

HKIAC Case No. 18117

**IN THE MATTER OF AN ARBITRATION UNDER THE
FREE TRADE AGREEMENT BETWEEN THE UNITED STATES OF
AMERICA AND THE REPUBLIC OF KOREA (THE “KORUS FTA”)**

-and-

**THE UNCITRAL ARBITRATION RULES (WITH NEW ARTICLE 1,
PARAGRAPH 4, AS ADOPTED IN 2013) (THE “UNCITRAL RULES”)**

-between-

(the “Claimant”)

-and-

THE GOVERNMENT OF THE REPUBLIC OF KOREA

(the “Respondent”, and together with the Claimant, the “Parties”, and each a “Party”)

PROCEDURAL ORDER NO. 2

Tribunal

Judge Bruno Simma (Presiding Arbitrator)
Dr. Benny Lo
Professor Donald McRae

Assistant to the Tribunal

Dr. Heiner Kahlert

Administering Institution

Hong Kong International Arbitration Centre (“**HKIAC**”)

1. Background

- 1.1 On 26 February 2019, the Respondent made an Application for Preliminary Objections pursuant to Articles 11.20.6 and 11.20.7 of the KORUS FTA (“**Application for Preliminary Objections**”), contending that all of the claims raised by the Claimant are not claims for which an award in the Claimant’s favour may be made and/or that the Tribunal does not have jurisdiction to determine the Claimant’s claims.
- 1.2 Pursuant to Articles 11.20.6(b) and 11.20.7 of the KORUS FTA, upon receipt of the Application for Preliminary Objections, the Tribunal shall, *inter alia*, suspend any proceedings on the merits and issue a decision or award on the objection, stating the grounds therefor. The Tribunal’s decision or award shall be issued no later than 180 days after the date of the request, if a disputing Party requests a Hearing, or up to 210 days (i.e., an additional 30 days) on the showing of extraordinary cause.
- 1.3 A Case Management Conference was held telephonically between the Tribunal and the parties on 14 March 2019 in which the Tribunal consulted with the Parties on, among other things, the Procedural Timetable in respect of the Parties’ submissions on the Application for Preliminary Objections.
- 1.4 On 3 April 2019, the Respondent requested a Hearing on the Application for Preliminary Objections which was granted in the Tribunal’s Decision on Claimant’s Application to Submit 3rd Amendment to Notice of Arbitration and Respondent’s Request for a Hearing on Its Application for Preliminary Objections dated 5 April 2019. This procedural order addresses the organisation of such Hearing. Subject to the terms of this procedural order, the Hearing shall otherwise be conducted in accordance with the applicable provisions of Procedural Order No. 1 dated 11 April 2019 (“**Procedural Order No.1**”).

2. Pre-Hearing Conference Call

- 2.1 A pre-hearing conference call was held with the Tribunal, the Parties and the HKIAC on 12 July 2019 at 2:00 p.m. Seoul time. This procedural order is issued taking into account the discussions held at the pre-hearing conference call.

3. Pre-Hearing Motions

- 3.1 In her email of 3 July 2019, the Claimant reserved her right to file pre-hearing motions to object to anticipated testimony of the Respondent’s expert witnesses. By its email of 4 July 2019, the Respondent objected to the admissibility of any such motions and did not indicate that it would be filing any motions of its own. The issue of whether the Claimant should be permitted to file such motions was further discussed at the pre-hearing conference call.
- 3.2 Having carefully considered the Parties’ positions, the Tribunal hereby grants permission for the Claimant to file the said pre-hearing motion **by Friday, 19 July 2019**. The Respondent may, if it considers necessary, file a brief written response by Friday, 26 July 2019. The length of the said pre-hearing motion and written response shall not exceed 2 pages (A4 size; 1.5 spaced; 12 pt. type).

4. Hearing Dates, Location and Agenda

- 4.1 In accordance with Procedural Order No. 1, the Hearing will take place from 31 July to 1 August 2019, with 2 August 2019 held in reserve (the “**Hearing**”). The agenda for each day of

the Hearing is appended hereto as **Annex I**. The time slots allocated to the examination of (expert) witnesses shall be inclusive of the time taken up by the agreed sequential interpretation.

- 4.2 The Hearing will be held at the Seoul International Dispute Resolution Center, Seoul, Republic of Korea. Break-out rooms for the Parties and the Tribunal have been reserved by the HKIAC.
- 4.3 Further logistical details including setup, entry passes, room assignment, and lunch and refreshments have been provided by the HKIAC in its email to the Parties and the Tribunal dated 12 July 2019.

5. Language

- 5.1 As agreed at the pre-hearing conference call, the Hearing will be conducted in English, with sequential translation into/from Korean being provided for the examination of the expert witnesses.

6. Attendees and Transparency of the Hearing

- 6.1 The Parties shall provide the names and affiliations of all persons who will attend the Hearing, including (expert) witnesses, Parties' counsel and representatives, no later than **Monday, 22 July 2019**, using the attendance sheet provided by the HKIAC by its email of 11 July 2019. As agreed during the pre-hearing conference call, the Claimant's husband, ***, may attend the Hearing.
- 6.2 The transparency of these proceedings shall be governed by Article 11.21 of the KORUS FTA, subject to this paragraph 6.
- 6.3 The Hearing shall be made accessible to the public via closed-circuit television broadcast to a room other than the room in which the Hearing is held, subject to a time delay and any other arrangements needed to safeguard protected information.
- 6.4 The video feed shall be broadcast to the public-access room on a 10-minute delay.
- 6.5 If either Party intends to use protected information during the Hearing, that Party shall provide prior notice to the HKIAC, which will have the video feed to the public-access room discontinued until that Party confirms that it does not intend to use further the protected information.
- 6.6 If protected information is inadvertently introduced during the Hearing, either Party shall immediately notify the Presiding Arbitrator. Upon such notice, the HKIAC will immediately have the video feed discontinued. The Party making the notification will have the opportunity to identify the protected information, and the other Party will have the opportunity to respond. In case of disagreement between the Parties, the Tribunal will make a determination.

7. Allocation of Time

- 7.1 In accordance with the agenda attached hereto as **Annex I**, each Party has been allocated a total Hearing time of 7 hours and 30 minutes (including time needed for interpretation). The Tribunal will ensure that the principle of equal time is observed, based on a chess-clock system administered by the HKIAC throughout the Hearing.

- 7.2 Each Party remains free to re-allocate its time from one part of the Hearing to another, provided that such Party does not exceed the total Hearing time allocated to it (unless decided otherwise by the Tribunal).

8. Opening and Closing Statements

- 8.1 The Tribunal may ask questions at any time during the Parties' opening and closing statements. However, the time spent by the Parties responding to such questions shall not be deducted from the time allocated to their opening and closing statements, respectively.
- 8.2 Having carefully considered the Parties' positions, the Tribunal has decided that there shall not be any formal time allocated for a rebuttal of the opening statements. However, as a matter of course, the Parties remain free to comment, within the Hearing time allocated to them, on anything arising out of the opening statements.
- 8.3 Given the tight deadline for the rendering of the Tribunal's decision or award on the Application for Preliminary Objections, no post-Hearing briefs may be filed by the Parties unless decided otherwise by the Tribunal.

9. Witness and Expert Examinations

- 9.1 The Claimant herself will be heard as a witness at the Hearing. Having carefully considered the Parties' positions, the Tribunal decides that the Respondent shall have the opportunity to cross-examine the Claimant, but that in view of Article 11.20.6(c) of the KORUS FTA, such cross-examination shall be limited to matters falling within the scope of the Respondent's preliminary objections pursuant to Article 11.20.7 of the KORUS FTA.
- 9.2 As per the discussions at the pre-hearing conference call, all three expert witnesses whose expert reports have been filed by the Parties will be heard at the Hearing. The expert witnesses are permitted to give a short presentation, in accordance with the agenda appended hereto as **Annex I**. They shall be allowed to use demonstratives and slides during their presentations, provided that any such demonstratives and slides are distributed to the other Party, the Tribunal Members, the HKIAC, the Assistant to the Tribunal, the court reporters (one) and, if applicable, interpreters (one) at the Hearing immediately prior to the respective presentation for which they are used, and subsequently sent by email to the HKIAC and to the other Party in electronic format. Demonstratives and slides shall indicate the exhibit or legal authority number of the document(s) from which they are derived.
- 9.3 As per paragraphs 18.11.4 and 19.3 of Procedural Order No. 1, the Tribunal may examine (expert) witnesses at any time. However, the time spent on such examination by the Tribunal shall not be deducted from the time allocated to the Parties for the Hearing.
- 9.4 Each (expert) witness shall be available for examination half a day before and after the time at which his or her examination is scheduled.
- 9.5 In accordance with paragraphs 18.10 and 19.3 of Procedural Order No. 1, each Party shall advance the costs of appearance of its own (expert) witnesses, irrespective of whether it was the other Party that called such (expert) witness to appear at the Hearing.

10. Hearing Materials

- 10.1 As per paragraph 20.4 of Procedural Order No. 1, no new evidence may be presented at the Hearing except with leave of the Tribunal.
- 10.2 The Parties shall prepare a joint electronic bundle comprising a full hyperlinked copy of the case file. A USB drive containing the electronic bundle shall be sent by courier to each Tribunal Member, the HKIAC and the Assistant to the Tribunal, immediately upon receipt by the Parties of this procedural order.
- 10.3 At the Hearing, the Parties shall make available to the Tribunal one hard copy of the case file in A4 size, unbound in ring binders, organised in chronological or other appropriate order with a separate tab for each document, and preceded by a list describing each document.
- 10.4 In addition, at the Hearing, the Parties shall provide one “core bundle” in A5 size to each Tribunal Member, the HKIAC and the Assistant to the Tribunal. Such “core bundle” shall include only (i) procedural orders and other decisions of the Tribunal, (ii) the Parties’ submissions (without exhibits and legal authorities; in case of amended submissions, only the latest version shall be included), (iii) the relevant parts of the KORUS FTA, (iv) the UNCITRAL Rules and (v) the applicable version of the Korean Arbitration Act. There shall be a separate tab for each document.
- 10.5 To facilitate the examination of (expert) witnesses, each Party shall prepare individual cross-examination bundles containing the witness statement / expert reports and the exhibits on the record to which the (expert) witnesses are to be referred during cross-examination, for use by the Tribunal and opposing counsel during the Hearing. The existence of cross-examination bundles will not prevent taking the (expert) witness to any other exhibit or authority on the record.
- 10.6 The Party conducting an examination shall ensure that the (expert) witness being examined has at all times a hard copy of the document to which he or she is referred.
- 10.7 The procedures governing the use of demonstrative exhibits are set out in paragraph 20.4 of Procedural Order No. 1. The Party submitting demonstrative exhibits shall provide them in hard copy to the other Party, the Tribunal Members, the HKIAC, the Assistant to the Tribunal, the court reporters (one) and, if applicable, the interpreters (one) at the Hearing immediately prior to the respective presentation for which it is used, and subsequently send them by email to the HKIAC and to the other Party in electronic format. Demonstrative exhibits shall indicate the exhibit or legal authority number of the document(s) from which they are derived.

11. Hearing Equipment

- 11.1 Each Party shall have a laptop that shall be connected to the screens made available at the Hearing room for projections of demonstrative exhibits and visual aids.
- 11.2 A whiteboard will be available in the Hearing room.

12. Records of the Hearing

- 12.1 Pursuant to paragraph 20.3 of Procedural Order No. 1, audio recordings will be made of the Hearings as well as verbatim transcripts, both in English and Korean.

- 12.2 HKIAC will continue to assist the parties in making arrangements to have English verbatim transcripts available in real-time using LiveNote or a similar software during the Hearing. Electronic versions of the English transcripts will be provided to the Parties, the Tribunal and the Assistant to the Tribunal on a same-day basis. Electronic versions of the Korean transcripts may be made available after the conclusion of the Hearing.

13. Language of the Decision or Award on the Application for Preliminary Objections

- 13.1 Pursuant to Article 11.20.3 of the KORUS FTA and Article 19 of the UNCITRAL Arbitration Rules, the proceedings shall be conducted in English and Korean. Accordingly, the Tribunal's decision or award on the Respondent's Application for Preliminary Objections will be issued in both English and Korean.
- 13.2 As agreed during the pre-hearing conference call, the Korean version of the decision may be issued after the deadline provided for in Article 11.20.7 of the KORUS FTA.

Place of Arbitration: Seoul, Republic of Korea



Judge Bruno Simma
(Presiding Arbitrator)
On behalf of the Tribunal

16 July 2019

Annex I: Hearing Agenda

	DAY 1 (Wednesday 31 July 2019)	DAY 2 (Thursday 1 August 2019)	DAY 3 (Friday 2 August 2019)
First Morning Session	09:30-09:45: Housekeeping (0:15) 09:45-11:15: Respondent's Oral Opening (1:30)	09:30-12:00: Examination of Professor *** (Respondent's expert witness) <ul style="list-style-type: none"> • 0:45 presentation • 1:30 cross-examination • 0:15 re-direct examination 	Reserved for continuation of the Hearing in case extra time is needed
Second Morning Session	11:30-13:00: Claimants' Oral Opening (1:30)		
First Afternoon Session	14:00-16:00: Examination of ** * (Claimant's fact witness) <ul style="list-style-type: none"> • 0:45 direct examination • 1:00 cross-examination • 0:15 re-direct examination 	13:00-15:30: Examination of Professor*** (Respondent's expert witness) <ul style="list-style-type: none"> • 0:45 presentation • 1:30 cross-examination • 0:15 re-direct examination 	
Second Afternoon Session	16:15-19:15: Examination of Professor *** (Claimant's expert witness) <ul style="list-style-type: none"> • 0:45 presentation • 2:00 cross-examination • 0:15 re-direct examination 	Oral Closings <ul style="list-style-type: none"> • 16:30 to 17:30: Respondent's Oral Closing (1:00) • 17:45 to 18:45: Claimant's Oral Closing (1:00) 18:45-19:00: Housekeeping (0:15)	