

CHAPTER SIXTEEN
COMPETITION-RELATED MATTERS

ARTICLE 16.1: COMPETITION LAW AND ANTICOMPETITIVE BUSINESS CONDUCT

1. Each Party shall maintain or adopt competition laws that promote and protect the competitive process in its market by proscribing anticompetitive business conduct. Each Party shall take appropriate action with respect to anticompetitive business conduct with the objective of promoting economic efficiency and consumer welfare.
2. Each Party shall maintain an authority or authorities responsible for the enforcement of its national competition laws. The enforcement policy of each Party's authorities responsible for the enforcement of such laws is to treat persons who are not persons of the Party no less favorably than persons of the Party in like circumstances, and each Party's authorities intend to maintain this policy.
3. Each Party shall ensure that a respondent in an administrative hearing convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws is afforded the opportunity to present evidence in its defense and to be heard in the hearing. In particular, each Party shall ensure that the respondent has a reasonable opportunity to cross-examine any witnesses or other persons who testify in the hearing and to review and rebut the evidence and any other collected information on which the determination may be based.
4. Each Party shall provide persons subject to the imposition of a sanction or remedy for violation of its competition laws with the opportunity to seek review of the sanction or remedy in a court of that Party.
5. Each Party shall provide its authorities responsible for the enforcement of its national competition laws with the authority to resolve their administrative or civil enforcement actions by mutual agreement with the subject of the enforcement action. A Party may provide for such agreements to be subject to judicial approval.
6. Each Party shall publish rules of procedure for administrative hearings convened to determine whether conduct violates its competition laws or what administrative sanctions or remedies should be ordered for violation of such laws. These rules shall include procedures for introducing evidence in such proceedings, which shall apply equally to all parties to the proceeding.
7. The Parties recognize the importance of cooperation and coordination between their respective authorities to promote effective competition law enforcement. Accordingly, the Parties shall cooperate in relation to their enforcement policies and in the enforcement of their respective competition laws, including through mutual assistance, notification, consultation, and exchange of information.

ARTICLE 16.2: DESIGNATED MONOPOLIES

1. Each Party shall ensure that any privately-owned monopoly that it designates after the date this Agreement enters into force and any government monopoly that it designates or has designated:

- (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;
- (b) acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market,¹ including with regard to price, quality, availability, marketability, transportation, and other terms and conditions of purchase or sale, except to comply with any terms of its designation² that are not inconsistent with subparagraph (c) or (d);³
- (c) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and
- (d) does not use its monopoly position to engage, either directly or indirectly, including through its dealings with its parent, subsidiaries, or other enterprises with common ownership, in anticompetitive practices in a non-monopolized market in its territory that adversely affect covered investments.

2. Nothing in this Chapter shall be construed to prevent a Party from designating a monopoly or maintaining a designated monopoly.

3. This Article does not apply to government procurement.

ARTICLE 16.3: STATE ENTERPRISES

¹ For greater certainty, "purchase or sale of the monopoly good or service in the relevant market" in Article 16.2 refers to the sale of the designated monopoly good or service in the case of a designated monopoly supplier and to the purchase of the designated monopoly good or service in the case of a designated monopoly buyer.

² For greater certainty, nothing in this Chapter shall be construed to prevent a Party from amending the terms of a monopoly's designation.

³ Subparagraph (b) shall not be construed to prevent a designated monopoly from supplying the monopoly good or service in accordance with specific rates approved, or other terms or conditions established, by a regulatory authority of a Party, provided that those rates or other terms or conditions are not inconsistent with subparagraph (c) or (d).

1. Each Party shall ensure that any state enterprise that it establishes or maintains:
 - (a) acts in a manner that is not inconsistent with the Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees, or other charges; and
 - (b) accords non-discriminatory treatment in the sale of its goods or services to covered investments.
2. Nothing in this Chapter shall be construed to prevent a Party from establishing or maintaining a state enterprise.

ARTICLE 16.4: DIFFERENCES IN PRICING

Articles 16.2 and 16.3 shall not be construed to prevent a monopoly or state enterprise from charging different prices in different markets, or within the same market, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions.

ARTICLE 16.5: TRANSPARENCY

1. The Parties recognize the value of transparency in their competition enforcement policies.
2. On request of a Party, each Party shall make available to the other Party public information concerning its:
 - (a) competition law enforcement activities;
 - (b) state enterprises and designated monopolies, public or private, at any level of government, provided that the request indicates the entities involved, specifies the particular goods or services and markets concerned, and includes some indicia that these entities may be engaging in practices that may hinder trade or investment between the Parties; and
 - (c) exemptions and immunities to its competition laws, provided that the request specifies the particular goods or services and markets of concern, and includes indicia that the exemption or immunity may hinder trade or investment between the Parties.
3. Each Party shall ensure that all final administrative decisions finding a violation of its competition laws are in writing and set out any relevant findings of fact and the reasoning and legal analysis on which the decision is based. Each Party shall further ensure that the

decisions and any orders implementing them are published or, where publication is not practicable, otherwise made available to the public in such a manner as to enable interested persons and the other Party to become acquainted with them. The version of the decisions or orders that the Party makes available to the public may omit business confidential information or other information that is protected by its law from public disclosure.

ARTICLE 16.6: CROSS-BORDER CONSUMER PROTECTION

1. The Parties recognize the importance of cooperation on matters related to their consumer protection laws in order to enhance the welfare of their consumers. Accordingly, the Parties shall cooperate, in appropriate cases of mutual concern, in the enforcement of their consumer protection laws.

2. The Parties shall endeavor to strengthen cooperation between the United States Federal Trade Commission, on the one hand, and the Ministry of Finance and Economy of Korea and the Korea Fair Trade Commission, on the other, in areas of mutual concern relating to their respective consumer protection laws, including by:

- (a) consulting on consumer protection policies and exchanging information related to the enactment and administration of their consumer protection laws;
- (b) strengthening cooperation in detecting and preventing fraudulent and deceptive commercial practices against consumers;
- (c) consulting on ways to reduce consumer protection law violations that have significant cross-border dimensions; and
- (d) supporting implementation of the *OECD Guidelines for Protecting Consumers from Fraudulent and Deceptive Commercial Practices Across Borders* (2003).

3. Nothing in this Article shall limit the discretion of an agency referred to in paragraph 2 to decide whether to take action in response to a request by a counterpart agency of the other Party, nor shall it preclude any of those agencies from taking action with respect to any particular matter.

4. Each Party shall endeavor to identify, in areas of mutual concern and consistent with its own important interests, obstacles to effective cooperation with the other Party in the enforcement of its consumer protection laws, and shall consider modifying its domestic legal framework to reduce such obstacles.

ARTICLE 16.7: CONSULTATIONS

1. To foster understanding between the Parties, or to address specific matters that arise under this Chapter, each Party shall, on request of the other Party, enter into consultations

regarding representations made by the other Party. In its request, the Party shall indicate, if relevant, how the matter affects trade or investment between the Parties.

2. The Party to which a request for consultations has been addressed shall accord full and sympathetic consideration to the concerns raised by the other Party.

3. To facilitate discussion of the matter that is the subject of the consultations, each Party shall endeavor to provide relevant non-confidential information to the other Party.

ARTICLE 16.8: DISPUTE SETTLEMENT

Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under Article 16.1, 16.6, or 16.7.

ARTICLE 16.9: DEFINITIONS

For purposes of this Chapter:

consumer protection laws means:

- (a) in the case of Korea, Chapters III, IV.3, IX, and X of the *Framework Act on Consumer*, and the *Fair Labeling and Advertising Act* and its implementing regulations; and
- (b) in the case of the United States, laws and regulations prohibiting “unfair or deceptive acts or practices” within the meaning of Section 5 of the *Federal Trade Commission Act*;

a **delegation** includes a legislative grant, and a government order, directive, or other act, transferring to the monopoly or state enterprise, or authorizing the exercise by the monopoly or state enterprise of, governmental authority;

designate means, whether formally or in effect, to establish, designate, or authorize a monopoly or to expand the scope of a monopoly to cover an additional good or service;

government monopoly means a monopoly that is owned, or controlled through ownership interests, by the central government of a Party;⁴

in accordance with commercial considerations means consistent with normal business practices of privately-held enterprises in the relevant business or industry;

market means the geographical and commercial market for a good or service;

monopoly means an entity, including a consortium or government agency, that in any

⁴ For greater certainty, ownership, or control through ownership interests, may be direct or indirect.

relevant market in the territory of a Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant; and

non-discriminatory treatment means national treatment and most-favored-nation treatment, as set out in the relevant provisions of this Agreement, including the terms and conditions set out in the relevant Annexes thereto.

CHAPTER SEVENTEEN GOVERNMENT PROCUREMENT

ARTICLE 17.1: GENERAL PROVISIONS

1. The Parties reaffirm their rights and obligations under the GPA and their interest in further expanding bilateral trading opportunities in each Party's government procurement market.
2. The Parties recognize their shared interest in promoting international liberalization of government procurement markets in the context of the rules-based international trading system. The Parties shall continue to cooperate in the review under Article XXIV:7 of the GPA and on procurement matters in APEC and other appropriate international fora.
3. Nothing in this Chapter shall be construed to derogate from either Party's rights or obligations with respect to the other Party under the GPA.
4. The Parties confirm their desire and determination to apply the *APEC Non-Binding Principles on Government Procurement*, as appropriate, to all their government procurement that is outside the scope of the GPA and this Chapter.

ARTICLE 17.2: SCOPE AND COVERAGE

1. This Chapter applies to any measure regarding covered procurement.
2. For purposes of this Chapter, **covered procurement** means procurement for governmental purposes:
 - (a) of goods, services, or any combination thereof:
 - (i) as specified in a Party's Schedule to Annex 17-A; and
 - (ii) not procured with a view to commercial sale or resale, or for use in the production or supply of goods or services for commercial sale or resale;
 - (b) by any contractual means, including purchase; lease; rental or hire purchase, with or without an option to buy; build-operate-transfer contracts; and public works concession contracts;
 - (c) for which the value equals or exceeds the relevant threshold provided for in Annex 17-A;
 - (d) by a procuring entity; and
 - (e) that is not otherwise excluded from coverage under paragraph 3 or Annex 17-A.
3. This Chapter does not apply to:

- (a) non-contractual agreements or any form of assistance that a Party provides, including cooperative agreements, grants, loans, equity infusions, guarantees, and fiscal incentives;
 - (b) the procurement or acquisition of fiscal agency or depository services, liquidation and management services for regulated financial institutions, or services related to the sale, redemption, and distribution of public debt, including loans and government bonds, notes and other securities; or
 - (c) procurement conducted for the specific purpose of providing international assistance, including development aid.
4. For greater certainty relating to the procurement of digital products as defined in Article 15.9 (Definitions):
- (a) covered procurement includes the procurement of digital products; and
 - (b) no provision of Chapter Fifteen (Electronic Commerce) shall be construed as imposing obligations on a Party with respect to the procurement of digital products.
5. The provisions of this Chapter do not affect the rights and obligations provided for in Chapters Two (National Treatment and Market Access for Goods), Eleven (Investment), Twelve (Cross-Border Trade in Services), and Thirteen (Financial Services).

ARTICLE 17.3: INCORPORATION OF GPA PROVISIONS

1. For all covered procurement, the Parties shall apply Appendices II through IV of the GPA, and the following articles of the GPA, *mutatis mutandis*:

Article I:3	Application to Non-listed Entities
Article II	Valuation of Contracts
Article III	National Treatment and Non-discrimination
Article IV:1	Rules of Origin
Article VI	Technical Specifications
Article VII	Tendering Procedures
Article VIII	Qualification of Suppliers
Article IX	Invitation to Participate Regarding Intended Procurement
Article X	Selection Procedures
Article XI:4	Time-Limits for Delivery
Article XII	Tender Documentation
Article XIII	Submission, Receipt and Opening of Tenders and Awarding of Contracts
Article XIV	Negotiation
Article XV	Limited Tendering
Article XVI:1	Offsets
Article XVIII	Information and Review as Regards Obligations of Entities
Article XIX:1 through 4	Information and Review as Regards Obligations of Parties

To that end, these GPA articles and appendices are incorporated into and made a part of this Chapter, *mutatis mutandis*.

2. For purposes of the incorporation of the GPA under paragraph 1, the term:
 - (a) “Agreement” in the GPA means “Chapter,” except that “countries not Parties to this Agreement” means “non-Parties” and “Party to the Agreement” in GPA Article III:2(b) means “Party;”
 - (b) “Appendix I” in the GPA means “Annex 17-A;”
 - (c) “Annex 1” in the GPA means “Section A of Annex 17-A;”
 - (d) “Annex 4” in the GPA means “Section C of Annex 17-A;”
 - (e) “Annex 5” in the GPA means “Section D of Annex 17-A;”
 - (f) “any other Party” in GPA Article III:1(b) means “a non-Party;”
 - (g) “other Parties” in the GPA means “the other Party;”
 - (h) “products” in the GPA means “goods;” and
 - (i) “among suppliers of other Parties or” in GPA Article VIII shall not be incorporated.
3. The Parties recognize that on December 8, 2006, the WTO Committee on Government Procurement provisionally approved the text of the revised GPA. Further to Article 24.3 (Amendment of the WTO Agreement), at such time as the revised GPA enters into force for both Parties, the Parties shall promptly incorporate by reference the appropriate provisions of the revised GPA in place of the provisions in paragraph 1.
4. If the GPA is further amended or is superseded by another agreement, the Parties shall, consistent with Article 24.2 (Amendments), amend this Chapter, as appropriate, after consultations.

ARTICLE 17.4: GENERAL PRINCIPLES

Use of Electronic Means

1. When conducting covered procurement by electronic means, a procuring entity shall:
 - (a) ensure that the procurement is conducted using information technology systems and software, including those related to authentication and encryption of information, that are generally available and interoperable with other generally available information technology systems and software; and

- (b) maintain mechanisms that ensure the integrity of requests for participation and tenders, including establishment of the time of receipt and the prevention of inappropriate access.

Valuation

2. For greater certainty with regard to Article II of the GPA, in estimating the value of a procurement for the purpose of ascertaining whether it is a covered procurement, a procuring entity shall include the estimated maximum total value of the procurement over its entire duration, whether awarded to one or more suppliers, taking into account all forms of remuneration, including premiums, fees, commissions, interest, and other revenue streams that may be provided for in the procurement.

ARTICLE 17.5: CONDITIONS FOR PARTICIPATION

1. A procuring entity shall limit any conditions for participation in a procurement to those that are essential to ensure that a supplier has the legal and financial capacities and the commercial and technical abilities to undertake the relevant procurement.

2. In assessing whether a supplier satisfies the conditions for participation, a procuring entity:

- (a) shall evaluate the supplier's financial capacity and commercial and technical abilities on the basis of that supplier's business activities outside the territory of the Party of the procuring entity, as well as its business activities, if any, inside the territory of the Party of the procuring entity;
- (b) shall not impose the condition that, in order for a supplier to participate in a procurement or be awarded a contract, the supplier has previously been awarded one or more contracts by a procuring entity of that Party or that the supplier has prior work experience in the territory of that Party; and
- (c) shall base its determination of whether a supplier has satisfied the conditions for participation solely on the conditions that the procuring entity has specified in advance in notices or tender documentation.

3. A procuring entity may exclude a supplier on grounds such as:

- (a) bankruptcy;
- (b) false declarations;
- (c) significant or persistent deficiencies in performance of any substantive requirement or obligation under a prior contract or contracts;
- (d) final judgments in respect of serious crimes or other serious offenses; and
- (e) failure to pay taxes.

ARTICLE 17.6: PUBLICATION OF NOTICES

Notice of Intended Procurement

1. For each covered procurement, a procuring entity shall publish a notice of intended procurement in accordance with Article IX of the GPA, in the appropriate electronic medium, except in the circumstances described in Article XV of the GPA.

Notice of Planned Procurement

2. Each Party shall encourage its procuring entities to publish, as early as possible in each fiscal year, a notice regarding their future procurement plans. The notice should include the subject matter of the procurement and the planned date of the publication of the notice of intended procurement and, to the extent possible, be published in an electronic medium listed in each Party's Appendix II to the GPA.

ARTICLE 17.7: TECHNICAL SPECIFICATIONS

For greater certainty, a Party, including its procuring entities, may, in accordance with Article VI of the GPA, prepare, adopt, or apply technical specifications:

- (a) to promote the conservation of natural resources or protect the environment; or
- (b) to require a supplier to comply with generally applicable laws regarding
 - (i) fundamental principles and rights at work; and
 - (ii) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health,

in the territory in which the good is produced or the service is performed.

ARTICLE 17.8: TIME-PERIODS

General

1. A procuring entity shall, consistent with its own reasonable needs, provide sufficient time for suppliers to prepare and submit requests for participation and responsive tenders, taking into account such factors as:

- (a) the nature and complexity of the procurement;
- (b) the extent of subcontracting anticipated; and
- (c) the time for transmitting tenders from foreign as well as domestic points where electronic means are not used.

Such time-periods, including any extension of the time-periods, shall be common for all interested or participating suppliers.

Deadlines

2. A procuring entity that uses selective tendering shall establish that the final date for the submission of requests for participation shall not, in principle, be less than 25 days from the date of publication of the notice of intended procurement. Where a state of urgency duly substantiated by the procuring entity renders this time-period impracticable, the time-period may be reduced to not less than 10 days.

3. Except as provided for in paragraphs 4 and 5, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 40 days from the date on which:

- (a) in the case of open tendering, the notice of intended procurement is published; or
- (b) in the case of selective tendering, the entity notifies suppliers that they will be invited to submit tenders, whether or not it uses a multi-use list.

4. A procuring entity may reduce the time-period for tendering set out in paragraph 3 to not less than 10 days where:

- (a) the procuring entity published a notice of planned procurement under Article IX:7 of the GPA at least 40 days and not more than 12 months in advance of the publication of the notice of intended procurement, and the notice of planned procurement contains:
 - (i) a description of the procurement;
 - (ii) the approximate final dates for the submission of tenders or requests for participation;
 - (iii) a statement that interested suppliers should express their interest in the procurement to the procuring entity;
 - (iv) the address from which documents relating to the procurement may be obtained; and
 - (v) as much of the information that is required under Article IX:6 of the GPA for the notice of intended procurement, as is available;
- (b) the procuring entity, for procurements of a recurring nature, indicates in an initial notice of intended procurement that subsequent notices will provide time-periods for tendering based on this paragraph; or
- (c) a state of urgency duly substantiated by the procuring entity renders such time-period impracticable.

5. A procuring entity may reduce the time-period for tendering set out in paragraph 3 by five days for each one of the following circumstances:

- (a) the notice of intended procurement is published by electronic means;
- (b) all the tender documentation is made available by electronic means from the date of the publication of the notice of intended procurement; and
- (c) the tenders can be received by electronic means by the procuring entity.

6. The use of paragraph 5, in conjunction with paragraph 4, shall in no case result in the reduction of the time-period for tendering set out in paragraph 3 to less than ten days from the date on which the notice of intended procurement is published.

7. Notwithstanding any other time-period in this Article, where a procuring entity purchases commercial goods or services, it may reduce the time-period for tendering set out in paragraph 3 to not less than 13 days, provided that it publishes by electronic means, at the same time, both the notice of intended procurement and the tender documentation. Where the entity also accepts tenders for commercial goods and services by electronic means, it may reduce the time period set out in paragraph 3 to not less than ten days.

ARTICLE 17.9: MODIFICATIONS AND RECTIFICATIONS TO COVERAGE

1. A Party shall notify the other Party of any proposed rectification of Annex 17-A, withdrawal of an entity from Annex 17-A, or other modification of Annex 17-A (referred to generally in this Article as “modification”). The Party proposing the modification (modifying Party) shall include in the notification:

- (a) for any proposed withdrawal of an entity from Annex 17-A in the exercise of its rights on the grounds that government control or influence over the entity’s covered procurement has been effectively eliminated, evidence that such government control or influence has been effectively eliminated; or
- (b) for any other proposed modification, information as to the likely consequences of the change for the mutually agreed coverage provided under this Chapter.

2. Where the other Party objects to the proposed modification, it shall notify the modifying Party of its objection within 30 days of the notification of the proposed modification and include the reasons for its objection.

3. The Parties shall seek to resolve any objection through consultations. In such consultations, the Parties shall consider the proposed modification and, in the case of a notification under paragraph 1(b), any claim for compensatory adjustments, with a view to maintaining a balance of rights and obligations and a comparable level of mutually agreed coverage provided in this Chapter prior to such notification.

4. If a Party proposes a modification pursuant to paragraph 1(b), the modifying Party shall offer to the other Party appropriate compensatory adjustments, where such adjustments are necessary to maintain a level of coverage comparable to that which was existing prior to the

modification. Such modification shall become effective if the other Party does not notify the modifying Party of any objection to the proposed modification within 30 days of the notification. A Party need not provide compensatory adjustments where the Parties agree that the proposed modification covers a procuring entity over which a Party has effectively eliminated its control or influence over the entity's covered procurement.

5. The Joint Committee shall adopt any proposed modification only where the other Party:
 - (a) does not object in writing to the proposed modification within 30 days of the notification provided under paragraph 1; or
 - (b) submits to the modifying Party a written notice withdrawing the objection.

ARTICLE 17.10: GOVERNMENT PROCUREMENT WORKING GROUP

1. The Parties shall establish a Working Group on Government Procurement comprising representatives of each Party.
2. The Working Group shall meet, as mutually agreed or upon request of a Party, to:
 - (a) consider issues regarding government procurement that a Party refers to it, including issues related to information technology; and
 - (b) exchange information relating to the government procurement opportunities in each Party.

ARTICLE 17.11: DEFINITIONS

For purposes of this Chapter:

APEC means Asia Pacific Economic Cooperation;

build-operate-transfer contract and **public works concession contract** mean any contractual arrangement the primary purpose of which is to provide for the construction or rehabilitation of physical infrastructure, plant, buildings, facilities, or other government-owned works and under which, as consideration for a supplier's execution of a contractual arrangement, a procuring entity grants to the supplier, for a specified period of time, temporary ownership or a right to control and operate, and demand payment for the use of, such works for the duration of the contract;

commercial goods or services means goods or services of a type generally sold or offered for sale in the commercial marketplace to, and customarily purchased by, non-governmental buyers for non-governmental purposes;

GPA means *WTO Agreement on Government Procurement*, done at Marrakesh, April 15, 1994; and

procuring entity means an entity covered under Section A of Annex 17-A.

ANNEX 17-A
GOVERNMENT PROCUREMENT

Section A: Central Level Government Entities

This Chapter applies to the entities of the central level of government listed in each Party's Schedule to this Section where the value of the procurement is estimated, in accordance with Article II of the GPA and Article 17.4.2, to equal or exceed:

- (a) for procurement of goods and services: 100,000 U.S. dollars with respect to the United States and 100 million Korean won with respect to Korea, to be adjusted, as necessary, based on consultations between the Parties; and
- (b) for procurement of construction services: 5,000,000 Special Drawing Rights (SDRs) (7.4 billion Korean won or 7,407,000 U.S. dollars), to be converted into each Party's national currency in accordance with the *Modalities for Notifying Threshold Figures in National Currencies*, Annex 3 to the *Decisions on Procedural Matters under the Agreement on Government Procurement (1994)* (GPA/1).

Schedule of Korea

- 1. Board of Audit and Inspection
- 2. Office of the Prime Minister
- 3. Office for Government Policy Coordination
- 4. Ministry of Gender Equality and Family
- 5. Ministry of Finance and Economy
- 6. Ministry of Planning and Budget
- 7. Financial Supervisory Commission
- 8. Ministry of Unification
- 9. Ministry of Government Administration and Home Affairs
- 10. Civil Service Commission
- 11. Ministry of Science and Technology
- 12. Government Information Agency
- 13. Ministry of Government Legislation
- 14. Ministry of Patriots and Veterans Affairs
- 15. Ministry of Foreign Affairs and Trade
- 16. Ministry of Justice
- 17. Ministry of National Defense (Note 2)
- 18. Ministry of Education and Human Resources Development
- 19. Ministry of Culture and Tourism
- 20. Cultural Heritage Administration
- 21. Ministry of Agriculture and Forestry
- 22. Ministry of Commerce, Industry and Energy
- 23. Ministry of Health and Welfare
- 24. Korea Food and Drug Administration
- 25. Ministry of Labor

26. Ministry of Construction and Transportation
27. Ministry of Maritime Affairs and Fisheries
28. Ministry of Information and Communications
29. Ministry of Environment
30. Public Procurement Service (Note 3)
31. National Tax Service
32. Customs Service
33. National Statistical Office
34. Korea Meteorological Administration
35. National Police Agency (Note 4)
36. Supreme Prosecutors' Office
37. Military Manpower Administration
38. Rural Development Administration
39. Forest Service
40. Korean Intellectual Property Office
41. Small and Medium Business Administration
42. Korea Coast Guard (Note 4)
43. National Emergency Management Agency
44. Defense Acquisition Program Administration (Note 2)
45. National Youth Commission
46. National Human Rights Commission of Korea
47. Korean Broadcasting Commission
48. Korea Independent Commission Against Corruption
49. Presidential Commission on Small and Medium Enterprises
50. Fair Trade Commission
51. The Ombudsman of Korea

Notes to Korean Schedule

1. The above central government entities include their subordinate linear organizations, special local administrative organs, and attached organs as prescribed in Korea's *Government Organization Act*.
2. Ministry of National Defense and Defense Acquisition Program Administration: Subject to the decision of the Korean Government under the provisions of Article XXIII:1 of the GPA, for the purchases of the Ministry of National Defense and the Defense Acquisition Program Administration, this Chapter will generally apply to the following FSC categories only, and for services and construction services listed in Section C and Section D, it will apply only to those areas which are not related to national security and defense.

FSC 2510	Vehicular cab, body, and frame structural components
FSC 2520	Vehicular power transmission components
FSC 2540	Vehicular furniture and accessories
FSC 2590	Miscellaneous vehicular components
FSC 2610	Tires and tubes, pneumatic, nonaircraft
FSC 2910	Engine fuel system components, nonaircraft
FSC 2920	Engine electrical system components, nonaircraft
FSC 2930	Engine cooling system components, nonaircraft

FSC 2940	Engine air and oil filters, strainers and cleaners, nonaircraft
FSC 2990	Miscellaneous engine accessories, nonaircraft
FSC 3020	Gears, pulleys, sprockets and transmission chain
FSC 3416	Lathes
FSC 3417	Milling machines
FSC 3510	Laundry and dry cleaning equipment
FSC 4110	Refrigeration equipment
FSC 4230	Decontaminating and impregnating equipment
FSC 4520	Space heating equipment and domestic water heaters
FSC 4940	Miscellaneous maintenance and repair shop specialized equipment
FSC 5120	Hand tools, nonedged, nonpowered
FSC 5410	Prefabricated and portable buildings
FSC 5530	Plywood and veneer
FSC 5660	Fencing, fences and gates
FSC 5945	Relays and solenoids
FSC 5965	Headsets, handsets, microphones and speakers
FSC 5985	Antennae, waveguide, and related equipment
FSC 5995	Cable, cord, and wire assemblies: communication equipment
FSC 6220	Electric vehicular lights and fixtures
FSC 6505	Drugs and biologicals
FSC 6840	Pest control agents disinfectants
FSC 6850	Miscellaneous chemical, specialties
FSC 7310	Food cooking, baking, and serving equipment
FSC 7320	Kitchen equipment and appliances
FSC 7330	Kitchen hand tools and utensils
FSC 7350	Table ware
FSC 7360	Sets, kits, outfits, and modules food preparation and serving
FSC 7530	Stationery and record forms
FSC 7920	Brooms, brushes, mops, and sponges
FSC 7930	Cleaning and polishing compounds and preparations
FSC 8110	Drums and cans
FSC 9150	Oils and greases: cutting, lubricating, and hydraulic
FSC 9310	Paper and paperboard

3. Public Procurement Service: This Chapter covers only those procurements carried out by the Public Procurement Service for the entities listed in this Section.

4. National Police Agency and Korea Coast Guard: This Chapter does not cover procurements for the purpose of maintaining public order, as provided in Article XXIII of the GPA.

5. This Chapter does not cover the procurement of agricultural, fishery and livestock products in accordance with the *Foodgrain Management Law*, the *Law Concerning Marketing and Price Stabilization of Agricultural and Fishery Products*, and the *Livestock Law*.

Schedule of the United States

1. Advisory Commission on Intergovernmental Relations
2. Africa Development Foundation

3. Alaska Natural Gas Transportation System
4. American Battle Monuments Commission
5. Appalachian Regional Commission
6. Broadcasting Board of Governors
7. Commission of Fine Arts
8. Commission on Civil Rights
9. Commodity Futures Trading Commission
10. Consumer Product Safety Commission
11. Corporation for National and Community Service
12. Delaware River Basin Commission
13. Department of Agriculture (Note 2)
14. Department of Commerce (Note 3)
15. Department of Defense (Note 4)
16. Department of Education
17. Department of Energy (Note 5)
18. Department of Health and Human Services
19. Department of Homeland Security (Note 6)
20. Department of Housing and Urban Development
21. Department of the Interior, including the Bureau of Reclamation
22. Department of Justice
23. Department of Labor
24. Department of State
25. Department of Transportation (Note 7)
26. Department of the Treasury
27. Department of Veterans Affairs
28. Environmental Protection Agency
29. Equal Employment Opportunity Commission
30. Executive Office of the President
31. Export-Import Bank of the United States
32. Farm Credit Administration
33. Federal Communications Commission
34. Federal Crop Insurance Corporation
35. Federal Deposit Insurance Corporation
36. Federal Election Commission
37. Federal Home Loan Mortgage Corporation
38. Federal Housing Finance Board
39. Federal Maritime Commission
40. Federal Mediation and Conciliation Service
41. Federal Mine Safety and Health Review Commission
42. Federal Prison Industries, Inc.
43. Federal Reserve System
44. Federal Retirement Thrift Investment Board
45. Federal Trade Commission
46. General Services Administration (Note 8)
47. Government National Mortgage Association
48. Holocaust Memorial Council
49. Inter-American Foundation
50. Merit Systems Protection Board

51. National Aeronautics and Space Administration (NASA)
52. National Archives and Records Administration
53. National Capital Planning Commission
54. National Commission on Libraries and Information Science
55. National Council on Disability
56. National Credit Union Administration
57. National Foundation on the Arts and the Humanities
58. National Labor Relations Board
59. National Mediation Board
60. National Science Foundation
61. National Transportation Safety Board
62. Nuclear Regulatory Commission
63. Occupational Safety and Health Review Commission
64. Office of Government Ethics
65. Office of the Nuclear Waste Negotiator
66. Office of Personnel Management
67. Office of Special Counsel
68. Office of Thrift Supervision
69. Overseas Private Investment Corporation
70. Peace Corps
71. Railroad Retirement Board
72. Securities and Exchange Commission
73. Selective Service System
74. Small Business Administration
75. Smithsonian Institution
76. Social Security Administration
77. Susquehanna River Basin Commission
78. United States Agency for International Development
79. United States International Trade Commission

Notes to United States Schedule

1. Unless otherwise specified herein, this Chapter applies to all agencies subordinate to the entities listed in this Section.
2. Department of Agriculture: This Chapter does not cover the procurement of any agricultural good made in furtherance of an agricultural support program or a human feeding program.
3. Department of Commerce: This Chapter does not cover the procurement of any good or service related to the shipbuilding activities of the National Oceanic and Atmospheric Administration (NOAA).
4. Department of Defense:
 - (a) This Chapter does not cover the procurement of any good described in any Federal Supply Code classification listed below (for complete listing of U.S. Federal Supply Classification, see <http://www.fedbizopps.gov/classCodes1.html>:

FSC 19	Ships, Small Craft, Pontoons, and Floating Docks (the part of this classification defined as naval vessels or major components of the hull or superstructure thereof)
FSC 20	Ship and Marine Equipment (the part of this classification defined as naval vessels or major components of the hull or superstructure thereof)
FSC 2310	Passenger Motor Vehicles (only buses)
FSC 51	Hand Tools
FSC 52	Measuring Tools
FSC 83	Textiles, Leather, Furs, Apparel, Shoes, Tents, and Flags (all elements other than pins, needles, sewing kits, flagstuffs, flagpoles, and flagstaff trucks)
FSC 84	Clothing, Individual Equipment, and Insignia (all elements other than sub-class 8460 - luggage)
FSC 89	Subsistence (all elements other than sub-class 8975 - tobacco products)

(b) This Chapter does not cover the procurement of any specialty metal or any good containing one or more specialty metals. **Specialty metal** means:

- (i) steel for which the maximum alloy content exceeds one or more of the following levels: manganese, 1.65 percent; silicon, 0.60 percent; or copper, 0.60 percent;
- (ii) steel that contains more than 0.25 percent of any of the following elements: aluminum, chromium, cobalt, columbium, molybdenum, nickel, titanium, tungsten, or vanadium;
- (iii) a metal alloy consisting of a nickel, iron-nickel, or cobalt base alloy that contains a total of other alloying metals (except iron) in excess of 10 percent;
- (iv) titanium or a titanium alloy; or
- (v) zirconium or a zirconium base alloy.

(c) The Chapter generally does not cover the procurement of any good described in any of the following FSC classifications, due to the application of Article XXIII:1 of the GPA:

FSC 10	Weapons
FSC 11	Nuclear Ordnance
FSC 12	Fire Control Equipment
FSC 13	Ammunitions and Explosives
FSC 14	Guided Missiles
FSC 15	Aircraft and Airframe Structural Components
FSC 16	Aircraft Components and Accessories
FSC 17	Aircraft Launching, Landing, and Ground Handling Equipment

FSC 18	Space Vehicles
FSC 19	Ships, Small Craft, Pontoons, and Floating Docks
FSC 20	Ship and Marine Equipment
FSC 2350	Combat, Assault & Tactical Vehicles, Tracked
FSC 28	Engines, Turbines, and Components
FSC 31	Bearings
FSC 58	Communications, Detection, and Coherent Radiation
FSC 59	Electrical and Electronic Equipment Components
FSC 60	Fiber Optics Materials, Components, Assemblies, and Accessories
FSC 8140	Ammunition & Nuclear Ordnance Boxes, Packages & Special Containers
FSC 95	Metal Bars, Sheets, and Shapes

5. Department of Energy: Due to the application of Article XXIII:1 of the GPA, this Chapter does not cover the procurement of:

- (a) any good or service made to support the safeguarding of nuclear materials or technology, where the Department of Energy conducts the procurement under the authority of the *Atomic Energy Act*; or
- (b) any oil purchase related to the Strategic Petroleum Reserve.

6. Department of Homeland Security:

- (a) This Chapter does not cover procurement by the Transportation Security Administration.
- (b) The essential security considerations applicable to the Department of Defense are equally applicable to the U.S. Coast Guard.

7. Department of Transportation: This Chapter does not cover procurement by the Federal Aviation Administration.

8. General Services Administration: This Chapter does not cover the procurement of any good described in any of the following FSC classifications:

FSC 51	Hand Tools
FSC 52	Measuring Tools
FSC 7340	Cutlery and Flatware

Section B: Goods

This Chapter applies to the procurement of any good by the entities listed in Section A, unless otherwise specified in this Chapter.

Section C: Services

This Chapter applies to the procurement of all services covered under each Party's Annex 4 of Appendix I of the GPA.

Section D: Construction Services

This Chapter applies to the procurement of all construction services under CPC 51 procured by the entities listed in Section A, unless otherwise specified in this Chapter.

Section E: General Notes

Unless otherwise specified herein, the following General Notes in each Party's Schedule apply without exception to this Chapter, including to all sections of this Annex.

Schedule of Korea

1. This Chapter does not apply to procurement in furtherance of human feeding programs.
2. This Chapter does not apply to:
 - (a) the single tendering procurement and set-asides for small- and medium-sized businesses -according to the *Act Relating to Contracts to which the State is a Party* and its Presidential Decree; or
 - (b) set asides for small-and medium-sized businesses according to the *Act on Private Participation in Infrastructure*.

Schedule of the United States

1. This Chapter does not apply to any set-aside on behalf of small or minority-owned businesses. A set-aside may include any form of preference, such as the exclusive right to provide a good or service, or any price preference.
2. This Chapter does not apply to the governmental provision of goods and services to persons or governmental authorities not specifically covered under this Annex.
3. Where a contract to be awarded by an entity is not covered by this Chapter, this Chapter shall not be construed to cover any good or service component of that contract.

CHAPTER EIGHTEEN INTELLECTUAL PROPERTY RIGHTS

ARTICLE 18.1: GENERAL PROVISIONS

1. Each Party shall, at a minimum, give effect to this Chapter.

International Agreements

2. Further to Article 1.2 (Relation to Other Agreements), the Parties affirm their existing rights and obligations with respect to each other under the TRIPS Agreement.

3. Each Party shall ratify or accede to the following agreements by the date this Agreement enters into force:

- (a) the *Patent Cooperation Treaty* (1970), as amended in 1979;
- (b) the *Paris Convention for the Protection of Industrial Property* (1967) (the Paris Convention);
- (c) the *Berne Convention for the Protection of Literary and Artistic Works* (1971) (the Berne Convention);
- (d) the *Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite* (1974);
- (e) the *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (1989);
- (f) the *Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure* (1977), as amended in 1980;
- (g) the *International Convention for the Protection of New Varieties of Plants* (1991);
- (h) the *Trademark Law Treaty* (1994);¹
- (i) the *World Intellectual Property Organization (WIPO) Copyright Treaty* (1996); and
- (j) the *WIPO Performances and Phonograms Treaty* (1996).

¹ A Party may satisfy the obligation in Article 18.1.3(h) by ratifying or acceding to the *Singapore Treaty on the Law of Trademarks* (2006), provided that treaty has entered into force.

4. Each Party shall make all reasonable efforts to ratify or accede to the following agreements:

- (a) the *Patent Law Treaty* (2000);
- (b) the *Hague Agreement Concerning the International Registration of Industrial Designs* (1999); and
- (c) the *Singapore Treaty on the Law of Trademarks* (2006).

More Extensive Protection and Enforcement

5. A Party may provide more extensive protection for, and enforcement of, intellectual property rights under its law than this Chapter requires, provided that the more extensive protection does not contravene this Chapter.

National Treatment

6. In respect of all categories of intellectual property covered in this Chapter, each Party shall accord to nationals² of the other Party treatment no less favorable than it accords to its own nationals with regard to the protection³ and enjoyment of such intellectual property rights and any benefits derived from such rights. With respect to secondary uses of phonograms by means of analog communications, analog free over-the-air radio broadcasting, and analog free over-the-air television broadcasting, however, a Party may limit the rights of performers and producers of phonograms of the other Party to the rights its persons are accorded in the territory of the other Party.

7. A Party may derogate from paragraph 6 in relation to its judicial and administrative procedures, including requiring a national of the other Party to designate an address for service of process in its territory, or to appoint an agent in its territory, provided that such derogation is:

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

² For purposes of paragraphs 6 and 7 and Articles 18.2.14(a), and 18.6.1, a “national” of a Party shall include, in respect of the relevant right, any person (as defined in Article 1.4 (Definitions)), of that Party that would meet the criteria for eligibility for protection of that right provided for in the agreements listed in paragraph 3 and the TRIPS Agreement.

³ For purposes of paragraph 6, “protection” includes: (1) matters affecting the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights as well as matters affecting the use of intellectual property rights specifically covered by this Chapter; and (2) the prohibition on circumvention of effective technological measures set out in Article 18.4.7 and the rights and obligations concerning rights management information set out in Article 18.4.8.

- (b) not applied in a manner that would constitute a disguised restriction on trade.

8. Paragraph 6 does not apply to procedures provided in multilateral agreements to which either Party is a party concluded under the auspices of the WIPO in relation to the acquisition or maintenance of intellectual property rights.

Application of Agreement to Existing Subject Matter and Prior Acts

9. Except as it provides otherwise, including in Article 18.4.5, this Chapter gives rise to obligations in respect of all subject matter existing at the date this Agreement enters into force that is protected on that date in the territory of the Party where protection is claimed, or that meets or comes subsequently to meet the criteria for protection under this Chapter.

10. Except as otherwise provided in this Chapter, including in Article 18.4.5, a Party shall not be required to restore protection to subject matter that on the date this Agreement enters into force has fallen into the public domain in the territory of the Party where the protection is claimed.

11. This Chapter does not give rise to obligations in respect of acts that occurred before the date this Agreement enters into force.

Transparency

12. Further to Article 21.1 (Publication), and with the object of making the protection and enforcement of intellectual property rights transparent, each Party shall ensure that all laws, regulations, and procedures concerning the protection or enforcement of intellectual property rights are in writing and are published,⁴ or where publication is not practicable made publicly available, in its national language in such a manner as to enable governments and right holders to become acquainted with them.

ARTICLE 18.2: TRADEMARKS INCLUDING GEOGRAPHICAL INDICATIONS

1. Neither Party may require, as a condition of registration, that signs be visually perceptible, nor may either Party deny registration of a trademark solely on the grounds that the sign of which it is composed is a sound or scent.

2. Each Party shall provide that trademarks shall include certification marks. Each Party shall also provide that geographical indications are eligible for protection as trademarks.⁵

⁴ For greater certainty, a Party may satisfy the requirement in paragraph 12 to publish a law, regulation, or procedure by making it available to the public on the Internet.

⁵ For purposes of this Chapter, **geographical indications** means indications that identify a good as originating in the territory of a Party, or a region or locality in that territory, where a given quality, reputation, or other characteristic of the good is essentially attributable to its geographical origin. Any sign (such as words, including geographical and personal names, as well as letters, numerals, figurative elements,

3. Each Party shall ensure that its measures mandating the use of the term customary in common language as the common name for a good or service (common name), including, *inter alia*, requirements concerning the relative size, placement or style of use of the trademark in relation to the common name, do not impair the use or effectiveness of trademarks used in relation to such good or service.

4. Each Party shall provide that the owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs, including geographical indications, at least for goods or services that are identical or similar to those goods or services in respect of which the owner's trademark is registered, where such use would result in a likelihood of confusion. In the case of the use of an identical sign, including a geographical indication, for identical goods or services, a likelihood of confusion shall be presumed.

5. Each Party may provide limited exceptions to the rights conferred by a trademark, such as fair use of descriptive terms, provided that such exceptions take account of the legitimate interests of the owner of the trademark and of third parties.

6. Neither Party may require, as a condition for determining that a mark is a well-known mark, that the mark has been registered in the territory of that Party or in another jurisdiction. Additionally, neither Party may deny remedies or relief with respect to well-known marks solely because of the lack of:

- (a) a registration;
- (b) inclusion on a list of well-known marks; or
- (c) prior recognition of the mark as well-known.

7. Article 6bis of the Paris Convention shall apply, *mutatis mutandis*, to goods or services that are not identical or similar to those identified by a well-known trademark,⁶ whether registered or not, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the trademark, and provided that the interests of the owner of the trademark are likely to be damaged by such use.

8. Each Party shall provide for appropriate measures to refuse or cancel the registration and prohibit the use of a trademark or geographical indication that is identical or similar to a well-known trademark, for related goods or services, if the use of that

and colors, including single colors) or combination of signs, in any form whatsoever, shall be eligible to be a geographical indication. "Originating" in this Chapter does not have the meaning ascribed to that term in Article 1.4 (Definitions).

⁶ For purposes of determining whether a mark is well-known, neither Party may require that the reputation of the trademark extend beyond the sector of the public that normally deals with the relevant goods or services.

trademark or geographical indication is likely to cause confusion, or to cause mistake, or to deceive or risk associating the trademark or geographical indication with the owner of the well-known trademark, or constitutes unfair exploitation of the reputation of the well-known trademark.

9. Each Party shall provide a system for the registration of trademarks, which shall include:

- (a) a requirement to provide to the applicant a communication in writing, which may be provided electronically, of the reasons for a refusal to register a trademark;
- (b) an opportunity for the applicant to respond to communications from the trademark authorities, to contest an initial refusal, and to appeal judicially a final refusal to register;
- (c) an opportunity for interested parties to oppose a trademark application and to seek cancellation of a trademark after it has been registered; and
- (d) a requirement that decisions in opposition and cancellation proceedings be reasoned and in writing. Written decisions may be provided electronically.

10. Each Party shall provide a:

- (a) system for the electronic application for, and electronic processing, registering, and maintenance of, trademarks; and
- (b) publicly available electronic database, including an online database, of trademark applications and registrations.

11. Each Party shall provide that:

- (a) each registration and publication that concerns a trademark application or registration and that indicates goods or services shall indicate the goods or services by their names, grouped according to the classes of the classification established by the *Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks* (1979), as revised and amended (Nice Classification); and
- (b) goods or services may not be considered as being similar to each other solely on the ground that, in any registration or publication, they appear in the same class of the Nice Classification. Conversely, each Party shall provide that goods or services may not be considered as being dissimilar from each other solely on the ground that, in any registration or publication, they appear in different classes of the Nice Classification.

12. Each Party shall provide that initial registration and each renewal of registration of a trademark shall be for a term of no less than ten years.

13. Neither Party may require recordation of trademark licenses to establish the validity of the license, to assert any rights in a trademark, or for other purposes.

14. If a Party provides the means to apply for protection or petition for recognition of geographical indications, through a system of protection of trademarks or otherwise, it shall, with respect to such applications and petitions (as relevant to the means chosen by the Party):

- (a) accept those applications and petitions without requiring intercession by a Party on behalf of its nationals;
- (b) process those applications and petitions with a minimum of formalities;
- (c) ensure that its regulations governing filing of those applications and petitions are readily available to the public and set out clearly the procedures for these actions;
- (d) make available contact information sufficient to allow the general public to obtain guidance concerning the procedures for filing applications and petitions and the processing of those applications and petitions in general; and to allow applicants, petitioners, or their representatives to ascertain the status of, and to obtain procedural guidance concerning, specific applications and petitions; and
- (e) ensure that applications and petitions for geographical indications are published for opposition, and provide procedures for opposing geographical indications that are the subject of applications or petitions. Each Party shall also provide procedures to cancel a registration resulting from an application or a petition.

15. (a) Each Party shall provide that each of the following shall be grounds for refusing protection or recognition of, and for opposition and cancellation of, a geographical indication:

- (i) the geographical indication is likely to cause confusion with a trademark that is the subject of a good faith pending application or registration in the Party's territory and that has a priority date that predates the protection or recognition of the geographical indication in that territory;
- (ii) the geographical indication is likely to cause confusion with a trademark, the rights to which have been acquired in the Party's

territory through use in good faith, that has a priority date that predates the protection or recognition of the geographical indication in that territory; and

- (iii) the geographical indication is likely to cause confusion with a trademark that has become well known in the Party's territory and that has a priority date that predates the protection or recognition of the geographical indication in that territory.
- (b) For purposes of subparagraph (a), the date of protection of the geographical indication in a Party's territory shall be:
- (i) in the case of protection or recognition provided as a result of an application or petition, the date of the application or petition; and
 - (ii) in the case of protection or recognition provided through other means, the date of protection or recognition under the Party's laws.

ARTICLE 18.3: DOMAIN NAMES ON THE INTERNET

1. In order to address the problem of trademark cyber-piracy, each Party shall require that the management of its country-code top-level domain (ccTLD) provide an appropriate procedure for the settlement of disputes, based on the principles established in the Uniform Domain-Name Dispute-Resolution Policy.
2. Each Party shall require that the management of its ccTLD provide online public access to a reliable and accurate database of contact information concerning domain-name registrants.

ARTICLE 18.4: COPYRIGHT AND RELATED RIGHTS

1. Each Party shall provide⁷ that authors, performers, and producers of phonograms⁸ have the right to authorize or prohibit⁹ all reproductions of their works, performances,¹⁰

⁷ The Parties reaffirm that it is a matter for each Party's law to prescribe that works and phonograms shall not be protected by copyright unless they have been fixed in some material form.

⁸ "Authors," "performers," and "producers of phonograms" in this Chapter refer also to any successors in title.

⁹ With respect to copyrights and related rights, the "right to authorize or prohibit" for purposes of this Chapter refers to exclusive rights.

¹⁰ With respect to copyright and related rights, a **performance** for purposes of this Chapter means a performance fixed in a phonogram unless otherwise specified.

and phonograms, in any manner or form, permanent or temporary (including temporary storage in electronic form).¹¹

2. Each Party shall provide to authors, performers, and producers of phonograms the right to authorize or prohibit the making available to the public of the original and copies¹² of their works, performances, and phonograms through sale or other transfer of ownership.

3. In order to ensure that no hierarchy is established between rights of authors, on the one hand, and rights of performers and producers of phonograms, on the other hand, each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required. Likewise, each Party shall provide that in cases where authorization is needed from both the author of a work embodied in a phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the performer or producer does not cease to exist because the authorization of the author is also required.

4. Each Party shall provide that, where the term of protection of a work (including a photographic work), performance, or phonogram is to be calculated:

- (a) on the basis of the life of a natural person, the term shall be not less than the life of the author and 70 years after the author's death; and
- (b) on a basis other than the life of a natural person, the term shall be:
 - (i) not less than 70 years from the end of the calendar year of the first authorized publication of the work, performance, or phonogram; or
 - (ii) failing such authorized publication within 25 years from the creation of the work, performance, or phonogram, not less than 70 years from the end of the calendar year of the creation of the work, performance, or phonogram.

5. Each Party shall apply Article 18 of the Berne Convention and Article 14.6 of the TRIPS Agreement, *mutatis mutandis*, to the subject matter, rights, and obligations in this Article and Articles 18.5 and 18.6.

¹¹ Each Party shall confine limitations or exceptions to the rights described in paragraph 1 to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder. For greater certainty, each Party may adopt or maintain limitations or exceptions to the rights described in paragraph 1 for fair use, as long as any such limitation or exception is confined as stated in the previous sentence.

¹² As used in paragraph 2, "copies" and "original and copies", being subject to the right of distribution in this paragraph, refer exclusively to fixed copies that can be put into circulation as tangible objects.

6. Each Party shall provide that for copyright and related rights, any person acquiring or holding any economic right in a work, performance, or phonogram:

- (a) may freely and separately transfer that right by contract; and
- (b) by virtue of a contract, including contracts of employment underlying the creation of works, performances, and phonograms, shall be able to exercise that right in that person's own name and enjoy fully the benefits derived from that right.

7. (a) In order to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that authors, performers, and producers of phonograms use in connection with the exercise of their rights and that restrict unauthorized acts in respect of their works, performances, and phonograms, each Party shall provide that any person who:

- (i) knowingly, or having reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter; or
- (ii) manufactures, imports, distributes, offers to the public, provides, or otherwise traffics in devices, products, or components, or offers to the public or provides services, that:
 - (A) are promoted, advertised, or marketed by that person, or by another person acting in concert with, and with the knowledge of, that person, for the purpose of circumvention of any effective technological measure;
 - (B) have only a limited commercially significant purpose or use other than to circumvent any effective technological measure; or
 - (C) are primarily designed, produced, or performed for the purpose of enabling or facilitating the circumvention of any effective technological measure,

shall be liable and subject to the remedies set out in Article 18.10.13.¹³
Each Party shall provide for criminal procedures and penalties to be applied

¹³ In addition, each Party shall provide that any person who, unknowingly and without reasonable grounds to know, circumvents without authority any effective technological measure that controls access to a protected work, performance, phonogram, or other subject matter shall be liable and subject at least to the remedies set out in subparagraphs (a), (c), and (d) of Article 18.10.13.

when any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, is found to have engaged willfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities. Such criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (e) of Article 18.10.27 as applicable to infringements, *mutatis mutandis*.

- (b) In implementing subparagraph (a), neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing subparagraph (a).
- (c) Each Party shall provide that a violation of a measure implementing this paragraph is a separate cause of action, independent of any infringement that might occur under the Party's law on copyright and related rights.
- (d) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to the following activities, which shall be applied to relevant measures in accordance with subparagraph (e):¹⁴
 - (i) noninfringing reverse engineering activities with regard to a lawfully obtained copy of a computer program, carried out in good faith with respect to particular elements of that computer program that have not been readily available to the person engaged in those activities, for the sole purpose of achieving interoperability of an independently created computer program with other programs;
 - (ii) noninfringing good faith activities, carried out by an appropriately qualified researcher who has lawfully obtained a copy, unfixed performance, or display of a work, performance, or phonogram and who has made a good faith effort to obtain authorization for such activities, to the extent necessary for the sole purpose of research consisting of identifying and analyzing flaws and vulnerabilities of technologies for scrambling and descrambling of information;
 - (iii) the inclusion of a component or part for the sole purpose of preventing the access of minors to inappropriate online content in a

¹⁴ Either Party may request consultations with the other Party to consider how to address, under subparagraph (d), activities of a similar nature that a Party identifies after the date this Agreement enters into force.

technology, product, service, or device that itself is not prohibited under the measures implementing subparagraph (a)(ii);

- (iv) noninfringing good faith activities that are authorized by the owner of a computer, computer system, or computer network for the sole purpose of testing, investigating, or correcting the security of that computer, computer system, or computer network;
 - (v) noninfringing activities for the sole purpose of identifying and disabling a capability to carry out undisclosed collection or dissemination of personally identifying information reflecting the online activities of a natural person in a way that has no other effect on the ability of any person to gain access to any work;
 - (vi) lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes;
 - (vii) access by a nonprofit library, archive, or educational institution to a work, performance, or phonogram not otherwise available to it, for the sole purpose of making acquisition decisions; and
 - (viii) noninfringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms when an actual or likely adverse impact on those noninfringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence, provided that any limitation or exception adopted in reliance on this clause shall have effect for a renewable period of not more than three years from the date the proceeding concludes.
- (e) The exceptions and limitations to measures implementing subparagraph (a) for the activities set forth in subparagraph (d) may only be applied as follows, and only to the extent that they do not impair the adequacy of legal protection or the effectiveness of legal remedies against the circumvention of effective technological measures:
- (i) Measures implementing subparagraph (a)(i) may be subject to exceptions and limitations with respect to each activity set forth in subparagraph (d).
 - (ii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that control access to a work, performance, or phonogram, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i), (ii), (iii), (iv), and (vi).

(iii) Measures implementing subparagraph (a)(ii), as they apply to effective technological measures that protect any copyright or any rights related to copyright, may be subject to exceptions and limitations with respect to activities set forth in subparagraph (d)(i) and (vi).

(f) **Effective technological measure** means any technology, device, or component that, in the normal course of its operation, controls access to a protected work, performance, phonogram, or other protected subject matter, or protects any copyright or any rights related to copyright.

8. In order to provide adequate and effective legal remedies to protect rights management information:

- (a) Each Party shall provide that any person who without authority, and knowing, or, with respect to civil remedies, having reasonable grounds to know, that it would induce, enable, facilitate, or conceal an infringement of any copyright or related right,
- (i) knowingly removes or alters any rights management information;
 - (ii) distributes or imports for distribution rights management information knowing that the rights management information has been removed or altered without authority; or
 - (iii) distributes, imports for distribution, broadcasts, communicates or makes available to the public copies of works, performances, or phonograms, knowing that rights management information has been removed or altered without authority,

shall be liable and subject to the remedies set out in Article 18.10.13. Each Party shall provide for criminal procedures and penalties to be applied when any person, other than a nonprofit library, archive, educational institution, or public noncommercial broadcasting entity, is found to have engaged willfully and for purposes of commercial advantage or private financial gain in any of the foregoing activities. These criminal procedures and penalties shall include the application to such activities of the remedies and authorities listed in subparagraphs (a), (b), and (e) of Article 18.10.27 as applicable to infringements, *mutatis mutandis*.

- (b) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to lawfully authorized activities carried out by government employees, agents, or contractors for the purpose of law enforcement, intelligence, essential security, or similar governmental purposes.

(c) **Rights management information** means:

- (i) information that identifies a work, performance, or phonogram; the author of the work, the performer of the performance, or the producer of the phonogram; or the owner of any right in the work, performance, or phonogram;
- (ii) information about the terms and conditions of the use of the work, performance, or phonogram; or
- (iii) any numbers or codes that represent such information,

when any of these items is attached to a copy of the work, performance, or phonogram or appears in connection with the communication or making available of a work, performance, or phonogram to the public.

- (d) For greater certainty, nothing in this paragraph shall be construed to obligate a Party to require the owner of any right in the work, performance, or phonogram to attach rights management information to copies of the work, performance, or phonogram, or to cause rights management information to appear in connection with a communication of the work, performance, or phonogram to the public.

9. Each Party shall provide appropriate laws, orders, regulations, government-issued guidelines, or administrative or executive decrees providing that its central government agencies not use infringing computer software and other materials protected by copyright or related rights and only use computer software and other materials protected by copyright or related rights as authorized by the relevant license. These measures shall provide for the regulation of the acquisition and management of software and other materials for government use that are protected by copyright or related rights.

10. (a) With respect to this Article and Articles 18.5 and 18.6, each Party shall confine limitations or exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work, performance, or phonogram, and do not unreasonably prejudice the legitimate interests of the right holder.

- (b) Notwithstanding subparagraph (a) and Article 18.6.3(b), neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal.¹⁵

¹⁵ For purposes of subparagraph (b) and for greater certainty, retransmission within a Party's territory over a closed, defined, subscriber network that is not accessible from outside the Party's territory does not constitute retransmission on the Internet.

ARTICLE 18.5: COPYRIGHT

Without prejudice to Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii), and 14*bis* of the Berne Convention, each Party shall provide to authors the exclusive right to authorize or prohibit the communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

ARTICLE 18.6: RELATED RIGHTS

1. With respect to the rights accorded under this Chapter to performers and producers of phonograms, each Party shall:
 - (a) accord those rights to the performers and producers of phonograms who are nationals of the other Party; and
 - (b) accord those rights with respect to performances and phonograms that are first published or first fixed¹⁶ in the territory of the other Party.¹⁷
2. Each Party shall provide to performers the right to authorize or prohibit:
 - (a) the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance; and
 - (b) the fixation of their unfixed performances.
3.
 - (a) Each Party shall provide to performers and producers of phonograms the right to authorize or prohibit the broadcasting and any communication to the public of their performances or phonograms, by wire or wireless means, including the making available to the public of those performances and phonograms in such a way that members of the public may access them from a place and at a time individually chosen by them.
 - (b) Notwithstanding subparagraph (a) and Article 18.4.10, the application of this right to analog transmissions and free over-the-air broadcasts, and exceptions or limitations to this right for such activity, shall be a matter of each Party's law.

¹⁶ For purposes of Article 18.6, "fixation" includes the finalization of the master tape or its equivalent.

¹⁷ With respect to the protection of phonograms, a Party may apply the criterion of fixation instead of the criterion of publication.