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## The KORUS FTA: Only as Good as We Make It

By Andrew J. Park, Seoul Office managing partner and Chair of Korea Practice Group, McKenna, Long & Aldridge, LLP

It has now been just over one year since the implementation of the KORUS FTA. So where do we stand? Is it a winner or a loser? Who gained and who lost? What are the short term and long term prospects? These and many other similar questions have been commonplace lately, and there has not been any shortage of academics, politicians, government agencies, trade groups, etc., all weighing-in on the answers. Thus, rather than adding to an already crowded discussion on these questions, this article focuses on the future. That is, the two governments have now done their part in re-setting the trade infrastructure, but does that mean that two-way commerce will somehow instantly lift-off, and if not, what will it take to do so?

There are many factors in measuring a "business opportunity," but most will likely agree that chief among them is assessing the cost of doing business. Depending on that assessment, among other things, businesses may decide to enter into a particular market, and as we all know, some will be vibrant and thrive, while others will not. To the extent that laws can be implemented and trade infrastructure can be crafted to be maximally conducive to trade, we have seen modern, free-market governments readily undertake responsibility to do so. The KORUS FTA is the product of one such achievement by the U.S. and Korean governments. They have, in essence, created a new trade framework that is designed and intended to stimulate, expand, and grow bi-lateral trade and investment.

So now that this new trade framework is in place, the realization of the goals of the KORUS FTA – or stated differently, the measure of its success or failure – is largely dependent on how Korean and U.S. businesses actively seek-out opportunities created by the KORUS FTA. But how can this be done? Read the free trade agreement? In all fairness, the KORUS FTA is a large document filled with diverse content, only a limited portion of which would likely be relevant to any given business.

In this respect, the governments of the respective countries have created governmental and quasi-governmental entities that have undertaken numerous and quite comprehensive efforts to educate, inform, publicize, and even directly assist businesses in identifying and pursuing business opportunities presented by the KORUS FTA. One of the notable services that these entities do is to help businesses to locate and match-up with prospective business partners.

In addition to the governmental and quasi-governmental entities, there are also a number of non-profit organizations and trade associations that also provide the same or similar services. For example, companies may visit the following websites for information on business opportunities under the KORUS FTA:

[www.ustr.gov](http://www.ustr.gov)

[www.fta@dhs.gov](mailto:www.fta@dhs.gov)

[www.amchamkorea.org](http://www.amchamkorea.org)





In addition to investigating and affirmatively seeking-out information and assistance from these and other governmental and private sector organizations, businesses are also encouraged to tap into the resources of professionals who can assist not only in your business development pursuits, but who can also provide you with the proper foundation and protection in connection with the actual implementation of your business endeavors. Accounting professionals, legal professionals, and others have the expertise to help you identify, navigate, and safely secure business opportunities.

Although there are many reports in the public media and in other circles about whether the KORUS FTA has or has not been a success, it is probably, in all fairness, too early to make any kind of reliable or accurate assessment. After all, the public and private sectors are just now beginning to familiarize themselves with the new trade framework and learning how best to take advantage of it.

Fortunately, there are various signs at this early stage of implementation that suggest the trade framework created by the KORUS FTA is working, as intended, in the sense that overall trade between the two countries has increased during the first year of the agreement's implementation. Although the increase has not necessarily been even across all sectors of industry, the trade statistics showing increased levels of bilateral trade are nevertheless encouraging, especially when considering that overall global trade volumes have been down due to the negative global economy and the financial crises in Europe, among other things.

So now that your company has completed its due diligence of the KORUS FTA, has located a business partner on the other side of the Pacific, and you are both ready to commence business, now what? Just as the KORUS FTA provides a framework for trade between the two countries, commercial agreements provide an equally vital "framework" for two trading partners to engage in a business transaction. Although each business transaction is unique, well-drafted commercial agreements typically include a number of provisions that are integral to a clear,

unambiguous, and enforceable contract. These include such things as:

- (1) Identification of the parties to the agreement, their place of business, and commencement or effective date of the agreement;
- (2) Brief summary of the background of the transaction contemplated;
- (3) Definitions of key terms in the agreement;
- (4) Recitation of the duties, obligations, etc. of the parties;
- (5) Description of the payment terms from one party to the other;
- (6) Term of the agreement and provisions covering early termination;
- (7) Ownership and rights in connection with the use of intellectual property;
- (8) Statement of each parties' representations and warranties;
- (9) Statement of the confidentiality of the terms of the agreement; and
- (10) Provision regarding forum and choice of law in the event of a dispute.

The foregoing is but a sample of the types of provisions that you may want to include in your next agreement. As mentioned above, each agreement is unique, so the actual provisions that may be included in your next agreement should be decided in consultation with your legal counsel.

In conclusion, as we witness how businesses are beginning to discover this "instrument" or "tool" we call the KORUS FTA, and to see how they are using it to their benefit, success will no doubt follow where, as here, the stake-holders from both countries - ranging from the respective governments, the private sector, and businesses - embrace the principals of a free market economy, entrepreneurship, and the rule of law.

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