds output VAT, the difference is refunded on a semi-annual basis. However, exports of goods or services are granted a zero tax rate.

Most foreign investors establish a subsidiary in Korea. Unlike a liaison office or branch, a subsidiary of a foreign investor will be deemed as a Korean company as it will be incorporated under the laws of Korea. Also, the requirements and the nature of establishing a subsidiary are generally more difficult and complex than those of a liaison office or a branch.

Once a foreign investor decides to establish a subsidiary, it will then have to decide on what type of subsidiary is desirable. The KCC recognises six types of business entities: *jo-hap* (a form of partnership), *chusik hoesa* (a form of joint stock company or corporation), *yuhan hoesa* (a form of limited company), *yuhan checkim hoesa* (a form of limited liability company), *hapmyung hoesa* (a form of unlimited liability company), *hapja hoesa*, and *hapja johap* (a form of joint partnership). These entities are largely distinguishable according to (1) the exposure to liability of members of the business entity, and (2) whether the liability extends to the members' personal assets or is limited to the assets of the business entity.

An overwhelming majority of the companies in Korea are established as *chusik hoesa*, mainly because it strictly insulates the stockholders from the debts of the company while at the same time allowing for large amounts of fixed capital and continued increases to its paid-in capital. It is also virtually the only form that enables a company to go public. In addition, the popularity of the *chusik hoesa* form is attributable to a perception in the Korean business society that *chusik hoesa* are prestigious, while other corporate forms carry a stigma of being suitable only for small family-owned businesses. Based on these reasons, *chusik hoesa* is the business entity most commonly selected by foreign investors. However, entities such as *yuhan hoesa* or *yuhan checkim hoesa* have their own merits and therefore should not be carelessly overlooked. In fact, a *yuhan hoesa* is more suitable for a small business that does not seek to increase its capital through public offerings. The major advantages of a *yuhan hoesa* over a *chusik hoesa* would be the flexibility in corporate management, no legal requirement for external audit, absence of an obligation to publicly disclose the accounts of the company and possible tax benefits. Another advantage available by establishing a *yuhan hoesa* is the potential pass-through of taxation for investors located in certain jurisdictions (the United States, for example, recognises the Korean *yuhan hoesa* as a pass-through entity under its check-the-box rule). On the other hand, the practical downside of a *yuhan hoesa* compared with a *chusik hoesa* is its inability to issue bonds, and limited transferability of equity. Entities such as *jo-hap*, *hapmyung hoesa*, etc. are rarely established by foreign investors.

Merits and demerits

Because both a branch office and a subsidiary may serve a foreign investor's intention to create a permanent establishment in Korea, an investor making a choice between a branch office and a subsidiary should understand the advantages and disadvantages of each form of these entities.

There are three major advantages of a branch office. First, the profits generated by the branch office in Korea may be repatriated to its head office after payment of relevant Korean corporate taxes, without any other withholdings or deductions. Second, there is no requirement in respect of transferring operating funds from the head office to the branch office, other than a nominal flat registration tax fee payable on the initial contribution of operating funds by the head office (the branch office must nonetheless inform the government through a foreign exchange bank of the receipt of such foreign funds). Third, there are no minimum statutory capital requirements for the establishment of a branch office. In addition, under the Local Tax Act, establishment of a branch office will result in a lower registration tax than establishment of a subsidiary (and any capital increases after establishment). A registration tax equal to 0.48 per cent (including an education surtax) of the capital amount of a Korean subsidiary will be assessed when it is registered with the relevant court. However, a branch

office will only be subject to a registration tax equal to 27,600 won (including education surtax). If the branch office or subsidiary is located in metropolitan Seoul, the registration tax will be tripled (i.e., to 82,800 won or 1.44 per cent).

There are three major disadvantages a branch office has when compared with a subsidiary. First, there are certain business areas in which a branch is not qualified to obtain the relevant licence to operate. Second, the parent company of the branch is subject to all the liabilities of the branch in person. Third, it is practically difficult to separate the accounting records of Korean sourced revenues and costs from the revenues and costs of its head office. Thus, if the Korean tax authority initiates an audit, the branch office may have difficulty substantiating and persuading the tax authority that the amount it reported was the actual income from Korean sources. In such cases, the tax authority may disregard the reported Korean-sourced income and levy a corporate tax on the entire or most of the income earned by the branch office and its head office (as the tax authority may construe this amount as Korean-sourced income on the basis that all or most of the business activities would take place in Korea).

A subsidiary has the following four major advantages when compared with a branch office. First, unlike a branch office, there are no restrictions on subsidiaries obtaining licences to operate any type of business (if a licence is required at all). Second, the liability of the foreign parent company is, in principle, limited to the paid-in capital of the foreign investor in the subsidiary. Third, the subsidiary form provides the most flexibility in terms of business expansion. For example, it is the easiest form in which to permit the entry of other shareholders. Fourth, in terms of income generation, a subsidiary accrues revenue pursuant to contracts with transaction parties in which the subsidiary is the principal party for itself. From an account record perspective, this makes it easier to differentiate between Korean-sourced revenues and costs of the subsidiary from the revenue and costs of its foreign parent company. Accordingly, the potential difficulties in dealing with the Korean tax authorities as discussed above for branches are reduced. Notably, an issue of transfer pricing may arise if a subsidiary buys products or services from its parent company or if the subsidiary sells products or renders services back to its parent company or affiliate companies.

A subsidiary has three major disadvantages compared with a branch office. First, establishment of a subsidiary involves more procedural requirements than establishment of a branch office. For example, the promoters of a subsidiary will need to prepare and adopt articles of incorporation, convene the inaugural shareholders' meeting (which may be evidenced by 'paper minutes'), and comply with other incorporation requirements. Consequently, establishing a subsidiary will take longer than establishing a branch office. Second, the initial capital contribution and subsequent capital contributions are subject to registration tax equal to 0.48 per cent (inclusive of education surtax) of the capital contribution. This registration tax is tripled if a subsidiary is established in certain Seoul metropolitan areas. Third, repatriation of profits to a subsidiary's foreign parent company must be in the form of dividends, which are subject to a withholding tax at the rate of 22 per cent (inclusive of local income tax). However, the withholding tax may be exempted or reduced pursuant to a tax treaty between Korea and the country of domicile of the parent company, if any.

ii Acquisition of shares in Korea: general requirements

In general, an acquisition of shares in a Korean company is deemed to have been completed and secured upon the delivery of share certificates by the sellers to the purchaser. Therefore,

it is customary in Korea's M&A transactions to include share certificates in the list of closing deliverables. If the target company has not issued any share certificates, the sellers must notify the company in writing of its transfer of shares to the purchaser to give effect to the share transfer, with a fixed date certified by the postal service or a government agency. In addition, the purchaser should register its shareholding in the shareholder registry of the target company to be acknowledged as a shareholder of the company.

Under the KCC, if a purchaser acquires 10 per cent or more shares (in a single transaction or a series of transactions) of a *chusik hoesa*, the purchaser must inform the company of its shareholding. This notice requirement can be fulfilled simultaneously with the registration of shareholdings in the company shareholders' registry.

iii Acquisition of shares in Korea: tender offers

Rules on tender offers in Korea do not discriminate between a foreign offeror and a domestic offeror. That is, anybody who intends to make a tender offer must publish a public notice setting forth certain required information, and must file a tender offer statement with the Financial Services Commission.

The information contained in the tender offer statement and the public notice must describe, *inter alia*, the purpose of the offer, details regarding the source of the purchase monies, terms of the tender offer (such as the tender offer period, price and payment date), certain information relating to the offeror and its 'specially related persons' (specifically defined in the relevant statute), the details of any prior agreement or arrangement between the offeror and the largest shareholder or officers of the target company, etc. Typically, this tender offer statement is filed through a tender offer agent. Only licensed Korean securities companies may act as tender offer agents.

After the date on which the tender offer statement is filed with the Financial Services Commission, the offeror, its specially related persons and the tender offer agent are prohibited from purchasing shares subject to the tender offer from outside the tender offer process during the period of the tender offer, except under certain special circumstances prescribed by the relevant statute. In principle, the offeror may not withdraw a tender offer after the tender offer statement is filed with Financial Services Commission.

IV REVIEW PROCEDURE

i Filings for foreign investment

FIPA report

Under the FIPA, if foreign investors will, as a result of investment, end up holding 10 per cent or more of shares in a Korean company, the foreign investor must file a foreign investment report with a foreign exchange bank designated by the Ministry of Trade, Industry and Energy. In most cases, the filing of the foreign investment report is procedural in nature, and is approved within a few days, as long as all the necessary documents are properly prepared (usually on the date of filing). Filing of this FIPA report is a prerequisite for remittance of any foreign investment in Korea.

Competition filings

Although not intended to apply only to foreign investors, many foreign investors investing in Korea are subject to this filing requirement. Under the Monopoly Regulation and Fair Trade Act, filing of a 'business combination report' with the Korea Fair Trade Commission

is required if (1) either party to a transaction (including worldwide affiliates of the party) has total assets or total sales of at least 200 billion won, and (2) the transaction involves, among others, acquisition of 20 per cent (15 per cent if the target company is a listed company) or more shares in the target company. In addition, if an acquiring party who has been an existing shareholder of the target company and was previously required to file a business combination report becomes the largest equity holder of the target company by acquisition of additional shares in the target company, the acquiring party must file another business combination report. Notwithstanding the foregoing, no report is required if the total assets and total sales of the other party to the transaction are less than 20 billion won.

In principle, a business combination report must be filed within 30 calendar days from the date of closing. However, if either party (including its worldwide affiliates) has total assets or total sales of at least 2 trillion won, the business combination report must be filed prior to the closing. In such cases, the report must be filed within 30 calendar days from the date of execution of the relevant contract, and the parties may not consummate the transaction until the Korea Fair Trade Commission has issued its clearance. Although the review period is typically 30 calendar days from the date of filing, the Korea Fair Trade Commission has the discretion to extend the review period by an additional 90 calendar days (i.e., a total of 120 days). In connection with the foregoing, the term 'affiliate' is generally defined in terms of the ability to control or influence each other's management. In practice, all companies required to be included in the consolidated financial statement of the concerned party are considered affiliates of the party.

ii Definition of 'foreigner'

Various definitions of 'foreigner' are used in the laws and regulations constituting Korea's foreign investment regime. Therefore, a foreign investor must seek advice from competent counsel before determining whether it falls within the definition of 'foreigner' within the meaning of any applicable laws or regulations. The most commonly used definition of 'foreigner' is enshrined in the Financial Investment Services and Capital Markets Act as any individual of foreign nationality without his or her domicile or abode in Korea for six months or longer, or a foreign legal entity that corresponds to any of the following:

a a foreign government;

b a foreign municipal government;

c a foreign public organisation;

d a foreign company established pursuant to foreign laws:

e any international organisation established pursuant to an international treaty;

f any fund or association created and supervised or managed in accordance with foreign laws:

g any fund or association created and supervised or managed by a foreign government, foreign municipal government, or a foreign public organisation; or

h any fund or association created and supervised or managed by an international organisation established pursuant to an international treaty.

V FOREIGN INVESTOR PROTECTION

The FIPA guarantees that foreign investors and foreign-invested companies shall be treated equally with Korean nationals or Korean corporations with respect to their operations, unless otherwise specifically provided for by relevant laws and regulations. The FIPA also provides that property rights of a foreign investor and a foreign-invested company shall be protected.

At the same time, foreign investors in Korea are also protected by almost 100 bilateral investment treaties and regional trade agreements containing investment protection chapters concluded between Korea and numerous countries around the globe. Therefore, foreign investors from most of the countries around the world are entitled to, among other things, fair and equitable treatment, full protection and security, most-favoured-nation treatment, national treatment, etc. when investing in Korea.

VI OTHER STRATEGIC CONSIDERATIONS

The Korean legal system is governed by the rule of law. Therefore, foreign investors can devise creative transactional structures freely within the legally allowed boundaries when investing in Korea, without being worried about any extra-legal concerns.

One unconventional development is that foreign investors are increasingly taking advantage of the complex network of Korea's regional trade agreements. For example, many of the foreign ownership restrictions observed in Section II, *supra*, have been lifted for companies established in Australia, Canada, the European Union and the United States, and in accordance with the relevant free trade agreements between those countries and Korea. While those free trade agreements do not lift the current 49 per cent ceiling on direct foreign shareholding in domestic telecommunications providers – except for telecommunications entities such as KT and SK Telecom – they have lifted the restrictions on indirect foreign ownership through the establishment of local subsidiaries. Also, although those free trade agreements do not lift the restrictions on foreign direct investment into the Korean cable television market covered by the Broadcasting Act, they have lifted the restrictions on indirect foreign ownership through the establishment of local subsidiaries for a programme provider under the broadcasting regulations. Understanding the implications of the various regional trade agreements concluded by Korea will become increasingly important for foreign investors to devise the most desirable investment structure.

VII CURRENT DEVELOPMENTS

In this period of lacklustre global economic recovery, it is evident that the Korean government is eager to reform the current foreign investment system to further boost direct foreign investment into Korea. Notably, in early 2016, the government revealed its plan to adopt a 'one-stop grievance resolution system'. Under this new regime, any issues that hinder foreign investment will be monitored by the relevant government agencies (e.g., the trade-promotion agency KOTRA, various ministries, etc.) and then discussed and resolved through regular meetings held among the chambers of commerce of various countries, top management of foreign invested companies in Korea and the relevant government agencies.

On another note, foreign investors have expressed concerns about the recent tendency of the Korean tax authority, the National Tax Service (NTS), to aggressively exercise its taxation power over foreign investors. The NTS has been aggressive in applying the

substance-over-form rule and conducted special audits on foreign investment structures and bypassed foreign entities (mostly investment vehicles) located in tax havens or jurisdictions where favourable tax treatment has been afforded under the applicable tax treaty, and imposed taxes on the beneficial owners of such foreign entities for capital gains or corporate income gained. This new development will pose more challenges to the innovative tax structuring that sophisticated foreign investors in Korea have devised so far.

Another notable policy change that may favour foreign investment is deregulation across various industries. A few years ago, Uber, the car-sharing service, pulled out of Korea because of the legal risk of violating current business regulations requiring drivers to obtain taxi permits to provide automobile passenger services. However, the Korean government is moving towards deregulating various industries to tackle the economic slowdown, which in turn may potentially lead to more business opportunities for foreign investors.

Appendix 1

ABOUT THE AUTHORS

JAEMIN JEON

Shin & Kim

Jaemin Jeon is a partner at Shin & Kim in the corporate practice group and international dispute resolution practice group. Mr Jeon has extensive experience in handling a wide range of cross-border M&A transactions, representing both multinational corporations and Korean corporations, including share purchases and joint ventures in Korea and abroad. In addition, Mr Jeon has represented major corporate clients in international commercial arbitration cases and multi-jurisdictional litigation arising out of cross-border M&A transactions and inbound and outbound investments.

Mr Jeon holds an LLB degree from Seoul National University Law School and an LLM degree from Stanford Law School. Mr Jeon is a member of the Korea, New York and California Bars, and he has worked as an international associate in the Hong Kong office of Linklaters.

HANEUL JUNG

Shin & Kim

Haneul Jung is a senior foreign attorney at Shin & Kim in the international trade practice group. Mr Jung focuses primarily on the public international law aspects of international trade and investment, including the WTO Agreement, free trade agreements, investment arbitrations, economic sanctions and export control, official development assistance, etc. Mr Jung also has extensive advisory and advocacy experience on various private cross-border projects and commercial transactions.

Mr Jung has gained considerable recognition and been awarded several public accolades, including the Vice Prime Ministerial Commendation from the Minister of Strategy and Finance of the Republic of Korea. Internationally, Mr Jung has been praised as 'an impressive trade lawyer who creatively solves his clients' problems' (*Chambers Global*, 2016) and 'a public international law expert with distinctive […] analytical abilities', who has 'in-depth knowledge of the WTO […] agreement' (*Chambers Asia-Pacific*, 2016).

As a jurist, Mr Jung frequently writes and publishes on various subjects of international trade law. Mr Jung's academic and theoretical observations have been cited or introduced by many authoritative sources such as the Congressional Research Service Reports for the United States Congress.

SHIN & KIM
8th Floor, State Tower Namsan
100 Toegye-ro, Jung-gu
Seoul 04631
Korea
Tel: 82 2 316 4654 (Jaemin Jeon)
Tel: 82 2 316 1714 (Haneul Jung)
Fax: 82 2 756 6226
jmjeon@shinkim.com
hnjung@shinkim.com
www.shinkim.com