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 REJOINDER TO RESPONDENT'S APPLICATION FOR PRELIMINARY OBJECTIONS

May 20, 2019

Arbitral Tribunal

Judge Bruno Simma (Presiding)

Mr. Benny Lo

Professor Donald McRae

Counsel for the Claimant

Charles Owen Verrill, JR

Ik Tae KIM

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1. INTRODUCTION

1.1 In this rejoinder, Claimant considers and rebuts the arguments made in the Respondent's Reply to Claimant's Response to Application for Preliminary Objections, filed May 13, 2019.

1.2 The Tribunal's task in this proceeding as clearly defined by KORUS Article 11.20(6) is to decide as "a preliminary question, any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 11.26." Alternatively, Respondent argues that the Tribunal does not have jurisdiction to determine the Claimants claims pursuant to KORUS Article 11.20 (7).

1.3 In Article 11.20.6 proceedings, the Tribunal is required by Article 20.6 (c) to "assume to be true claimant's factual allegations in the notice of arbitration (or any amendment thereof)" as well as where applicable "the statement of claim referred to in Article 18 of the UNCITRAL Arbitral rules." The Tribunal "may also consider any relevant facts not in dispute." KORUS Article 11.20 (7) is silent on issues of proof.

1.4 The Application was filed by the Respondent on February 26, 2019, and amended on April 12, 2019, following the filing of an amendment to the Notice of Arbitration by Claimant, which was approved by the Tribunal.[1] The Amended Application, filed after the Claimant's amended Notice of Arbitration was filed and accepted, states: "For the purposes of this Application, ROK is prepared to accept the background facts as presented by the Claimant as correct….."[2] We submit that this assumption applies to both Article 11.20 (6) and (7).

1.5 We acknowledge Respondent's observation that the Claimant's amended Notice of Arbitration includes a statement of claim. [3] However, while Respondent argues that the statement is not entirely consistent with UNCITRAL Article 20.2, that is not for this Tribunal to determine, since the adequacy of the facts stated in the Notice as amended is a question of admissibility.

1.6 Here, Article 20.6 (c) requires the Tribunal to assume the claimant's factual allegations are true. And, as noted above, Respondent has agreed to accept the background facts as correct, including those in the amended Notice of Arbitration for purposes of "this application," which includes objections under both KORUS 11.20 (6) and 11.20 (7).

[1] See 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, April 5, 2019.
[2] Respondent's Amended Application for Preliminary Objections, April 12, 2019, at 3.2. (Hereinafter, "Application.")
[3] Respondent's Reply to Response to Application for Preliminary Objections, May 13, 2019, at 4.2.4. (hereinafter, "Reply.")

2. REJOINDER REGARDING PRELIMINARY OBJECTION 1: Investment

(A) The Property is an Investment Protected by KORUS.

2.1 Claimant argued in her Response that the definition of investment in KORUS Article 11.28 should be limited to the three specific criteria identified (commitment of capital, the expectation of gain or profit and assumption of risk). Respondent objects, with a long recitation of decisions, academic writings, and other authorities that it claims justify looking beyond those criteria to find other characteristics of an investment based on the so-called *Salini* test.[4] But after all of that, Respondent limits its analysis to the three criteria listed in the KORUS definition,[5] For this reason, the Tribunal need not dwell on the issue of application of the *Salini* criteria that are outside the KORUS definition. Turning then to the three KORUS criteria:

2.2 Commitment of Capital: There is no evidence whatsoever for the proposition that capital must originate outside the host state as claimed by Respondent.[6] In fact, Respondent cites four cases in footnote 37 of its Reply to the effect that capital generated in the same country as the investment satisfies the requirement of a commitment of capital. While Respondent attempts to distinguish those decisions on the ground that the investors were not nationals of the host state, that is not relevant to the issue of what is a "commitment of capital," since nationality is only relevant to determining what is a covered investment, which is addressed later in this Rejoinder.

Here, it is not disputed that the Claimant committed capital to the purchase of the property. That is all that is needed to satisfy the commitment of capital criteria of the definition of investment.

2.3 Expectation of Gain or Profit: The Respondent states rather remarkedly that *providing rental income for your parents is not within the "frame of commercial activity*." [7] The activity here is the agreement by the investor (the Claimant) to allow a third party (the tenant) to use the property in exchange for rent (i.e., compensation). Here, the circumstances were as follows:

> 2.3.1 *"During our stay in the U.S. my parents rented our house . . . my parents collected the rent payments from the tenants, and we allowed them to spend the rent money for themselves because they were doing some minor maintenance work for the house and I wanted to support them financially.*"[8]
>
> 2.3.2 The fact that Claimant arranged for her parents to receive the proceeds of her investment is wholly irrelevant to the issue whether she had an expectation of gain or profit and, frankly, rather snide.

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[4] Salini Construttori S.p.A. v. the Kingdom of Morocco, ICSID CASE No Arb/00/04, Decision on Jurisdiction, July 16, 2001.

[5] Reply at 5.9.

[6] Reply at 5.21. Instead, the issue is whether there was a commitment of capital

[7] Reply at 5.29.

[8] Claimant's Response to Application for Preliminary Objections, April 22, 2019 ("Response"), *** Statement, Ex CW-1.

2.4 Assumption of Risk: the Respondent argues that "*there is always an inherent risk that an asset will decline in value* "[9] and there must be something "*additional*." This interpretation flies in the face of common sense and must be rejected. When one acquires an asset that has the potential to decline in value, one assumes that risk because there is presumably an expectation of profit. When an investor buys real estate for rental purposes, the buyer assumes the risk that rentals will not materialize or that rental income will not cover costs, although again a prudent investor will have an expectation of gain or profit which justified the assumption of the risk.

In sum, this criteria involves identifying whether there is a risk associated with an asset/investment such as a rental property and whether the person acquiring that asset/investment assumes the risk that the value will decline, but elects to invest because of the expectation of gain.

2.5 The foregoing analysis demonstrates conclusively that each of the KORUS criteria for determining whether there is an investment is met in this proceeding.

(B) The Property is a Covered Investment

2.6 A "covered investment" is defined in KORUS Article 1.4 as "an investment, as defined in Article 28, in its territory of an investor of the other Party that is in existence as of the effective date of entry in force of this Agreement or established, acquired, or expanded thereafter." For purposes of reference, the effective date of KORUS was March 15, 2012. As of that date, Claimant *** was the owner of the property at issue in this arbitration, having purchased it in 2001. However, Claimant was naturalized as a U.S. citizen on *** **, ****. Hence, the issue is whether the property was "established, acquired or expanded" after the date that the Claimant became a U.S. citizen.

2.7 In the Notice of Arbitration, Claimant noted that one evidence of establishment occurred when she changed the name on the title documents to reflect her U.S. citizenship in February 2016. [10] The Respondent now claims that Claimant has changed position and that there is "no mention of this argument" in the Response. [11] This is not true. It is clearly stated in the Claimant's Response that *** reestablished her property by "reflecting her U.S. citizenship on the official records."[12]

2.8 Prior to the change in the registry, but after *** became a U.S. citizen, she and her husband applied on April 30, 2014, to purchase a parcelled-out property in the development zone, with the understanding that the value of their existing property would be applied to purchase the parcelled-out property.[13] Subsequently, Claimant and her husband elected to withdraw their property from the "parcelling-out" process because they were not satisfied with the "assessed value."[14] This is important because it demonstrates that *** in effect "reestablished" her right to the value of the original property. So, while the underlying title was not affected by these

[9] Reply at 5.34.1
[10] Section VI, paragraph 5 of the Notice.
[11] Reply at 5.42.
[12] Response at 6.9 and again at 6.12.
[13] Response, 6.8.
[14] Id.

actions according to Respondent's experts,[15] there was a distinct change in the Claimant's rights regarding the property.

2.9 In addition to the foregoing actions, various improvements were made to the property beginning in 2014.[16] These improvements included the construction of a parking lot, installation of a gate and fence, and miscellaneous other improvements. We recognize that one significant improvement, the addition of a rental unit, was made a month after January 19, 2016, the date of the expropriation.[17] Whether or not this was "legal" is not an issue here, as it goes to the question of admissibility, not jurisdiction. What this improvement does show is the Claimant's continuing commitment to the property and her conviction that her consent to be part of the Development Union was forged. And the addition of the additional unit was an "expansion" relevant to the assessment of whether there was a covered investment as defined by KORUS Article 1.4.

2.10 Summing up, our point here is that there was a combination of events after *** became a U.S. citizen that justify a finding of establishment and/or expansion that satisfy the definitional requirement of a covered investment inKORUS Article 1.4 in a situation such as this where the owner of property on the effective date of KORUS becomes a U.S. citizen thereafter.

3. REJOINDER REGARDING PRELIMINARY OBJECTION 2: Fork-in-the Road

(A) KORUS Article 11-E is NOT Applicable

3.1 In this section of the Rejoinder, we address the fork in the road arguments made in the Respondent's Reply at paragraphs 6.1 through 6.14. The Respondent's arguments regarding the status of the legal proceedings in paragraphs 6.15 through 6. 38 are dealt with from section 3.B.

3.2 Respondent disputes the Claimant's contention that Annex 11-E is triggered only when there is an allegation before a court or administrative tribunal that a breach has, in fact, occurred, stating that Annex 11-E "does not require the allegation . . .to be based on a breach that has in fact occurred."[18] This position is untenable because it is not consistent with the language in Annex 11-E. Specifically, Annex 11-E.1 precludes a claim by a United States investor that "Korea has breached an obligation under Section A . . .if the investor … has alleged that breach of an obligation . . . before a court or administrative tribunal of Korea." The operative words, therefore, are "has breached" and "that breach."

3.3 The Claimant in her Response referred to Article 31.1 of the Vienna Convention on the Law of Treaties ("VCLT") 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. . ." [19] Based

[15] Reply at 5.48,
[16] See Response at C-5.
[17] Response at 6.11.
[18] Reply 6.9.
[19] Response at 8.2.

on this interpretive rule, Claimant argued that "the ordinary meaning of 'the breach' is a breach that has occurred . . ." [20]

3.4. This interpretation of the terms "has breached" and "that breach" is convincingly supported by the Interim Award (corrected) in "*Spence International Investments, LLC Berkowitz, et al v. Republic of Costa Rica,*" ICSID Case No. UNCT/13/2, May 30, 2017. In *Spence*, the Tribunal considered the term "breach" in the context of whether there was knowledge thereof on the part of a Claimant. It then defined a breach as follows:

3.4.1 "*[I]f a claim is to be justiciable for purposes of CAFTA Article 10.18.1, the Tribunal considers that it must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period.*" [21]

3.4.2 Further, the *Spence* Tribunal observed that: "*[F]or a 'component' of a dispute to be justiciable in the face of a time-bar limitation clause, that component must be separately actionable, i.e., it must constitute a cause of action, a claim, in its own right.*"[22]

3.4.3 The teaching of the *Spence* requires this Tribunal to accept that Annex 11-E is only triggered when there is a breach that constitutes a justiciable cause of action; that is, conduct which, standing alone, is actionable. In this arbitration, that conduct occurred on January 29, 2016. [23]

3.5 We submit that this interpretation of the words "has breached" and "the breach" would not "result in narrowing the scope of Annex 11-E" as claimed by the Respondent. [24] Instead, the *Spence* precedent serves to avoid multiple adjudicative proceedings.

3.6 Moreover, the *Spence* approach will provide Claimants with clear guidance as to the meaning of Annex 11-E and give meaning to the language of that Annex that is consistent with the VCLT.

3.7 Finally we note that Respondent concedes that "*it is for the Tribunal to determine whether the statements made by the Claimant amount to 'observations'…or 'allegations*.' " [25] This parsing of transcripts is unnecessary given the clear direction provided by the *Spence*.

3.8 The "Fundamental Basis Test" is Inapplicable. The Respondent has acknowledged that upon ratification KORUS automatically became part of domestic law in Korea.[26] This

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[20] Response at 8.3.
[21] Spence International Investments LLC, Berkowitz, et al. v. the Republic of Costa Rica, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 at 210. (R-CLA 18).
[22] Id.
[23] Response at 8.4.3.7. The Committee stated that the date of the expropriation was several weeks later, on March 18, 2016, Notice of Arbitration, as amended, III.7. The Committee's January 29, 2016, decision was followed by the conclusion of the eviction proceedings on January 11, 2017. See Response at 8.4.3.2.
[24] Reply at 6.9.
[25] Reply at 6.14.
[26] Reply at 6.12.

observation means that "asymmetrical" fork in the road provision in Annex 11-E removes any need for the resort to the "fundamental basis test" as described in the Amended Application. [27]

B. The status of the Central Land Expropriation Committee is NOT an administrative tribunal.

3.9 It is clear that Respondent's quote of the Korean Supreme Court's Decision about the nature of Central Land Expropriation Committee is WRONG when it states that "*the Supreme Court of Korea has also found that the Central Land Expropriation Committee has the characteristics of an administrative tribunal.*"[28] In nowhere in the Decision, the Supreme Court renders such an opinion. By doing so, Respondent erroneously relies on the authority of the Supreme Court of Korea.

3.10 Likewise, Respondent misleads when it states in its Application that "*the procedure before the Central Land Expropriation Committee possesses the characteristics of an administrative appeal and that it was, therefore, subject to the Administrative Appeal Act,*" [29] although the correct quote should be "*the procedure of the appeal substantially has a characteristic of an administrative proceeding in nature.*"[30]

3.11 Without directly admitting the above mentioned misquotes, Respondent states "*ROK is not entirely clear about the Claimant's point and Claimant's criticism seems to be based on the (wrong) premise that to be an administrative tribunal it must mean that its decisions cannot be appealed to the courts*,"[31] and subsequently, adjusts its tone of argument by claiming that "*when the Korean Supreme Court has referred to the Central Land Expropriation Committee performing an "administrative proceeding" or the Constitutional Court has said it is "administrative adjudication", ROK submits this is good evidence these tribunals/committees are considered "administrative tribunals" as opposed to "courts" in Korea. It is notable also that the Central Land Expropriation Committee is subject to the Administrative Appeals Act.*"[32]

3.12 For the avoidance of doubt, Claimant is not suggesting that the decision of the Central Land Expropriation Committee should not be appealed for the Central Land Expropriation Committee to qualify for an administrative tribunal. Instead, Claimant is suggesting that: 1) the administrative proceeding/adjudication before the Central Land Expropriation Committee is an administrative act; and, 2) the Central Land Expropriation Committee should not be recognized as an administrative tribunal simply for the reason that it takes the appeal from the local expropriation committee and is subject to the Administrative Appeal Act. These features do not bestow the Central Land Expropriation Committee the characteristics of administrative tribunal.

3.12.1 The Supreme Court of Korea and the Constitutional Court of Korea noted that the act of Central Land Expropriation Committee retains the characteristics of

[27] Application at 5.27 – 5.35.
[28] Application at 5.18.
[29] Ibid.
[30] Response at 7.9.2.5
[31] Reply at 6.22.
[32] Ibid at 6.25

"administrative proceedings/adjudication." However, they NEVER mention that the Central Expropriation Committee has the characteristics of the administrative tribunal which requires more judicial characteristic than those of administrative proceedings. In this regard, the work of Central Land Expropriation is merely an administrative act as well explained in "Administrative Law Principle (1)" which was submitted as CL-4 in Claimant's Response. It states that "*Meanwhile, the administrative trial is a part of the trial in a broad sense having the character of conflict resolution, but nevertheless, it is an administrative procedure1, and it is not a judicial proceeding. Also, the decision in the administrative trial is also one of the administrative actions by itself, and has the characteristic of the administrative act*."[33]

3.12.2 Nevertheless, based on the premises that administrative proceeding in an admnistraitve committee is the same with that of an administrative tribunal, Respondent seems to rely on the decision of both the Supreme Court of Korea and the Constitutional Court of Korea in its Application 5.18. Respondent's logic is as follows: 1) Premise: The organization which conduits administrative proceeding/adjudication is an administrative tribunal; 2) Fact: Central Land Expropriation Committee's decision has the characteristics of the administrative adjudication; and therefore 3) Conclusion: Central Land Expropriation Committee is an administrative tribunal. This logic has an inherent problem as it begins with the wrong premise.

3.12.3 In support of this logic, further, Respondent argues that the Central Land Expropriation Committee's administrative adjudication has *quasi-judicial* characteristics. However, *quasi-judicial* characteristics should be distinguishable from judicial characteristics because it is the characteristics adopted by an administrative body to perform its administrative act. Mere possession of *quasi-judicial* characteristics does not change its characteristics of an administrative act which, after all, is carried out by the Executive.

3.12.4 According to Claimant's Expert Witness, Professor ***'s Second Opinion[34], the independence and the impartiality of the Central Expropriation Committee is not equivalent to those of the Court. The Central Land Expropriation Committee retains a non-full time judge who relies on a fact-finding work conducted by government employees of the Ministry of Land, Infrastructure, and Transportation. It does not mandate the presence of the interested parties during the proceedings although the presence of the interested party is an essential requirement in a judicial proceeding. The landowners may appeal to the Central Land Expropriation Committee from the local expropriation committee's decision as well as to the Administrative Court simultaneously. Further, many features are different between the Central Expropriation Committee and the U.S./the U.K Administrative Tribunal.

[33] See CL-4 at I. Administrative Trial in a broad & narrow sense. The 2nd paragraph.
[34] CL-6, Additional Expert Opinion by Professor ***

If we recognize the Central Land Expropriation Committee as a Tribunal, such recognition will eventually create a five-tier appeal system assuming a landowner appeals to the Administrative Court from the Central Land Expropriation Committee's review on local land expropriation committee's decision; appeals to the Appellate Court; and eventually to the Supreme Court.

Contradictory Expert Opinion of Respondent

3.13 Respondent, in support of its argument, submits two professors' opinions. However, their opinions are NOT credible because both professors have previously published contradictory opinions.

3.13.1 In his paper 'Operation of British Administrative Judicial System' (Public Law, Vol. 38, No. 4, May 2010), Professor *****-*** *** states in page 177 that "*Considering the reason it exists, the current Administrative appeals has several problems. Article 107(3) of the Constitution provides that 'Administrative appeals may be conducted as a procedure prior to a judicial trial. The procedure of administrative appeals shall be determined by the Act and shall be in conformity with the principles of judicial procedures.' This can be read as the Article requiring Administrative appeals to function as a proceeding that protects citizen's rights as much as the judicial process does. Even though independence, warrant of procedural rights and fair composition of members are crucial to meet these requirements,* ***it is doubtful that the current Administrative appeals and other administrative procedures are doing so***." (*emphasis added in bold*).[35]

He argues that the Korean Administrative appeals and special administrative appeals (including the Central Land Expropriation Committee) fail to uphold what the Article requires. Therefore, it is contradictory to cite Article 107(3) of the Constitution as the basis for his arguments on the expert opinion.

3.13.2 In his paper 'Concept and Range of the System of Administrative Trials - An Interpretation based on its Historical Progress' (Human Rights and Justice, Vol. No. 445, 2014), Professor ******-** ** also wrote "*It is important to note that the Constitutional Court contends that the latter part of Article 107(3) of the Constitution only applies to the Administrative appeals that require a mandatory exhaustion of administrative remedies. (Constitutional Court Decision 98Hun-Ba8, June 1, 2000, and Supreme Court Decision 2010Du8676 Decided November 15, 2012, concur) Under a mandatory administrative remedy system, Article 107(3) is read to be mandating the legislator to construct the administrative appeal procedure so that it would conform to the principles of judicial proceedings so as not to become a mere formality. Under an optional administrative remedy system, the administrative appeal procedure may be omitted and thus the above concern becomes unnecessary. In short, the Constitutional*

[35] CL-7 "Operation of British Administrative Judicial System" (Public Law, Vol. 38, No. 4, May 2010), Professor *****-*** ***. (June, 2010)

Court interprets the application of Article 107(3) of the Constitution strictly in relation to the right to a trial."[36]

Professor ** emphasizes that the Constitutional Court considers Article 107(3) of the Constitution to be relevant only to Administrative appeals that require the mandatory exhaustion of administrative remedies. The appeal proceedings related to Central Land Expropriation Committee does not mandate the exhaustion of the administrative remedy as an optional administrative remedy system becuase a landowner may appeal to the Administrative Court directly bypassing the Central Land Expropriation Committee or simultaneously to both Central Land Expropriation Committee and the Administrative Court. Therefore, it is contradictory when he argues that the Central Land Expropriation Committee's procedure satisfies the procedural requirements of Article 107(3) of the Constitution in his expert opinion.

Central Committee's Jurisdiction

3.14 The Central Land Expropriation Committee does not have any jurisdiction over the Claimant's assertions in relation to KORUS FTA as previously explained in Claimant's Response.[37] Respondent's argument that the test is whether the breach of KORUS was alleged at all before a court or administrative tribunal[38] is inherently wrong because unless the allegation is made in a relevant court with competent jurisdiction, it could simply be regarded as the emotional expression of mental anguish. According to the Respondent's argument, if the Claimant submitted her state of mind deeply hurt by unjustifiable expropriation in violation of KORUS FTA as a mitigating factor or as a defense in a criminal or a civil court irrelevant to expropriation including even in a traffic court, she would be prohibited from initiating arbitration under KORUS FTA.

Document from Korea to the U.S.

3.15 Although Respondent seems to imply that the status of the Central Land Expropriation Committee is recognized to a certain degree by the U.S. during the negotiation stage for KORUS FTA by submitting a government document[39] reflecting Korea's position on a domestic procedure in land expropriation, the document is silent about the status of the land expropriation committee while it mainly explains the computation method which is not an issue at this preliminary stage of arbitration. Further, it is not clear how this document is recognized by the U.S. and how the status of Central Land Expropriation Committee was reflected in the KORUS FTA. Perhaps, through this document, Respondent attempts to imply that the Central Land Expropriation Committee is recognized as an administrative tribunal in KORUS FTA.

[36] CL-8 "Concept and Range of the System of Administrative Trials - An Interpretation based on its Historical Progress" (Human Rights and Justice, Vol. No. 445, 2014), Professor ******-** **. (October, 2014)

[37] Response at 7.9.2.7

[38] Reply at 6.31

[39] See R-29 Document from Korea to the U.S.

3.16 In the same line of argument, Respondent argues about the purpose of separation between the administrative tribunal and court in Annex 11-E, and yet the argument does not help to recognize the Central Land Expropriation Committee as an administrative tribunal.[40] Instead, the Constitutional Court of Korea would qualify for an administrative tribunal because it deals with the action or inaction of governmental power (Constitutional Court Act, Art 68.1)[41] as it is not a court per se.[42] Further, since the U.S. Judiciary is a centralized system without a constitutional court, this proposition makes a more logical sense.

D. Claimant's withdrawal of her appeal

3.17 Although Respondent states that Claimant quoted the wrong statutory provision (Civil Procedure Article 267 instead of Article 393) regarding the withdrawal of a lawsuit, Respondent admits, "*Article 393(2) provides that the provisions of 266(3) to (5) and 267(1) shall apply mutatis mutandis to the withdrawal of an appea*l."[43] Therefore, with regard to the withdrawal of the appeal, Article 267(1) also applies. The purpose of *mutatis mutandis* is to avoid the repetition of the same words and therefore, the correct reading of the Article 393(2) shall be "No appeal shall be deemed to have been pending (from the beginning)[44] before the court so far as the withdrawal is concerned."

3.18 Although Respondent claims that Claimant's translation of Article 267 is not correct, the translation is correct. The official government translation omits the word "from the beginning." Claimant's translation is further corroborated by a certified translator.[45] Here, the important point in Claimant's translation of "*No lawsuit shall be deemed to have been pending from the beginning before the court so far as the withdrawal is concerned*" is that an appeal becomes non-existent from the effect of extinguished appeal. Claimant neither denies the effect of the trial court's judgment nor the existence of the record that the appeal was filed.

> 3.18.1 Nevertheless, Respondent's expert, Professor ** states that "*50. Finally, a clear distinction is necessary as between the withdrawal of a lawsuit as opposed to an appeal. In the case of withdrawing a lawsuit, the underlying judgment is extinguished retroactively. However, in case an appeal is withdrawn, the appeal is only deemed to have discontinued and the underlying judgment on the 1st instance becomes final and conclusive. 51. In short, the Claimant's filing of an appeal regarding the alleged inadequacy of compensation and the subsequent withdrawal of the same from the Court does not extinguish the fact that the appeal was filed, and the allegations made in connection with the appeal remain in effect*,"[46] in his expert report.

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[40] See Reply at 6.24
[41] CL-9 Constitutional Court Act, Art 68.1
[42] The translation of the Constitutional Court of Korea in Korean is 헌법재판소, which could be translated into English as "Constitutional Tribunal of Korea."
[43] Reply at 6.36.1
[44] The insertion of "from the beginning" is discussed in the following paragraph.
[45] CL-10, Translation of Article 267(1) &Certificate
[46] RE-1 at Ph. 50 & 51

3.18.2 This is self-contradictory because he states in the preceding paragraph of the same report that "*in the case of withdrawing a lawsuit, the underlying judgment is extinguished retroactively.*"[47] (Ironically, here, the translation of Article 267 quoted by Professor ** is similar to the translation of Claimant. Professor ** used the word "retroactively" instead of "from the beginning." but the meaning of the words are same). Since Article 267 applies to the withdrawal of appeal pursuant to Article 393, there is no distinction between the effect of the withdrawal of a lawsuit and the withdrawal of an appeal except that in the case of withdrawal of the appeal, the trial court's judgment stands.

3.19 Finally, the most important point is that Seoul Western Court in the case does NOT have any jurisdiction over the compensation of expropriation and the violation of KORUS FTA because the civil complaint case before Seoul Western District Court filed by the Redevelopment Union was about the ownership of the property and the eviction.

4. REJOINDER REGARDING PRELIMINARY OBJECTION 3; Time Limitation

4.1 Application of KORUS Article 11.18 Requires a "Breach."

4.1.1 Respondent's time limitation arguments (Reply at 7.2.1 through 7.14) do not include any discussion of this critical issue: when did the breach occur? Yet, without determining when the breach occurred, there is no way to even guess when the Claimant first acquired knowledge of the breach or should have first acquired such knowledge.

4.1.2 KORUS Article 11.8, like Annex 11-E, specifically refers to "the breach" as the pivotal occurrence. And, the *Spence* precedent specifically provides that knowledge of the breach "*must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period*." [48] Because Respondent fails to identify such a breach, indeed seems to have scrupulously avoided doing so, its preliminary objection regarding the time limitation of KORUS 11.18 fails.

4.2 In contrast, Claimant has continuously maintained that the "breach" occurred on January 29, 2016, well within the three year limitation period.[49]

5. REJOINDER REGARDING PRELIMINARY OBJECTION 4: Ratione Temporis

5.1 Respondent has Conceded the Ratione Temporis Argument. The Respondent, taking note of the Claimant's Response that the forgery claims relate to the unfair treatment by Korean

[47] Ibid at Ph. 50.
[48] Spence International Investments LLC, Berkowitz, et al. v. the Republic of Costa Rica, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017 at 210. (R-CLA 18).
[49] Response at 8.4.3.2.

authorities, states that "*ROK is prepared to concede that the ratione temporis argument it made in the Application is no longer available*."[50]

5.2 *** Raised the Forgery Issue Numerous Time. In the Notice of Arbitration, the following statement is made:

> 5.2.1 "*The Union later used these forged documents to claim consent by *** and her husband despite ***'s and ****'s constant objection and claim for forgery from the beginning of the dispute. CE-12*."[51]
>
> 5.2.2 "*During the negotiation process, including the meetings on February 1, 2017, and March 23, 2017, as well as other meetings, *** kept raising the issue of fraud by appealing to Mapo-gu government officials who were present at the meetings and yet ***'s claim for fraud was ignored . . .*"[52]
>
> 5.2.3 "*It is alleged that the Mapo-gu government had a motive to disregard these claims since the Supreme Court of Korea had rendered an opinion to invalidate the establishment of Development Union based on fraud in 2012 and set a precedent. It is to be recalled that the Redevelopment Union representative was also the representative of the ***-**** Redevelopment Union which had been declared invalid*."[53]

5.3 We submit that these statements demonstrate that ***'s claim of denial of justice and other violations of fair and equitable treatment.

6. RELIEF SOUGHT

For the foregoing reasons, and any reasons Claimant may submit later, Claimant respectfully requests the Tribunal to dismiss Respondent's Application for Preliminary Objection and, pursuant to Article 42 of the UNCITRAL Arbitration Rules and KORUS Article 11.20 (8), to order the Respondent to pay all costs of this proceeding. Claimant restates and incorporates the reservation of its rights as stated in Paragraph X of the Notice of Arbitration.

RESPECTFULLY SUBMITTED

May 20, 2019.

Counsel for the Claimant

[50] Reply at 2.3 & 8.4
[51] Notice at 6.
[52] Notice at 12.
[53] Ibid.