In The Arbitration Under Chapter Eleven of the

United States- Korea Free Trade Agreement

and the UNCITRAL Arbitration Rules

IN THE MATTER OF AN ARBITRATION UNDER
THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATION TRADE LAW
AND
THE KOREA-UNITED STATES FREE TRADE AGREEMENT

CASE NO. HKIAC/18117

***, CLAIMANT

AND

THE REPUBLIC OF KOREA, RESPONDENT

CLAIMANT'S RESPONSE TO THE SUBMISSION OF THE UNITED STATES

July 11, 2019

Arbitral Tribunal

Judge Bruno Simma (Presiding)

Mr. Benny Lo

Professor Donald McRae

Counsel for the Claimant

Charles Owen Verrill, JR

Ik Tae KIM

1. INTRODUCTION

1.1 Claimant, *** hereby makes this Response to the Submission of the United States ("Submission") pursuant to Article 11.20.4 of the United States-Korea Free Trade Agreement ("KORUS").

1.2 Claimant does not dispute that the United States has negotiated investment agreements that permit a respondent State to assert preliminary objections in an "efficient manner."(Submission at 3). Nevertheless, the Tribunal must, in exercising its discretion, "conduct the proceedings so as to . . . to provide a fair and efficient process for resolving the parties' dispute." UNCITRAL Article 17.1.

2. ARGUMENT

2.1 Expedited Review Mechanisms (KORUS Articles 11.20.6-11.20.7): We submit that these Articles provide stand alone mechanisms to deal with a respondent's claim that it must "prevail as a matter of law," KORUS 11.20.6, and separately that the tribunal lacks competence, KORUS 11.20.7.

2.2 The reason for this distinction is that the expedited procedure under paragraph 6 has three aspects that do not apply to the tribunal's consideration of challenges to competence under subparagraph 7

2.2.1 First, there are strict time lines applicable to preliminary objections under subparagraph 6, but not subparagraph 7;

2.2.2 Second, the assumption applicable to expedited procedures under subparagraph 6 that the complaint's allegations in the notice of arbitration and statement of claim are true, does not necessarily apply to other objections raised as a preliminary measure; and

2.2.3 Third, under UNCITRAL Article 23(3)(20) a challenge to competence (i.e., jurisdiction) can be raised any time no later than the statement of defense.

2.3 We submit that these differences must be borne in mind as the Tribunal addresses the anomalies that can and do emerge when Respondent raises both the subparagraph 6 preliminary objection, which is based on the assumption that the facts alleged by complaint in the notice of arbitration and any amendments thereof are true, and which are evaluated to determine whether the claim is "manifestly without legal merit, " and a subparagraph 7 challenge to competence, which reflects the record up to the statement of defence. We submit that a competence objection would be better, and more fairly, assessed with a more fully developed record than can be developed in the very limited time frame of a preliminary objection. [1]

[1] For example, Respondent complains that the "complainant has not provided the basic documents required to support these allegations such as rental contracts, agent contracts, receipt of maintenance fees, and receipt of rental fees that could prove the existence of her rental activities." Reply to Response to Application for Preliminary Objections, 13 May 2019, at paragraph 4.9.

2.4. It is in this context that the Tribunal in this arbitration must consider the Submission of the United States relative to burden of proof, which states that there is no requirement that the Tribunal assume to be true claimant's factual allegations in an objection to competence.

2.5 Submission at para. 12, cites *Bridgestone Licensing services, Inc. v. Republic of Panama*[2]. Then at para 13, the Submission states that *Bridgestone* also holds that contrary to the facts alleged to be true assumption of subparagraph 6, the normal rules of burden of proof applies in a competence challenge: that is the claimant must prove the necessary and relevant facts. However, the U.S. Submission ignores important determinations that the Bridgestone Tribunal made in rejecting the Submission's simplistic assertions regarding burden of proof.

2.6. In *Bridgestone*, Panama argued, based on a provision in the U.S.-Panama Trade Promotion Agreement, which is substantively identical to subparagraph 7 here, that in an expedited competence proceeding, the tribunal is required to apply the same standard of proof that always applies in the case of all competence objections. The *Bridgestone* Tribunal wrote that "*it does not accept this scenario*."[3] Instead, the Tribunal held that

> "*When Panama invoked the right to request that its objections as to jurisdiction should be decided on and expedited basis pursuant to Article 10.20.5, this request implicitly invoked the authority conferred on the Tribunal by Article 41 of the ICSID Convention and Rule 41 of the Arbitration Rules. The Tribunal's authority to reach a decision on the objections on an expedited basis is subject to the regime laid down in Article 41 and Rule 41 of the Arbitration Rules.*" [4]

The *Bridgestone* Tribunal further stated that the provisions of Article 41 and Rule 41 are "*designed to give the Tribunal the authority to conduct proceedings in the most efficient and cost effective manner*."[5]

2.7. Article 41 of the ICSID Convention and of the Administrative Rules provides for expedited competence proceedings. Specifically, Convention Article 41 provides that the tribunal has the discretion to deal with a competence objection as a preliminary question or join it to the merits of the dispute. ICSID Rule 41 also specifically provide that the tribunal may deal with the objection as a preliminary question or join it to the merits of the dispute. ICSID Rule 41(4).

2.8. Article 23(3) of the UNCITRAL Rules similarly provide the Tribunal as the discretion to rule on a competence plea either as a preliminary question or as an award on the merits.

2.9. While the Tribunal in *Bridgestone* proceeded to decide the preliminary objection (see decision at 122), it nevertheless held that:

> "*The Tribunal rejects Panama's submission that it has no authority on an expedited objection to competence . . .to reach a decision on a prima facie basis and to join the*

[2] ICSID Case No. ARB/16/34. Decision on Expedited Objections (Dec. 13, 2017).
[3] Id. at para. 112.
[4] Id at para. 116.
[5] Id at para. 115.

issue of competence to the merits of the dispute. Such authority is essential if the Tribunal is to prevent the hearing of the expedited objection turning into a mini, or even maxi, trial . . .A decision to join the objection to the merits of the dispute will satisfy the Tribunal's obligation . . .to issue an expedited decision on the objection." [6]

2.10 In sum, the Tribunal should take into account efficiency and cost in deciding whether it should exercise the option authorized under the ICSID and UNCITRAL Rules to join a competence objection to the merits. We raise this point because we fear the "weaponization" of procedures to disadvantage claimants that have limited resources and could be discouraged from asserting their treaty rights. [7]

2.11. Limitations on Consent, KORUS Article 18: The Submission (paragraphs 16-22) lists a host of decisions concerning consent but nowhere addresses a key point raised by Claimant. As we detailed in our Response to Respondent's Application for Preliminary Objections, [8] KORUS Article 11.18.1 focusses on the date that the claimant "first acquired, or should have acquired, knowledge of the breach . . . and knowledge the claimant . . .has incurred loss or damage." The key words in this Article then are "**the breach**" and has **"incurred loss or damage**." Both of these clauses thus refer to events that have happened and the requisite knowledge is of events that happened. This reading of Article 18.1 is required by Article 31.1 of the Vienna Convention on the Law of Treaties, which specifically states that "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty. . . ."

2.12 The use of the terms "the breach" and "loss incurred" in KORUS, and their interpretation as we have suggested is the only proper approach and avoids the necessity of a subjective determination of when the breach occurred, as was the case here where the Land Expropriation Committee specifically stated that the expropriation occurred on a certain date. This approach gives potential claimants clear guidance about the meaning of "the breach."

3. CONCLUSION

We respectfully request the Tribunal to take the foregoing comments of the Claimant on the Submission of the United States.

July 11, 2019

Counsel for the Claimants

[6] Id at para.120
[7] Claimant submits that the UNCITRAL Rules, and the Bridgestone Tribunal, make it clear that cost and efficiency must be factored into discretional determinations.
[8] Claimant's Response, April 22, 2019, at 20-22.