**IN THE MATTER OF AN ARBITRATION UNDER**

**THE ARBITRATION RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW**

**and**

**THE KOREA-UNITED STATES FREE TRADE AGREEMENT**

**CASE NO. HKIAC/18117**

**BETWEEN:**

*** *** ***

**(Claimant)**

**and**

**THE REPUBLIC OF KOREA**

**(Respondent)**

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# REPLY TO RESPONSE TO APPLICATION FOR PRELIMINARY OBJECTIONS

**13 May 2019**

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| **Arbitral Tribunal** | **Counsel for the Respondent** |
|---|---|
| Judge Bruno Simma (Presiding Arbitrator) | Herbert Smith Freehills |
| Mr Benny Lo | Yoon & Yang LLC |
| Professor Donald McRae | |

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## 1. INTRODUCTION

1.1 Pursuant to Paragraph 14.2 and Annex I (Procedural Timetable for the Preliminary Objections Phase) of Procedural Order No. 1, this is the Respondent's Reply to the Claimant's Response to the Respondent's Application for Preliminary Objections dated 22 April 2019 (the "**Response**"), which is based on KORUS Articles 11.20(6) and 11.20(7).

1.2 Unless otherwise stated, defined terms used in this Reply have the same meaning as in the Respondent's Amended Application for Preliminary Objections dated 12 April 2019 (the "**Application**").

## 2. EXECUTIVE SUMMARY

2.1 ROK maintains its first three preliminary objections to the jurisdiction of the Arbitral Tribunal as set out in the Application, namely that:

2.1.1 **first,** Claimant's Property is neither an "*investment*" nor a "*covered investment*" as defined by KORUS;

2.1.2 **second,** Claimant is prohibited from bringing her claims now in arbitration because she raised them already before Korean courts or administrative tribunals; and

2.1.3 **third,** the Claimant's claims are time barred because she had knowledge of the alleged breaches and damages she now complains of more than three years before she commenced this arbitration.

2.2 The Response does nothing to undermine any of the three arguments noted above. On the contrary, many of the new facts and documents introduced into evidence by the Claimant actually undermine her position and provide additional support to the ROK's jurisdictional objections. It would appear also some of her actions even violated Korean law (see paragraph 3.1.1(B) below).

2.3 ROK's fourth preliminary objection (*ratione temporis*) concerned the Claimant's arguments related to *minimum standard of treatment* under Article 11.5 KORUS in respect of the alleged forged consent to join the Redevelopment Union. In the Response, the Claimant clarifies that her claims under Article 11.5 do not relate to the forged consent *per se* but the Korean authorities' failure to treat her properly/fairly when she raised the issue of the forged consent in February 2017. Given this clarification, ROK is prepared to concede the *ratione temporis* argument it made in the Application is no longer available.

2.4 However, this clarification (change) creates further problems for other parts of the Claimant's case. In particular, if the Claimant did not raise the issue of her consent allegedly being forged until February 2017, this means she was writing to the Redevelopment Union in 2014 and participating in the Central Land Expropriation Committee in 2016 and subsequent District Court proceedings in 2016/17 all without making any reference to this alleged forgery. This raises serious questions about the Claimant's overall conduct and ROK reserves its right to explore these issues further, if necessary.

2.5 Moreover, as a result of this clarification, ROK now raises another new preliminary objection. Even if the forgery of the documents was true (which is denied), there is simply no evidence that the Claimant raised these issues with the Korean authorities beyond the Claimant's bald assertion that she did so. This is not sufficient for the Claimant to establish her claim and in the circumstances it is manifestly without legal merit and should be dismissed pursuant to Article 11.20(6) KORUS.

## 3. PRELIMINARY COMMENTS/OBSERVATIONS

3.1 In the Response, the Claimant introduced new facts and evidence in response to the issues raised in the Application. However, when analysed properly, many of these new facts actually undermine the Claimant's position further. For example:

3.1.1 In an attempt to respond to ROK's argument that the Claimant did not "*expand, acquire or establish*" the Property after KORUS came into force, the Claimant introduced new evidence that she "*added a new rental unit*" and spent just over USD *,*** on home improvements. However:

(A) The new rental unit was added in February 2016, ***after*** the date of the alleged expropriation. This therefore provides further evidence the Property was not a "*covered investment*" at the time of the expropriation as required by KORUS and is a further reason the Arbitral Tribunal should find it has no jurisdiction over many of the claims.

(B) Furthermore, as a matter of Korean law, after the public announcement of a redevelopment project's approval (which in this case was 19 January 2012), it is illegal to modify the structure of properties in the redevelopment area as such modifications may be used to inflate the compensation amount.[1] It would appear therefore the addition of the rental unit, if it "*expanded*" the Property, was illegal, and it is well settled that illegal investments should not be afforded investment treaty protection.[2]

(C) The evidence submitted by the Claimant in respect of the home improvements demonstrates her husband, Mr ****, paid for much of them. But Mr **** is not a party to this arbitration (he is a Korean national and has no standing under KORUS) and if there was no expenditure from the Claimant, it follows the Claimant cannot be said to have "*expanded*" the investment as required by KORUS.

3.1.2 In an attempt to respond to ROK's arguments that the Claimant had no expectation of gain or profit from the Property (one of the requirements for the Property to be an "*investment*"), the Claimant introduced new evidence that parts of the Property were rented out at certain points in time. However, that evidence also shows the rental income was received by the Claimant's parents, not by the Claimant, so there is still no evidence the Claimant received any profit from the Property (or had any expectation of profit).

3.2 It is also clear from the documentary record that the Claimant is prepared to do almost anything to avoid her Property being part of the Redevelopment Union. For example:

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1 Act on Acquisition of and Compensation for Land, Etc. for Public Works Projects (**Exhibit RL-2**) (the "**Land Acquisition Act**") (which came into force on 18 March 2014, see Article 25).

2 See, for example, *Yukos Universal Limited (Isle of Man) v. Russian Federation* (PCA Case No. AA 227), Final Award, para 1349; "*Even where the applicable investment treaty does not contain an express requirement of compliance with host State laws (as is the case with the ECT), an investment that is made in breach of the laws of the host State may either: (a) not qualify as an investment thus depriving the tribunals of jurisdiction; or (b) be refused the benefit of the substantive protections of the investment treaty*".

3.2.1 in August 2014, she wrote a letter stating "*we will not, under any circumstance, vacate our house. We promise you that we will risk our lives to protect our property*"; and

3.2.2 in June 2016, she wrote to the Central Land Expropriation Committee and said "*if illegal acts such as summoning the property owner before the court by filing an eviction suit continue, I hereby inform you that I may raise the issue regarding violations of the KORUS FTA as an official agenda of a presidential candidate at the US Presidential Election*".

3.3 The Claimant may well be disappointed her Property was part of the Redevelopment Union, but unfortunately for her that is no basis to bring a claim such as this arbitration. In this regard, it is important also to emphasise:

3.3.1 As explained in the Application,[3] the Korean Act on the Maintenance and Improvement of Urban Areas and Dwelling Conditions for Residents, No. 8970 (which was in force at the time) (the "**Urban Improvement Act**") permits areas of land to be designated as redevelopment zones and, upon such designation, the residents in that zone have the option of forming a redevelopment union if at least 75% of the residents so agree.

3.3.2 All residents in the zone (whether they voted to form the redevelopment union or not) then have the right to purchase a new property in the subsequently redeveloped zone with the value of their old property being credited against their purchase price of the new property to be established in the zone. If they do not wish to purchase a new property, they are given money that reflects the value of their old property.

3.3.3 The Korean legislation permits this process to move ahead with approval of 75% of the residents so as to prevent a minority of residents holding the majority to ransom. On the facts of this case, the Redevelopment Union was formed in May 2008 after a total number of 515 of 672 residents (76.64%) agreed to form the Union.

3.3.4 There is no suggestion (even from the Claimant) that the Redevelopment Union did not follow the correct Korean law procedures to redevelop the area and subsequently evict the Claimant from her Property. The Claimant was also treated at all times in the same manner as any other residents who refused to leave their properties, whether Korean or foreign. This is consistent also with the Preamble of KORUS which provides "*foreign investors are not hereby accorded greater substantive rights with respect to investment protections than domestic investors under domestic law*".

3.3.5 The Claimant has been offered (and always has been offered) compensation for her Property. That compensation was calculated in accordance with the Korean Notice of Values and Appraisal of Real Estate Act (the "**Public Notice Act**") which, amongst other things, requires reports from seven independent valuation companies.[4]

3.3.6 An explanation of how the Public Notice Act works and how it is compatible with the provisions in KORUS was discussed between the US and ROK during

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3 Paragraph 3.10 of the Application.

4 **Exhibit RL-8**; The Public Notice Act.

KORUS negotiations; for the Tribunal's convenience, the explanation document which ROK provided to the US is attached as **Exhibit R-29** to this Reply.

3.3.7 The compensation offered to the Claimant was then approved (and adjusted upwards) by the Seoul Land Expropriation Committee and the Central Land Expropriation Appeals Committee (in accordance with the procedures in the Public Notice Act). That money remains available to the Claimant and is sitting currently in an escrow account accruing interest.

3.4 This arbitration appears to be the Claimant's last resort to fulfil her threat from 2014 to not "*under any circumstances, vacate* [her] *house*". However, her claims are fundamentally flawed because, as explained in the Application and further below, there are a number of reasons why the Arbitral Tribunal does not have jurisdiction.

## 4. THE BURDEN OF PROOF

4.1 The Claimant's position on the burden of proof required for her claims and whether or not she has submitted a Statement of Claim as required by KORUS keeps changing.

4.2 Before addressing the substance of the Claimant's position on the burden of proof, it is necessary to summarise the procedural background to this issue:

4.2.1 Article 11.16(4)(c) of KORUS requires a claimant to file both a Notice of Arbitration and Statement of Claim as required under the UNCITRAL Rules. ROK accepts this can be provided in one composite document, but as the Tribunal will be well aware, the requirements for each document in the UNCITRAL Rules are different (with more detail and evidence being required in a Statement of Claim). The relevant part of KORUS is as follows:

> "*A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of, or request for, arbitration (notice of arbitration):*
>
> *(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18*[5] *of the UNCITRAL Arbitration Rules, are received by the respondent*".

4.2.2 The Claimant commenced this arbitration by filing a document called "*Notice of Arbitration*" dated **12 July 2018**.

4.2.3 Counsel for ROK wrote to the counsel for the Claimant on 24 August 2018 and asked them to confirm whether the Claimant was electing to treat the Notice of Arbitration also as her Statement of Claim.[6]

4.2.4 The Claimant responded on **29 August 2018** by amending her Notice of Arbitration; in particular, while the document was still called a "*Notice of Arbitration*" the Claimant changed the title of a section that was previously called "*Statement of Facts*" to "*Statement of Claim*". A further amended version was then filed on **13 September 2018**, although none of those amendments are relevant for present purposes.

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5 The reference to Article 18 is to the 1976 UNCITRAL Rules; the parties have agreed that the 2010 UNCITRAL Rules will apply to this arbitration and the provisions relating to Statements of Claim are set out in Article 20 of the UNCITRAL Rules.

6 **Exhibit R-30.**

4.2.5 Based on the above, and in particular the Claimant's apparent confirmation that the Notice of Arbitration stood as her Statement of Claim, ROK prepared the initial version of the Application based on the "*facts*" as presented by the Claimant. This was filed on **26 February 2019**.

4.2.6 Upon receiving the Application, the Claimant presumably realised the factual case she had advanced was not sufficient and then proceeded to file a third amendment to the Notice of Arbitration on **1 April 2019**. This third amendment introduced a number of new facts asserting the Property was rented for periods and improvements had been made and these assertions were made without evidence.

4.2.7 As a result of the Claimant's third amendment to her Notice of Arbitration, ROK was afforded the opportunity to amend its Application, which it duly did on **12 April 2019**. This amended version of the Application introduced a new section entitled "*Burden of Proof*" which noted that the new facts introduced by the Claimant had been made without evidence and, therefore, the Claimant had not met her burden of proof for a Statement of Claim as required under the UNCITRAL Rules.[7]

4.3 In the Response, the Claimant's submission in reply to ROK's burden of proof argument is as follows:

> "*As the Tribunal will quickly notice, this section is based on a blatant misunderstanding of when Article 20.2 of the UNCITRAL Rules applies. That Article requires the Statement of Claim to be submitted with factual evidence. While that is what Article 20.2 says, it is inapplicable here because Respondent chose to file its Application before the UNCITRAL Rules require the claimant to file a statement of claim.* ***Here we are dealing with an Application addressed to the Notice of Arbitration which is governed by UNCITRAL Article 3.3 and which Claimant's Notice fully complies with, including the Amendment which was approved by the Tribunal****. In these circumstances, the burden of proof is in KORUS Article 11.20.6 (c), which requires "the Tribunal to assume to be true "claimant's factual allegations in the notice of arbitration (or any amendment thereof)*" (emphasis added).

4.4 The Claimant's argument is inherently inconsistent with her earlier actions in this arbitration. She must decide whether her position is that she has submitted a Notice of Arbitration and Statement of Claim (as required under KORUS Article 11.16(4)(c)) or just a Notice of Arbitration (as she is now arguing). She cannot have it both ways.

4.5 If the Claimant is arguing she has submitted a Statement of Claim (the Claimant's previous position), ROK maintains its position in the amended Application that the Claimant has not provided sufficient evidence to support the allegations made as required under the UNCITRAL Rules. Moreover, as noted in the amended Application, the Claimant bears the burden to establish jurisdiction and past tribunals have confirmed that the Claimant must prove the necessary and relevant facts to establish jurisdiction.[8]

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7 Paragraph 4.38 of the Application.

8 Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Decision on the Respondent's Jurisdictional Objections, 1 June 2012. At paragraph 2.9, the Tribunal states that *"… all relevant facts supporting such jurisdiction must be established by the Claimant at this jurisdictional stage and not merely assumed in the Claimant's favour"*. At paragraph 2.15, the Tribunal states that *"…the Claimant has the burden to prove facts necessary to establish jurisdiction"*.

4.6 Alternatively, if the Claimant now stands behind her new position that she has only submitted a Notice of Arbitration and not a Statement of Claim, this may cure her issues related to the burden of proof, but there are other consequences. In particular, if the Claimant has not submitted a Statement of Claim, then she has not commenced arbitration properly as required under Article 11.16(4)(c) of KORUS.

4.7 Moreover, if the Claimant was to later cure this procedural defect by eventually filing a Statement of Claim, ROK will have additional arguments under its Preliminary Objection No. 3 (*time limitation*). In particular, even on the Claimant's case, the alleged expropriation and her knowledge of the "*damage*" she suffered occurred in January 2016.[9] However, more than three years have now passed since that date and, therefore, on any analysis the Claimant's claims complaining about expropriation are now time barred (see Section 7 below for a detailed reply to the other parts of the *time limitation* objection).

4.8 To support the position that the Claimant has met her burden of proof, the Claimant also refers to Article 11.20(6)(c) of KORUS which requires the Claimant's factual allegation to be assumed true in determination of any preliminary objections application. There are two points related to the burden of proof in response:

4.8.1 **first**, Article 11.20(6)(c) notes that in claims brought under the UNCITRAL Rules, the "*facts*" that are assumed to be true are those set out in the Statement of Claim; as explained above and in the Application, the Claimant has not yet provided a Statement of Claim compliant with the UNCITRAL Rules; and

4.8.2 **second,** ROK's application is made under both Article 11.20(6) and (7). There is no such requirement to accept the truth of the Claimant's allegations in Article 11.20(7) and therefore general rules relating to the burden of proof should apply. This is supported by the case of *Renco v. Peru*[10] where the Tribunal sought to distinguish between the standard of proof required for a "*merits objections*" (corresponding to Art 11.20(6) of KORUS) and the "*competence objections*" (corresponding to Art 11.20(7) of KORUS).

4.9 Accordingly, the Claimant has still not met her burden of proof in relation to the amendments made in the Notice of Arbitration. In particular, the Claimant has not provided the basic documents required to evidence 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. Moreover, the evidence the Claimant has submitted at Exhibit C-4 does not demonstrate who signed the rental contracts (or even if such contracts existed) or that payments were made for rental.

## 5. PRELIMINARY OBJECTION NO.1; THE PROPERTY IS NOT AN "INVESTMENT" PROTECTED BY KORUS

5.1 As set out in Section 4 of the Application, there are two limbs to this first preliminary objection, being that the Claimant's Property is neither: (1) an "*investment*" as defined in Article 11.28; nor (2) a "*covered investment*" as defined in Article 1.4. Each is addressed below.

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Apotex Inc v. United States of America, NAFTA/UNCITRAL, Award on Jurisdiction and Admissibility, at paragraph 146: *"…Apotex bears the burden of proving at the jurisdictional stage the factual elements necessary to establish the Tribunal's jurisdiction."*

9 See paragraph 3.5 of the Response.

10 *The Renco Group Inc v. Republic of Peru*, UNCT/13/1, Decision as to the scope of the Respondent's Preliminary Objections under Article 10.20.4, 18 December 2014, at paragraph 246 to 250.

## (A) The Property is not an "*investment*"

5.2 KORUS defines "*investment*" in Article 11.28 as:

> "[E]*very asset that an investor owns or controls, directly or indirectly,* ***that has the characteristics of an investment****, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*" (emphasis added).

5.3 The definition then sets out a list of forms that an investment may take, which includes "*immovable property*".[11]

5.4 The first debate between the parties relates to how the words "*characteristics of an investment*" should be interpreted. ROK's position is that as there is no further guidance in Article 11.28 as to what that phrase means, the Arbitral Tribunal should look to investment arbitration jurisprudence to give meaning to those words, notably the *Salini* criteria and subsequent case law and academic writings considering the definition of investment.[12]

5.5 The Claimant's position on this debate has changed. In the Notice, the Claimant appeared to be relying on the *Salini* criteria and made reference to the case without reservation as to its application.[13]

5.6 However, in the Response, the Claimant now argues that only the first three *Salini* criteria are relevant (namely "*duration, contribution and assumption of risk*") because these are analogous with the words "*commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk*" used in the KORUS definition.[14] The explanation provided by the Claimant for this position is as follows:

> "*Therefore, assuming that the negotiators of KORUS were familiar with Salini, it is reasonable to assume that the omitted Salini criteria were purposely not adopted in Article 11.28 of KORUS and should not be applied here*".[15]

5.7 The Claimant's new argument is flawed. The definition under KORUS does not say those three factors are the only characteristics of an investment and instead prefixes them with the language "*including such characteristics as …* ". This clearly suggests an investment could have other characteristics and the Arbitral Tribunal can (and should) look to other sources (namely the additional *Salini* criteria) to give the full meaning to the words "*characteristics of an investment*" as used in Article 11.28.

5.8 The Claimant then relies on the case of *RREEF Infrastructure v Spain*[16] under the Energy Charter Treaty ("ECT") where the Tribunal rejected an argument that additional characteristics not set out in the ECT should be included in the definition of "*investment*".[17]

5.9 However, the Claimant's reliance on *RREEF* is misplaced. The ECT contains a composite definition of what constitutes an "*investment*" and, therefore, it was inappropriate in that case for a party to seek to import additional criteria into the definition.

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11 Article 11.28(h) of KORUS.
12 Paragraph 4.8 of the Application.
13 Section VI, paragraph 3 of the Notice.
14 Article 11.28 of KORUS.
15 Paragraph 5.2 of the Response.
16 *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Tow Lux S.a.r.l v Kingdom of Spain*, ICSID Case No. ARB/13/30, Award 6 June 2016.
17 Paragraphs 5.3 to 5.4 of the Response.

5.10 Indeed, it should be noted also that the definition of investment in Article 1(6) ECT uses expressions like "*economic activity*" and "*energy sector*" as part of the definition that do not appear in other investment treaties.[18] In this context, the Tribunal's conclusion that the ICSID definition of investment cannot be imported is correct.

5.11 Finally, the Claimant argues ROK cannot refer to the writings of Professor Zachary Douglas in respect of the definition of investment,[19] in particular saying his views were "*rejected*" by the tribunal in *White Industries v India*[20] because they concern the ICSID Convention and therefore were not applicable in that case. There are two points in response:

5.11.1 **First,** *White Industries* was a dispute under the Australia-India BIT, which again contained a composite definition of "*investment*". As with the *RREEF* case, it was correct in that case to refer only to the definition as used in the BIT. However, as also with the *RREEF* case, that is not relevant in this arbitration where the definition is that an "*investment*" is an asset which has the "*characteristics of an investment*".

5.11.2 **Second**, as noted in the original Application, ICSID decisions concerning the definition of investment have been referred to by Arbitral Tribunals considering the question of what constitutes an investor or investment in cases outside the ICSID framework, particularly other UNCITRAL cases such as the decision of *Ulysseas Inc v. The Republic of Ecuador*.[21] Other non-ICSID cases also referring to ICSID jurisprudence on the definition of investment include *Nreka v. Czech Republic*[22] (UNCITRAL) and *Alps Finance v. Slovakia*[23] (*ad hoc*).

5.12 Accordingly, the Claimant's objections to the use of the *Salini* criteria do not withstand scrutiny. More importantly, and as explained in the Application, the Tribunal must seek to give effect to definition used in KORUS, which is that an "*investment*" is an asset "*with the characteristics of an investment*".

5.13 This is clear also from the writings from a number of academics. For example:

5.13.1 Kenneth Vandevelde's commentary, *US International Investment Agreements*, notes that the words "*every asset … with the characteristics of an investment*" were used because "*US negotiators thus wished to make clear that an asset would be covered by the definition only if it had the character of an investment*".[24] Vandevelde further notes that "*The purpose of BITs, however, was to protect investment, not all US owned property in the territory of the BIT party*".[25]

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18 **Exhibit RL-9**; the Energy Charter Treaty.
19 Paragraphs 5.5 and 5.6 of the Response.
20 *White Industries Australia Limited v the Republic of India*, UNCITRAL, Final Award 30 November 201.
21 Paragraph 4.8 of the Application; see for example *Ulysseas Inc v. The Republic of Ecuador*, UNCITRAL, Final Award, 12 June 2012 at paragraph 251.
22 *Pren Nreka v Czech Republic*, UNCITRAL, final award not published.
23 *Alps Finance and Trade AG v The Slovak Republic*, UNCITRAL, Final Award, 5 March 2011.
24 Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford University Press, 2009) at Section 4.1.1 on page 114.
25 Kenneth J. Vandevelde, *U.S. International Investment Agreements* (Oxford University Press, 2009) at Section 4.1.1 on page 114.

5.13.2 In a similar vein, McLachlan, Shore and Weiniger note the words "*characteristics of an investment*" are a "*limiting phrase*"[26] (i.e. they place a limit on what is considered an investment under the treaty).

5.14 It is essential therefore that the Arbitral Tribunal give effect to the words "*characteristics of investment*" as used in the definition and not just the limited examples of commitment of capital, expectation of profit and assumption of risk that the Claimant argues for.

5.15 And in circumstances where there is no further guidance in KORUS as to what the words "*characteristics of an investment*" mean, the natural place for the Arbitral Tribunal to look is other case law and commentaries considering the definition of investment, which includes *Salini*. Indeed, this is an approach several other investment treaty tribunals have adopted, for example:

5.15.1 *Biwater Gauff v. Tanzania*:[27] The award considers that a more flexible and pragmatic approach to the meaning of "*investment*" is appropriate, which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID.

5.15.2 *Inmaris v. Ukraine*:[28] The tribunal noted that the *Salini* test may be useful in the event that a tribunal were concerned that a BIT or contract definition of investment was so broad that it might appear to capture a transaction that would not normally be characterized as an investment under any reasonable definition.

5.16 Furthermore, while it is accepted that *Salini* has not been universally adopted by all investment tribunals looking at the definition of investment, most academics agree that the definition of investment does not mean every single asset that a person owns. For example:

5.16.1 As noted in the Application, ***Schreuer*** notes that most investments include: (1) duration; (2) regularity of profit and return; (3) assumption of risk, usually by both sides; (4) the commitment is substantial; and (5) **contribution to the host state's development**.[29]

5.16.2 ***McLachlan, Shore and Weiniger*** state that "*Most attempts at definition* [of investment] *require a certain duration, **a contribution to the economic development of the host State** and some assumption of risk*".[30]

5.16.3 **Douglas** notes that "*Rule 22: The legal materialisation of an investment is the acquisition of a bundle of rights in property that has the characteristics of one or more of the categories of an investment defined by the applicable investment treaty*" (i.e. it is not every type of asset) and "*Rule 23: The economic materialisation of an investment requires the **commitment of resources to the***

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26 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2017) at paragraph 6.47.

27 *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID, Final Award 24 July 2008.

28 *Inmaris Perestroika Sailing Maritime Services GmbH and Others v. Ukraine*, ICSID, Final Award 1 March 2012.

29 Christoph H. Schreuer and others, *The ICSID Convention: A Commentary* (2nd Edition, Cambridge University Press, 2009) at paragraph 153; see also paragraph 4.17 of the Application.

30 Campbell McLachlan, Laurence Shore and Matthew Weiniger, *International Investment Arbitration: Substantive Principles* (Oxford University Press, 2017) at paragraph 6.169.

***economy of the host state*** *by the claimant entailing the assumption of risk in expectation of a commercial return*".[31]

5.17 Accordingly, three of the major investment arbitration textbooks all note that the definition of investment includes, in particular, a contribution to the economic development of the host state, which was also one of the *Salini* criteria. Furthermore, ROK submits the Property at the heart of this Arbitration does not meet this criteria because the purchase of residential real estate in 2001 (i.e. 12 years before the treaty even came into force) does not meet this threshold.

5.18 In this regard, while ROK accepts there is some jurisprudence which suggests a contribution to the host state's development is not required, these cases have no application under KORUS. This is because the KORUS Preamble notes clearly that the US and ROK desires (amongst other things) to: "*promote economic growth … expanding trade and investment between their territories …*". The purchase of residential real-estate 12 years before KORUS came into force in no way contributes to Korea's "*economic growth*" and is not the sort of investment KORUS intended to protect.

5.19 Ultimately, however, the debate about whether the *Salini* criteria and other investment treaty criteria should apply is largely academic because, as explained below, the ROK's arguments that the Property is not an investment succeed in any event when just looking at the three criteria set out in KORUS and which the Claimant concedes do apply.

5.20 Turning now to the three additional criteria which the Claimant does say apply, namely (1) commitment of capital; (2) expectation of gain or profit; and (3) assumption of risk.

5.21 **Commitment of capital:** There is no evidence of any commitment of capital into Korea by the Claimant as required by KORUS. Rather, the evidence appears to suggest the money of a person who was a Korean national at the time (i.e. in 2001) was used to purchase Korean real estate. It is also not even clear if the money came from the Claimant herself or her husband.

5.22 The Claimant argues the "*source of the capital is not relevant*",[32] but this misses the point; KORUS requires a commitment of capital and it is unsound to state that a capital outlay to purchase the Property in 2001 is immediately transformed into a commitment of capital as required by KORUS with a mere change in nationality of the Claimant ** years later without any additional commitment.

5.23 Indeed, as far as ROK is aware, there is no previous investment arbitration award analogous to this case; i.e. where investment treaty protection was afforded to a person who was a national of the host at the time they made the investment using money generated in the host state to purchase an asset in the host state and ** years later that person obtained nationality of the other contracting state and then tried to seek investment treaty protection without making any additional contribution to the "*investment*".

5.24 A case with some parallels is *KT Asia v. Republic of Kazakhstan*[33]. In that case, the claimant (who was found to be an investor under the BIT) argued the legal status of an alleged investment had shifted from domestic to foreign, thus requiring protection by the investment treaty. However, the tribunal noted that one of the issues it needed to consider was whether the claimant can at all rely on a previous contribution from a host state

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31 Zachary Douglas, *The International Law of Investment Claims* (Cambridge University Press, 2009), page 161.

32 Paragraph 5.9 of the Response.

33 *KT Asia v. Kazakhstan*, ICSID Case No. ARB/09/8, Award 17 October 2013.

national (in this case a Mr Ablyazov) to satisfy the contribution requirement of a qualifying investment.[34] The tribunal found the investor could not rely on the previous contribution of a host state national and instead looked for a "*substantial subsequent contribution*";[35] and in the absence of any subsequent investment, the tribunal concluded it did not have jurisdiction.

5.25 Moreover, it should be noted also the tribunal in *KT Asia* ruled that the element of risk is intertwined with contribution. The tribunal further ruled that no risk is present if no contribution has been made.[36]

5.26 The requirement for a commitment of capital from outside the host state is also clear from the Preamble to KORUS which notes that the US and Korea are "*Desiring to raise living standards, promote economic growth and stability, create new employment opportunities, and improve the general welfare in their territories by liberalizing* ***and expanding trade and investment between their territories***" (emphasis added). KORUS aims to *expand* investment, not be used as a vehicle to re-classify 15 year old investments to give a person with newly acquired US citizenship additional rights over domestic home owners in the same area.

5.27 Finally, while ROK accepts that some arbitral tribunals have found that capital generated in the same country as the investment satisfies the necessary condition of a contribution of capital,[37] in all of those cases the investor was not a national of the host state (i.e. there was some form of cross border element because someone who was clearly a foreign "*investor*" as defined under the relevant treaty was using capital either generated in the host state or from another person/company to make an investment in the host state).

5.28 **Expectation of gain or profit:** The new evidence introduced by the Claimant is that she rented the Property for certain periods and allowed her parents to keep any profit from the rent.[38]

5.29 These are not the actions of an investor who expects a gain or a profit. As the tribunal noted in *Franz Sedelmayer v. The Russian Federation*[39] "*It must be presupposed, however, that investments are made within the frame of commercial activity and that investments are, in principle, aiming at creating further economic value*". Providing a home for your family or a rental income for your parents is not within the "*frame of commercial activity*".

5.30 Further, most academics note the expectation of profit needs to be one of "*regularity of profit and return*".[40] Given by the Claimant's own admission the Property was only partially rented part of the time from 2001, this requirement of ***regular*** profit has not been met.

5.31 In any event, and as noted in the Application, there is a question whether an expectation of gain or profit alone is sufficient for an asset to be classified an investment. For example:

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34 *KT Asia v. Kazakhstan*, *Ibid. at* paragraph 192.
35 *KT Asia v. Kazakhstan*, *Ibid. at* paragraph 198.
36 *KT Asia v. Kazakhstan*, *Ibid.* at paragraphs 219-221.
37 See, for example, *Joseph Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award 28 March 2011, *Mr Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award 8 April 2013, *Bernhard von Pezold and Others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award 28 July 2015 and *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award 1 June 2009.
38 Paragraph 8 of CW1.
39 *Franz Sedelmayer v. The Russian Federation*, SCC, Final Award 7 July 1998 at paragraph 2.2.4
40 Christoph H. Schreuer, *ICSID Convention: A* Commentary (Cambridge University Press, 2001) at paragraph 153.

5.31.1 In *Malaysian Historical Salvors Sdn, Bhd v The Government of Malaysia*, the tribunal stated that "*this criterion is not always critical*," nor "*determinative of the question of 'investment*".[41]

5.31.2 In *Electrabel S.A. v The Republic of Hungary*, the tribunal stated that the "*the expectation of profit and return which is sometimes viewed as a separate component of an investment must rather be considered as included in the element of risk*".[42]

5.32 **Assumption of risk:** As set out in the Application, the Claimant did not assume any commercial risk with her purchase of residential real estate in 2001.[43]

5.33 In the Response, the Claimant describes the risks as follows: "*the Respondent has conceded that there is a risk that the value of a real estate asset will decline. And an unrealized loss on a balance sheet has important consequences for the owner*".[44]

5.34 There are four points in response:

5.34.1 **First**, there is always an inherent risk that any asset will decline in value. The requirement for an "*assumption of risk*" must mean a risk additional to the value of the asset going down otherwise there would be no need to expressly state it as a requirement for investment in the first place.

5.34.2 **Second**, while there is little jurisprudence about exactly what the assumption of risk means, those cases that have commented on risk have referred to things like the inherent risk in long term supply contracts,[45] the host state's political and economic climate[46] and the need to rely on national courts;[47] none of those cases say that the risk of the asset value going down is the investment risk.

5.34.3 **Third**, most decisions and academics describing risk require risk to be "*assumed by **both** sides*".[48] There is no such assumption of risk by two sides in relation to the residential property or even in the "*balance sheet*" analogy the Claimant tries to rely on.

5.34.4 **Fourth**, but related to the first point noted above, many of the leading academics have been clear that not all risks are sufficient for there to be an investment risk as required under *Salini* and other awards considering the same issue. For example (and as noted in the Application):

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41 *Malaysian Historical Salvors Sdn, Bhd v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction 17 May 2009 at paragraph 108.

42 *Electrabel S.A. v The Republic of Hungary*, ICSID Case No. ARB/07/19, Award 25 November 2015 at paragraph 5.43.

43 Paragraph 4.18.3 of the Application.

44 Paragraph 5.11 of the Response.

45 *Consortium RFCC v Royaume du Maroc*, ICSID Case No. ARB/00/6, Award 22 December 2003 at paragraphs 63-64 (note that this Award is in French and the Respondent will not be providing translation with this Reply Submission).

46 *Ioannis Kardassopoulos and Ron Fuchs v The Republic of Georgia*, ICSID, Decision on Jurisdiction 6 July 2007 2017 at paragraph 117.

47 *Consorzio Groupement L.E.S.I.-DIPENTA v People's Democratic Republic of Algeria*, ICSID, Award 10 January 2005 at paragraph (2.2) 14(iii).

48 Christoph H. Schreuer, *ICSID Convention: A Commentary* (Cambridge University Press, 2001) at paragraph 153.

(A) Christoph Schreuer notes that "*all risks do not fall under the criteria of the Salini test*" and this has been *"always confirmed by tribunals*".[49]

(B) Professor Douglas notes that "*ordinary commercial contracts cannot be considered an investment*".[50]

5.35 The Claimant then identifies as another risk that "*there is also no assurance of predicted rental income*".[51] That is irrelevant in the discussion of risk when the Claimant must also establish an expectation of a profit. The risk associated with the investment must be more than simply not making a profit.

5.36 The Claimant also asserts that "*Finally, the risk of loss borne by the Claimant is what this arbitration is all about!*". That comment misses the point. The reference to "*risk*" in both the KORUS definition and the *Salini* criteria is that the investment itself must carry some *commercial* risk; not that the state or its actors may at some point exercise its legal right to compulsory purchase the property provided due process and proper compensation are offered.

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5.37 Accordingly, for the reasons set out above and at paragraphs 4.3 to 4.20 of the Application, the Claimant's purchase of the Property in 2001 does not have the "*characteristics of an investment*" as required by Article 11.28 KORUS.

**(B) The Property is not a "*covered investment*"**

5.38 Even if the Arbitral Tribunal concludes that the purchase of residential property satisfies the definition of "*investment*" in Article 11.28 KORUS, the Claimant's particular "*investment*" certainly does not fall within the definition of "*covered investment*".

5.39 As explained in the Application,[52] the definition of "*covered investment*" in Article 1.4 is "*an investment, as defined in Article 11.28 (Definitions), in its territory of an* ***investor of the other Party*** *that is* ***in existence as of the date of entry into force of this Agreement or established, acquired, or expanded thereafter***" (emphasis added).

5.40 KORUS defines "*investment*" in Article 11.28 as (in pertinent part) "*every asset that an* ***investor*** *owns or controls …*" (emphasis added). The Claimant was not an "*investor*" when KORUS came into force (she was still a Korean citizen at that time) and therefore she did not have an "*investment*" (as defined) that was "*in existence as of the date of entry into force*" of KORUS. This appears to be accepted by the Claimant.[53]

5.41 The debate between the parties is whether the Claimant "*established, acquired, or expanded*" her investment after KORUS came into force.

5.42 The Claimant's position on this debate has changed. In the Notice, the Claimant argued she "*established*" her investment when she changed the name on the title documents for

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49 Christoph H. Schreuer, *ICSID Convention: A Commentary* (Cambridge University Press, 2001) at paragraph 131.

50 Zachary Douglas, *The International Law of Investment* Claims (Cambridge University Press, 2009) at paragraphs 407C.

51 Paragraph 5.11 of the Response.

52 Paragraph 4.22 of the Application.

53 Paragraph 6.4 of the Response.

the Property to her new US name in February 2016.[54] However, in the Response, there is no mention of this argument and instead the Claimant raises two new arguments, being the "*investment*" was: (1) "*re-established*" when she withdrew from the parcelling out process with the Redevelopment Union in August 2014;[55] and (2) also "*expanded*" with some home improvements (the exact date this happened is not clear, but as explained below it appears most likely to have been ***after*** the alleged expropriation).[56]

5.43 ROK deals below with each of the new arguments raised by the Claimant, but, as a preliminary comment, notes that it is not clear whether the Claimant maintains her argument from the Notice that the investment was "*established*" with the changing of the name on the title documents in 2016; if those arguments are maintained, ROK repeats its arguments in response at paragraphs 4.21 to 4.37 of the Application.

(1) The alleged "*re-establishment*" of the investment

5.44 The background facts relevant to this argument are set out in detail at paragraphs 3.1 to 3.10 of the Application, but in brief the key points to note are that:

5.44.1 The Redevelopment Union was formed on 16 May 2008.

5.44.2 On 30 April 2014, the Claimant (as a member of the Redevelopment Union) applied to purchase a "*parcelled-out*" property that was going to be part of the redevelopment (as explained in the Application and at paragraph 3.3.2 above, under Korean Law, the members of the Redevelopment Union are given the right of first refusal to purchase new property in the redeveloped area with the value of their old property being credited to the value of the new unit(s)).

5.44.3 On 23 July 2014, the Redevelopment Union wrote to all members of the Redevelopment Union, including the Claimant, to inform them of the "*the estimated value of each site or structure to be parcelled-out to each person entitled to parcelling-out*".

5.44.4 On 25 August 2014, the Claimant and her husband wrote to the Redevelopment Union and withdrew their application to purchase a redeveloped parcelled-out property. This letter stated (in pertinent part) that:

> "*… At the beginning of this year, we filed an application form to purchase a parcelled-out apartment after seeing its assessed value announced by the Mapo-gu Office (such assessed value was 35% higher than the assessed value of the redevelopment association), but we withdraw such application and will not, under any circumstance, vacate our house…*"

5.45 In the Response, the Claimant argues that "*by withdrawing the property from the "parcelling out" in August 2014, the Claimant and her husband re-established their right in the property, which they had given up by agreeing to the parcelling out*".[57]

5.46 This argument makes very little sense. The test in KORUS is not about establishing or re-establishing a right in a property, it is about establishing an investment. As set out in the Application, the natural meaning of the word "*establish*" is to build or create something (the

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54 Section VI, paragraph 5 of the Notice.
55 Paragraphs 6.7 to 6.9 of the Response.
56 Paragraph 6.10 to 6.13 of the Response.
57 Paragraph 6.9 of the Response.

definition used in *Tokios v Ukraine*[58] from the New Shorter Oxford English Dictionary was "*set up on a permanent basis; bring into being, found*").[59] The simple act of withdrawing from the parcelling out process (or changing the name on a title document; the Claimant's previous argument) is just not what the word "*establish*" as used in KORUS means.

5.47 Moreover, while not strictly relevant to the question of what constitutes "*establishment*" as used in KORUS, it should be noted that as a matter of Korean law, the Claimant removing herself from the parcelling out process had no impact on her underlying status as the owner of the Property. At all times she was the owner of the Property. Specifically, under the Urban Improvement Act, the Claimant's ownership of the Property may only be transferred to the Redevelopment Union after the Claimant receives cash compensation from the Redevelopment Union either by amicable settlement or by the expropriation decision by the Land Expropriation Committee (the latter being the case in this arbitration).[60]

5.48 In the circumstances of this case, the only difference is that when she was part of the parcelling out process she was willing to purchase a property in the new development with the value of her old property being credited to this new property, but when she withdrew from the parcelling out she had exercised her legal right to exit the Redevelopment Union and receive cash compensation for the Property. The fact that joining and then withdrawing from the parcelling out process does not affect the owner's underlying rights in the Property is confirmed also in ROK's Expert Report.[61]

(2) The alleged "*expansion*" of the investment

5.49 As an alternative, the Claimant argues that "*Beginning in 2014, after the effective date of KORUS, various improvements were made to the property including the addition of a fifth rental unit in February 2016*".[62] The evidence for this is set out in the Claimant's "*Confirmation of Facts regarding Home Improvement*" at new Exhibit C-5 and also a witness statement from the Claimant herself (CW1). The Claimant then argues this means that the Property was "*expanded*" after KORUS came into force and thus the Claimant satisfies the defined of "*covered investment*".[63]

5.50 The alleged "*improvements*" are as follows:

5.50.1 **15 December 2014**: A "*parking lot fence*" was installed costing KRW*,***,*** (approx. USD*,***).[64]

5.50.2 **From early 2014 to 2015:** The Claimant "*put wallpaper and floor oil paper for the existing four units*" (USD*,***).[65]

5.50.3 **February 2016** the Claimant "*built one more rental until by renovating a hut into a room*".[66] This involved installing a door and door frame (USD***) and a new

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58 *Tokios Tokelés v. Ukraine*, ICSID Case No. ARB/02/18, Decision on Jurisdiction, 29 April 2004 at paragraph 28.
59 Paragraph 4.32 of the Application.
60 Paragraph 37 of Professor Ha's Expert Report and paragraph 28 of Professor Kim's Expert Report.
61 Paragraph 38 of Professor Ha's Expert Report and paragraph 26 of Professor Kim's Expert Report.
62 Paragraph 6.11 of the Response.
63 Paragraph 6.12 of the Response.
64 Page 4 of Exhibit C-5.
65 Paragraph 20 of CW1.
66 Paragraph 22 of CW1.

boiler (USD***).[67] The Claimant alleges this also involved "*electricity, a toilet and oil paper were purchased*" (at a combined cost of USD*,***), although no evidence has been provided for these costs.[68]

5.51 There are three issues with these new arguments from the Claimant:

5.51.1 **First**, the alleged improvements come nowhere close to "*expanding*" the investment as required by KORUS. They are all simple acts of home improvement and/or maintenance. The natural meaning of the concept of "*expanding*" an investment is to make that investment bigger;[69] adding a new fence, replacing wallpaper or partitioning off part of the Property to create a new rental unit does not fundamentally change or expand the Property or the investment.

5.51.2 **Second**, it is not clear these were the actions of the Claimant. The Claimant's statement asserts the boiler was "*established by* **** [i.e. her husband]"[70] and also "*for the expenses on home improvement … sometimes, my husband **** also contributed as well because he was the co-owner of the house*".[71] In order to satisfy the requirement of "*expanding*" the investment as required in Article 1.4 KORUS, the investor (i.e. the Claimant) must be responsible for the acts of expansion; she cannot simply assert the acts of a national of the host state satisfy her obligation to expand the property just because she is married to that national.

5.51.3 **Third**, as noted at paragraph 3.1.1 above, any modifications made to the Property after the public announcement of a redevelopment project's approval (which in this case was 19 January 2012) are illegal as a matter of Korean law. As also noted above, it is well settled that illegal investments should not be afforded investment treaty protection.

5.52 The new arguments about the addition of the fifth rental unit also create an additional problem for the Claimant. Assuming it is correct the addition of this rental unit means the Claimant was deemed to have "*expanded*" her investment such that it became a "*covered investment*" (which is denied), these actions took place in February 2016.

5.53 However, the Claimant's entire claim for breach of Article 11.6 of KORUS (*expropriation*) relates to events which happened before February 2016 (i.e. even on the Claimant's case the expropriation was completed by January 2016[72]). It follows that if the Claimant only had a "*covered investment*" from February 2016 then the entirety of her claims under the expropriation heading should be dismissed (i.e. the Claimant has no standing to bring a claim for acts which took place in January 2016 if she did not have a "*covered investment*" until February 2016).

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5.54 In conclusion, whether the Claimant relies on the old argument advanced in the Notice or the new arguments set out in the Response, none of them have merit when properly

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67 Paragraph 23 of CW1.
68 Paragraph 23 of CW1.
69 The definition in the New Oxford English Dictionary is *"Become or make larger or more extensive*", see **Exhibit R-31**.
70 Paragraph 23 of CW1.
71 Paragraph 25 of CW1.
72 Section III, Paragraph 6 of the Notice.

analysed. It is clear the Claimant did not "*establish, acquire or expand*" her investment after KORUS came into force and therefore the Property does not fall within the definition of "*covered investment*" in Article 1.4 of KORUS; the Claimant does not have standing to bring this arbitration and thus the Arbitral Tribunal does not have jurisdiction.

## 6. PRELIMINARY OBJECTION NO. 2; FORK-IN-THE-ROAD

6.1 In summary, the basis of ROK's objection under this heading is that: (1) the Claimant has alleged already before a Korean court or administrative tribunal the same breaches of KORUS now raised in this arbitration; and/or (2) in the alternative, even if the Arbitral Tribunal finds that the Claimant's actions did not constitute the "*allegation of breach*" provided in Annex 11-E of KORUS, her claims in those fora have the same fundamental basis as the claims she now brings in this arbitration and therefore she should not be permitted to run the same claims again.

6.2 The Claimant's Response deals only with point (1) of ROK's objection. It is not clear therefore whether the Claimant accepts ROK's alternative case under point (2), but to the extent the Claimant later raises any arguments in response to point (2), ROK reserves its right to respond to those arguments.

6.3 The issues the Claimant raises in respect of point (1) are as follows:

6.3.1 the Claimant did not actually make "*allegations*" before the courts or administrative tribunals of Korea and instead merely made "*observations*";

6.3.2 neither the Seoul Land Expropriation Committee nor the Central Land Expropriation Committees are "*administrative tribunals*" within the meaning of KORUS (which is supported by an expert report from Professor Seo at Chungnam National University Law School);

6.3.3 the Central Land Expropriation Committee had no jurisdiction to consider the validity of the Redevelopment Project and therefore any assertions before that Committee concerning KORUS are irrelevant; and

6.3.4 the Claimant withdrew her final appeal * days after it was filed which means it was not ever validly filed and therefore any statements made in such an appeal should be deemed to have never existed.

6.4 Each point is considered below in turn.

### (A) Whether the Claimant made allegations or observations

6.5 The Claimant states that "*we submit that the term "allegation" must be interpreted by this Tribunal to mean more than a mere reference to KORUS without specificity or advice of counsel*".[73]

6.6 ROK agrees with part of that sentence. It is accepted the term "*allegation*" must be more than a mere reference to KORUS without specificity. That is the natural meaning of the words used in Annex 11-E which requires the US investor to have "*alleged that breach of an obligation under Section A in any proceedings before a court or administrative tribunal of Korea*".

[73] Paragraph 7.4 of the Response.

6.7 However, whether any statements were made with or without advice of counsel is irrelevant. As set out in the Application, there is no such requirement in KORUS.[74] It is also questionable whether the Claimant in fact made these statements without legal advice because a report from the Mapo-gu office dated 1 February 2017 notes that she visited them "*accompanied by a US attorney*"[75] and also that the US attorney argued that the Redevelopment Project does not have a public purpose.

6.8 Next, the Claimant seeks to define "*allegation*" by saying that:

> "*The decisive language of Annex 11-E is "that breach of an obligation." This means without a doubt that that the only allegations that trigger Annex 11-E are those that specify "that breach," a breach that has in fact occurred*".

6.9 This statement is incorrect and would result in narrowing the scope of Annex 11-E. In particular, Annex 11-E does not require the allegation to specify a breach or to be based on a breach that has in fact occurred. Rather, the clear meaning of the language used in Annex 11-E is that the simple act of claiming "*that Korea has breached an obligation under Section A*" triggers Annex 11-E, regardless of what specific breach has been alleged.

6.10 It would appear also the Claimant has mistranslated Annex 11-E on the Korean version of her Response. In the Korean version, the Claimant continues to use the expression "실제위반(meaning actual breach)" in place of the words "that breach" as used in the English version. This expression has no textual basis as the Korean version of Annex 11-E simply states "의무 위반(breach of obligation)."

6.11 The Claimant also notes that all the statements made before the Korean courts or administrative tribunals (whether mere references or allegations) questioned the "*public interest*" of the measures rather than the "*public purpose*" which is the language used in KORUS.[76] This is irrelevant and there is no difference between these two phrases.

6.12 Finally, it must be understood that the rationale for an asymmetrical fork in the road provision such as Annex 11-E (i.e. one which applies only to allegations made before the courts or administrative tribunals of Korea) is due to the different status that international treaties have in the Korean civil law legal system compared to the US common law system. In particular, under Korean law, international treaties such as KORUS are automatically part of the domestic law and are directly enforceable in the local courts.[77]

6.13 Against that background, ROK submits it is clear that the statements the Claimant made before the Central Land Expropriation Committee and the Seoul Western District Court amount to allegations (as the word is properly understood) rather than mere observations. These statements are set out in detail in the Application, but in summary the Claimant said the following things:

6.13.1 Before the Central Land Expropriation Committee:

(A) **On 8 May 2016**, the Claimant alleged the expropriation of the Property breached Article 11.6 of KORUS on the basis it did not serve the public

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74 Paragraph 5.21.5 of the Application.
75 **Exhibit R-32.**
76 Paragraph 7.1 of the Response.
77 **Exhibit RL-25**; Article 6(1) of the Constitution of Korea, see **Exhibit RL-24** and **Exhibit RL-26**; Young Heo, Principles of the Constitution of the Republic of Korea (10th Edition, Pakyoungsa Publishing Company) at page 184.

interest.[78] She then went on to say "*Accordingly, I notify that Land Expropriation Committee has no right to expropriate* [the Property] *until the arbitration lawsuit is over and also inform that all of these actions are being taken within the boundary of the KORUS-FTA laws*".

(B) **On 13 June 2016**, the Claimant then said "*According to Article 11.6(1) KORUS FTA, direct expropriation is limited to projects serving the public interest … Redevelopment, however, is not for public interest under international law … According to KORUS FTA, all such actions* [i.e. the actions of the Redevelopment Union] *have not been performed legally, but rather illegally … I,* *** ***-*** [i.e. the Claimant] *request the Central Land Expropriation Committee to cancel the land expropriation*".

(C) Ultimately, it will be for the Arbitral Tribunal to review the submissions made by the Claimant and determine if they are mere "*observations*" or "*allegations*", but ROK submits when Claimant specifically states that "*according to KORUS*" certain acts have been performed "*illegally*" and as a result she requests "[cancellation] *of the land expropriation*" this is much more than a mere observation; the Claimant has specifically alleged a violation of KORUS and is seeking relief as a result of this alleged violation.

6.13.2 Before the Seoul Western District Court:

(A) *** ******* 2016**: The Claimant made a submission which said that Korean law contained provisions "*that are in conflict with the application of current market price, the serving of public interest, and the government's direct expropriation specified under* [KORUS]", and that KORUS should prevail.[79] That submission then went on to say "*As I have argued on numerous occasions already, redevelopment does not qualify as the public works project under international law. I would like to attach the Korean and English version of Article 11 (Investment) of the KORUS FTA*".

(B) **** *** 2016:** The document the Claimant submitted on this day referred only to KORUS and Article 6 of the Korean Constitution and then concluded by stating "*I officially request the honourable Justice* [i.e. a Korean court judge] *to immediately provide protections over four citizens of the United States of America (myself and my ***** children)*".

(C) ROK submits that the Claimant requesting specific relief from KORUS from a Korean court judge is more than a mere observation; again, it is an allegation that KORUS has been breached and the Claimant is seeking specific relief as a result of this alleged violation of KORUS.

6.13.3 In her appeal before the Seoul Western District Court:

(A) **21 February 2017:** The Claimants submission stated: "*The details I would like to go over in the appeal are as follows … 2) I would like to take the case to the High Court on whether redevelopment will be considered*

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78 Claimant and Mr ****'s Statement of Appeal against the decision of the Seoul Expropriation Committee (**Exhibit R-20**) dated 8 May 2016 and Claimant's Statement of Appeal against the decision of the Seoul Expropriation Committee (**Exhibit R-21**) dated 13 June 2016.

79 Claimant's Preparatory Documents dated * ******** 2016 filed in the Eviction Proceedings (**Exhibit R-25**).

*as a project serving public interest at the ISDS. That is, whether civilian investment can be regarded as public works project under international law … 3) The third part I would like to cover is whether compensation has been justly made. I was clearly discriminated and this is in violation of Article 11.6 Paragraph 2 of the KORUS FTA*".

(B) In this submission, the Claimant expressly states the actions against her were "*in violation of* [KORUS]". ROK submits this is clearly the Claimant making an allegation KORUS has been breached and not a mere observation.

6.14 As noted above, it is for the Arbitral Tribunal to determine whether the statements made by the Claimant amount to "*observations*" (the Claimant's position) or "*allegations*" (ROK's position), but ROK submits that on a clear reading of the submissions as filed they amount to allegations of breach of KORUS.

**(B) The status of the Central Land Expropriation Committee as an administrative tribunal**

6.15 The Claimant's next argument is that the Central Land Expropriation Committee is not an "*administrative tribunal*" of Korea as required by Annex 11-E of KORUS.

6.16 The status of the Committee is largely academic in the context of this arbitration because, as noted at paragraph 6.12 above, the Claimant also made numerous allegations before the Seoul Western District Court and there is no dispute that forum is not a "*court of Korea*" as also required by Annex 11-E. Nonetheless, for completeness, ROK deals below with the Claimant's arguments under this heading.

6.17 The term "*administrative tribunal*" is not defined in Annex 11-E or otherwise in KORUS. Nonetheless, as noted in the Application:[80]

6.17.1 the Supreme Court of Korea has found that the Central Land Expropriation Committee has the characteristics of an administrative tribunal;[81] and

6.17.2 the Constitutional Court of Korea found the procedures before the Central Land Expropriation Committee possess the characteristics of an administrative appeal and that it was therefore subject to the Administrative Appeal Act.[82]

6.18 The Claimant's Response objects to ROK's reliance on both Korean court decisions saying that the quote from the Supreme Court is "*WRONG*"[83] and the one from the Constitutional Court "*MISLEADING*"[84] (capitals letters used in the original).

6.19 In relation to the Supreme Court decision, the Claimant argues that "*nowhere in the Decision, the Supreme Court renders such an opinion. The closest language would be "however, as the procedure of appeal against adjudication on expropriation of the Land Expropriation Committee is virtually an administrative proceeding in nature*".[85]

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80 Paragraph 5.19 of the Application.
81 Supreme Court's judgment, Case Number: 92Nu565, dated 9 June 1992 (Case on Appeal of the Decision on Land Expropriation) (**Exhibit RL-3**).
82 Constitutional Court's judgment, Case No. 2000Hun-ba77, dated 28 June 2001 (**Exhibit RL-4**) (Case on Paragraph 1 of Article 75-2 of the Land Expropriation Act).
83 Paragraph 7.9.2.3 of the Response.
84 Paragraph 7.9.2.5 of the Response.
85 Paragraph 7.9.2.3 of the Response.

6.20 The Claimant then goes to say:

> "*Assuming Respondent extended the meaning of "administrative tribunal" from "administrative proceeding" it is widely accepted that "although, in a broad sense, the administrative proceeding is part of legal adjudication and, yet it is still administrative procedure, not judicial procedure. Also, the decision in the administrative proceeding is one of the administrative action by itself and has the characteristics of the administrative act*".[86]

6.21 In relation to the Constitutional Court quote, the Claimant says:

> "*Respondent's indirect quote of the Constitutional Court's Decision is MISLEADING, when it states, "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". The correct quote should be "the procedure of the appeal substantially has a characteristic of an administrative proceeding in nature" which has a different connotation. As above explained, an administrative proceeding is different from a legal (judicial) proceeding*"".[87]

6.22 With respect, ROK is not entirely clear what point the Claimant is trying to make here in its Response. In particular, the 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.

6.23 For the avoidance of doubt, ROK is not suggesting the decisions of the Central Land Expropriation Committee cannot be appealed to the Korean courts. On the contrary, as is clear from the Administrative Appeals Act, the decisions can indeed be appealed to the courts; this is further evidence the Central Land Committee exercises a legal (judicial) function as required for an administrative tribunal under the explanation in *Azurix v Argentina*.[88]

6.24 In any event, in the context of Annex 11-E of KORUS, ROK reaffirms that the key issue is whether the Central Land Expropriation Committee is an "*administrative tribunal*" of Korea. This clearly means something different than the courts of Korea because Annex 11-E refers to the courts separately.

6.25 In such circumstances, 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 (emphasis added) in Korea.

6.26 The Claimant also relies on an expert report from Professor Seo at Chungnam National University Law School.[89] However, when properly analysed, this report does not assist the Claimant.

6.26.1 In his "*conclusion*", Professor Seo proposes three criteria for what he says constitutes an administrative tribunal and states that "*domestic and international*

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86 Paragraph 7.9.2.4 of the Response; quoting also from Exhibit CL4.
87 Paragraph 7.9.2.5 of the Response.
88 See paragraph 5.20 of the Application and also paragraphs 6.24 to 6.29 of this Reply below.
89 Paragraph 7.9.1.5 of the Response.

*laws recognize*" these criteria.[90] However, he fails to point out what actual laws support his criteria and ROK submits in fact there is no consensus along the lines he suggests. Moreover, in order to understand the words as used in KORUS, reference must be made to Korean law to understand what constitutes an "*administrative tribunal of Korea*".

6.26.2 Professor Seo relies on four reasons to support his conclusion, being: (1) the composition and authority of the Committee; (2) an analysis of the procedure related to the Claimant's particular case; (3) a comparison to New York State administrative tribunals; and (4) a comparison to UK administrative tribunals.

6.26.3 The comparisons to New York and the UK (points (3) and (4)) are irrelevant to the question of what constitutes an "*administrative tribunal of Korea*". Professor Seo also fails to explain why, even on his analysis, these examples disqualify the Central Land Expropriation Committee as an "*administrative tribunal of Korea*" as defined in KORUS.

6.26.4 In any event, Professor Seo's observations about both the US and UK, in particular his comment that in both countries "*administrative cases are adjudicated by salaried judges*", are also wrong. In the US, administrative tribunals often consist of lay members.[91] The same is true in the UK (see **Appendix 1** setting out details of the Courts and Administrative Tribunals in the UK).

6.26.5 In relation to point (1) (*composition and authority of the Committee*), Professor Seo simply lists out some of the statutes that he says are applicable under this heading. There is no analysis as to why these particular statutes, or the composition or authority of the Committee generally, mean it is not an administrative tribunal. He also fails to offer any opinion on the consequences of the Committee being subject to the Administrative Appeals Act.

6.26.6 In relation to point (2) (*the procedure related to the Claimant's case*) this is again irrelevant to the question of the status of the Committee. This section also notes that of the eight people who decided the Claimant's case, two were lawyers (one of who was also a Judge and was the Chairperson for the proceedings) and the six others were "*professors with doctorate degrees, degrees, degrees, public officials former (former or current) and certified public appraisers*";[92] this mix of a judge and non-legal industry experts is similar to the analogous tribunals in the UK and US (***see Appendix 1***) which Professor Seo concedes are actually "*administrative tribunals*".

6.27 Overall, the Claimant's arguments (and those of its expert) that the Central Land Expropriation Committee is not an administrative tribunal are simply wrong and unsupported. Nonetheless and for completeness, ROK also submits an expert report from Professor Myeong-Ho Ha and Professor Kwang-Soo Kim which confirms that the Central Land Expropriation Committee is indeed considered an administrative tribunal in Korea.

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90 Paragraph 1 of Professor Seo's report at Exhibit CL-3.

91 Kristen Kndusen Latta, 'The Role of Non-Lawyers on Administrative Tribunals: What Lay Members Think About Law, Lawyers, and Their Own Participation in Alaska's Mixed Administrative Tribunals' [2014] 31 ALR 1 <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1372&context=alr >

92 Page 6 of the English Translation of the Expert Report at Reason 2.

6.28 Finally, while there is little investment treaty jurisprudence on the meaning of "*administrative tribunal*", the case which does exist assists ROK. In particular, *Azurix v Argentina* (which ROK cited in the Application) noted that an administrative tribunal would need to be independent and have a "*judicial function to settle conflicts*"; the Committee has both of these features.

6.29 Moreover, as noted at paragraph 3.3.6 above, when KORUS was being negotiated, ROK provided details to the US about "*Computation of Compensation Amount when Expropriating Land in Korea*". This document notes (amongst other things) that "*when consultations* [about the price for expropriated property] *have failed to yield any agreement, the project operator may file an application for adjudication to the Land Expropriation Committee*".[93] This document made it clear to the US that the Land Expropriation Committee had the "*judicial function to settle conflicts*" (as required in the *Azurix* decision) and thus the Committee should be considered an administrative tribunal of Korea.

**(C) The status of the Central Land Expropriation Committee as a forum to consider the validity of the Redevelopment Project**

6.30 The Claimant's next objection is that the Central Land Expropriation Committee had no jurisdiction to consider the validity of the Redevelopment Project and therefore any assertions the Claimant made before that Committee concerning KORUS are irrelevant.[94]

6.31 This is simply a bad point. The test in KORUS is not whether the breach of KORUS is alleged in the correct forum, it is whether it was alleged at all before a court or administrative tribunal. The Claimant did allege a breach and now must face the consequences.

6.32 In any event, much like the Claimant's second objection (considered at paragraphs 6.15 to 6.30 above) again the question of whether allegations could be made before the Central Land Expropriation Committee are largely academic because the Claimant also made the same allegations before the Seoul Western District Court.

**(D) The consequences of the Claimant withdrawing her appeal**

6.33 This final objection raised by the Claimant applies only to status of the Claimant's statements made in her appeal before the Seoul Western District Court (see paragraph 6.13.3 above).

6.34 The appeal was filed on 21 February 2017 and was then withdrawn on ** ******** 2017. The Claimant alleges the notice of appeal was not served on the Redevelopment Union before the appeal was withdrawn, no docket or case number was assigned and no public notice was posted regarding this appeal. The Claimant then says "*nothing was done before the appeal was withdrawn according to the Case Summary of the Eviction Case*".[95]

6.35 The Claimant then alleges that:

> "*According to the Korean Civil Procedure Act, Article 267 (Effect of Withdrawal of Lawsuit): "(1) No lawsuit shall be deemed to have been pending from the beginning before the court so far as the withdrawal is concerned." In this case,* ***

93 **Exhibit R-29.**
94 Paragraph 7.9.2.8 of the Response.
95 Paragraph 7.11.3 of the Response, Case Summary attached to the Response as C6.

*withdrew her Appeal in its entirety and, therefore, the appeal should be considered non-existing from the beginning*".[96]

6.36 The Claimant's factual allegations are simply wrong:

6.36.1 **First,** the Claimant quotes the wrong statutory provision. Article 267 (which the Claimant relies on) applies to the withdrawal of a lawsuit, whereas Article 393(2) of the same act deals with the withdrawal of appeals. Article 393(2) provides that the provisions of 266(3) to (5) and 267(1) shall apply *mutatis mutandis* to the withdrawal of an appeal.[97]

6.36.2 **Second,** the Claimant's translation of Article 267 is not accurate. The Claimant quote is that "*No lawsuit shall be deemed to have been pending from the beginning before the court so far as the **withdrawal** is concerned.*" However, the official translation of the Act provided by the Korean Ministry of Government Legislation states: "*No lawsuit shall be deemed to have been pending before the court so far as the **withdrawn part thereof** is concerned*".

6.36.3 **Third**, there is nothing in Article 267 which suggests once a lawsuit is withdrawn that it should be treated as having never existed. Moreover, this interpretation has been supported by the Korean Supreme Court. In particular, the Supreme Court stated that "*the relevant lawsuit shall end but any other related lawsuits (i.e. counterclaims, a lawsuit intervened by independent party) remain unaffected even after the withdrawal of the relevant lawsuit*".[98] Had the court supported the Claimant's argument with respect to the withdrawal of an appeal, the court would have ruled that any other related lawsuits would be extinguished, which was not the case here. The withdrawal therefore does not erase the fact the lawsuit or appeal was initiated in the first place.

6.36.4 **Fourth,** the Claimant appears to misunderstand the difference between the withdrawal of a lawsuit and the withdrawal of an appeal. The latter has the effect of the judgment in the original instance final and conclusive.[99]

6.36.5 **Fifth**, no separate docket or case number is required in order to file an appeal in the first instance and there is no requirement in law for public notice. The Claimant's attempts to suggest otherwise are misguided

6.37 Moreover, the document at Exhibit C-6 which the Claimant describes as "*Case Summary of the Eviction Case*" is actually a print out from the Court's website setting out the major milestones in the case at both first instance and appeal. It clearly records that the appeal was filed and then withdrawn so for the Claimant to allege it should be treated as never existing is a fallacy.

6.38 Finally, far from supporting the Claimant's position, the fact the appeal was withdrawn so quickly is telling. ROK submits this strongly suggests the Claimant (or her legal advisors) realised the impact the Claimant's various submissions before the Korean courts would have on the arbitration claim the Claimant was preparing and they sought to minimise the damage by withdrawing the appeal. Unfortunately for the Claimant, it was too late and she must now face the consequences.

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96 Paragraph 7.11.4 of the Response.
97 Article 393(2) of the Korean Civil Procedure Act (**Exhibit RL-6**).
98 Supreme Court's judgment, Case Number: 90Da4723 dated 25 January 1991 (**Exhibit RL-7**).
99 Excerpt from Si Yun Lee, New Civil Procedure Act (13th edition) at page 870 (**Exhibit RL-28**).

## 7. PRELIMINARY OBJECTION NO. 3; TIME LIMITATION

7.1 Article 11.18 of KORUS provides that no claim "*may be submitted to arbitration … if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the breach … and knowledge that the claimant … has incurred loss or damage*".

7.2 The key background facts related to this part of the application are as follows:

7.2.1 On **16 May 2008**, the Redevelopment Union was established.[100]

7.2.2 On **19 January 2012**, the redevelopment Project was authorised and the Redevelopment Union was also authorised to implement the redevelopment process.[101] By this date (if not before) the "*purpose*" of the Redevelopment Project was known to the Claimant.

7.2.3 On **30 April 2014**, the Claimant applied to the Redevelopment Union to purchase a redeveloped parcelled-out property.[102]

7.2.4 On **23 July 2014**, the Redevelopment Union notified members, including the Claimant, of the "*estimated value of each site or structure to be parcelled out* [and the price of] *previous land or structures*".[103]

7.2.5 On **25 August 2014**, the Claimant wrote to the Redevelopment Union. This letter stated (in part) that "*at the beginning of this year, we filed an application form to purchase a parcelled-out apartment after seeing its assessed value announced by the Mapo-gu Office (such assessed value was 35% higher than the assessed value of the* [Redevelopment Association]*), but we withdraw such application and will not, under any circumstance, vacate our house*."

7.2.6 On **12 March 2015,** the official notice for redevelopment authorising the "*Management and Disposal Plan*" was posted by the Mapo-gu Municipal Office. The Management and Disposal Plan was available for interested persons to view in hard copy, and included detail of the compensation for each property in the District covered by the Project.

7.3 ROK's position is that the Claimant had knowledge of the purpose of the Redevelopment Scheme and her likely amount of compensation in 2008 and 2014 respectively and therefore by commencing proceedings in July 2018 her claims are time barred as a result of Article 11.18.[104]

7.4 The Claimant appears to accept she had knowledge of the purpose of the Redevelopment Scheme around 2007/8 (although she denies it was for a "*public purpose*),[105] but then argues "*this is just one of the four elements of a lawful expropriation and as we have stressed, the expropriation occurred on January 29, 2016*".[106]

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100 See paragraph 3.10.4 of the Application.
101 See paragraph 3.10.7 of the Application.
102 See paragraph 3.10.8 of the Application.
103 Letter from Redevelopment Union to its members dated 23 July 2014 (**Exhibit R-7**).
104 Paragraph 6.29 of the Application.
105 Paragraph 8.4.2 of the Response.
106 Paragraph 8.4.2 of the Response.

7.5 The other three elements of a lawful expropriation the Claimant refers to are that the expropriation is conducted: (1) in a non-discriminatory manner; (2) on payment of prompt, adequate, and effective compensation; and; (3) in accordance with due process of law.[107]

7.6 There is no allegation the process was conducted in a non-discriminatory manner (point (1)) and therefore it is only points (2) and (3) that are relevant.

7.7 In relation to point (2) (*compensation*), the Claimant argues she "*did not have knowledge of the breach until January 29, 2016, when the Seoul Land Expropriation Committee issued its decision on the amount of compensation*".[108] The Claimant then goes on to argue that the language "*has incurred*" used in Article 11.18.1 of KORUS "*obviously means that something final has taken place*" and that "[the Claimant] *was only certain a loss "has incurred" on January 29, 2016*".

7.8 The Claimant's arguments are simply wrong as a matter of law and ignore completely the cases of *Ansung v China* and *Spence v Costa Rica* which ROK cited in its Application.[109] In particular, and as noted in the Application:

7.8.1 Identical wording to Article 11.18.1 is contained in the China-Korea BIT and was considered by the tribunal in *Ansung Housing Co. Ltd. v. People's Republic of China.*[110] While dismissing the claim for a "*manifest lack of legal merit*" due to limitation periods having expired, the tribunal noted that "[t]*he limitation period begins with an investor's first knowledge of the fact that it has incurred loss or damage, not with the date on which it gains knowledge of the quantum of that loss or damage*".[111]

7.8.2 A similar conclusion was reached in the Interim Award in *Spence International Investments LLC, Berkowitz, et. al. v. Republic of Costa Rica*[112] (which was cited with approval in *Ansung*[113]) where the tribunal noted that "*the limitation clause does not require full or precise knowledge of the loss or damage … such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result*".

7.9 Accordingly, in interpreting Article 11.18.1 of KORUS, the Arbitral Tribunal is not required to look at the date the Claimant finally had knowledge of the quantum of her loss, but the date on which she first appreciated (or should have appreciated) loss or damage will be incurred. This date was well before January 2017 and at the very latest was August 2014 when the Claimant wrote to say "*we will not, under any circumstances, vacate our house*".

7.10 In relation to point (3) (*due* process), the Claimant's position is very confused. The only allegation she makes that she did not receive due process concern her allegations that the alleged forgery of her consent to join the Redevelopment Union was not dealt with properly/fairly by the Korean authorities.[114] However, even on the Claimant's case, these

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107 Article 11.6(1(b)-(d)) of KORUS.
108 Paragraph 8.4.3.3 of the Response.
109 Paragraphs 6.8 to 6.13 of the Application.
110 *Ansung Housing Co. Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25, Award, 9 March 2017 ("***Ansung***").
111 *Ansung Ibid.* at paragraph 110.
112 *Spence International Investments LLC, Berkowitz, et. al. v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, at paragraph 213.
113 *Ansung*, at paragraph 111.
114 Section VII, Paragraph 6 of the Notice.

allegations were raised for the first time in February 2017 (i.e. after the expropriation had taken place).[115]

7.11 Moreover, there is no suggestion, even from the Claimant, that the correct procedures under the Urban Improvement Act to establish the Redevelopment Union and then to exercise the redevelopment project were not followed properly.

7.12 Indeed, even if it is assumed the Claimant's consent to join the Redevelopment Union was forged such that it is somehow invalid, that still does not assist the Claimant. As noted at paragraph 3.3.1 above and in the Application, consent from only 75% of residents is needed to establish the Redevelopment Union. In the context of this case, consent was received from 515 of 672 residents (i.e. 76.64%) of residents. Even if the Claimant had withheld her consent, the Redevelopment Union would have still been formed and the Redevelopment Project would still have gone ahead.

7.13 Overall, the evidence is clear that the Claimant knew the purpose of the Redevelopment Project and that the amount of compensation offered would not meet her expectations more than three years before she commenced this arbitration. In such circumstances, her claim is time barred.

7.14 Also, while not strictly relevant to the analysis of when the limitation period started, it is noteworthy that the Claimant was writing about potentially bringing an ISD arbitration as early as May 2016,[116] yet for some reason waited over two years to July 2018 to commence arbitration. If this delay has resulted in the Claimant losing her rights under KORUS (which it actually did not because she had no rights in the first place for the other reasons explained in the Application), then unfortunately she only has herself to blame.

## 8. PRELIMINARY OBJECTION NO. 4; PREVIOUSLY JURISDICTION RATIONE TEMPORIS BUT NOW THAT THE CLAIM UNDER ARTICLE 11.5 IS MANIFESTLY WITHOUT LEGAL MERIT

8.1 Article 11.1(2) of KORUS provides that:

> "*For greater certainty, this Chapter does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Agreement*".

8.2 In the Application, ROK argued that: the Claimant's claims under Article 11.5 (*minimum standard of treatment*) are that her legitimate expectations were violated because the ROK or its agents relied on the Claimant's forged consent to join the Redevelopment Union; the forged consent (if it happened at all) took place in February or March 2008 (i.e. before KORUS came into force);[117] and therefore to the extent the Claimant has any objection based on this alleged forged consent, she is prohibited from raising it in arbitration under KORUS because it relates to an act or fact that took place before KORUS came into force.

8.3 In the Response, the Claimant accepts the alleged forged consent occurred in 2008, but then argues her claims based on the forged consent were raised with the Korean authorities after the effective date of KORUS in February 2017, and that it is the inactions of the authorities that amount to violations of the fair and equitable treatment obligations of KORUS.[118]

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115 Paragraph 7.9.1.1 of the Response.
116 Paragraph 7.9.1.2 of the Response.
117 See paragraph 3.10.4 of the Application.
118 Paragraph 8.4.1.4 of the Response.

8.4 Given the Claimant has clarified that her claim in relation to alleged forged consent does not relate to the forged consent *per se*, but the alleged failure of the Korean authorities to deal with these issues fairly when they were raised for the first time in February 2017, ROK is prepared to concede the *ratione temporis* argument it made in the Application is no longer available.

8.5 However, yet again, this clarification (change) by the Claimant creates significant problems for other parts of the Claimant's case. If the Claimant's position now is that she did not raise the issue of her consent allegedly being forged with the Korean authorities until February 2017, this means she was writing to the Redevelopment Union in 2014 and participating in the Central Land Expropriation Committee in 2016 and subsequent District Court proceedings in 2016/17 all without making any reference to this alleged forgery.

8.6 Moreover, as a result of this clarification, ROK now raises another new preliminary objection. Even if the forgery of the documents was true (which is denied), there is simply no evidence that the Claimant raised these issues with the Korean authorities beyond the Claimant's bald assertion that she did so.

8.7 In regard to denial of justice, KORUS 11.5.2(a) states that *"fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.* KORUS 11.5(1) provides the criteria for denial of justice as ***the customary international law*** and KORUS 11.5(2) emphasizes that *The concepts of "fair and equitable treatment" and "full protection and security"* ***do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights.*** *(emphasis added)*

As KORUS manifestly defines, the criteria for denial of justice should be construed in light of customary international law. The threshold is high as the tribunals of numerous cases[119] acknowledged. In *Mondev v. United States*, the tribunal requires *the shock or surprise occasioned to an impartial tribunal tribunals leads, on reflection, to justified concerns as to the judicial propriety of the outcome, bearing in mind on the one hand that international tribunals are not courts of appeal.*[120] In *Oostergetel v. Slovak Republic*, the tribunal shared the same view that *A denial of justice implies the failure of a national system as a whole to satisfy minimum standards.*[121]

ROK submits that even if, as the Claimant claims, the relevant authority of the Korean government did not take care of the issue which the Claimant has raised (although ROK does not agree), it does not establish ROK's breach of customary international law, and therefore it is clear that the Claimant's claim related to Article 11.5 should be dismissed pursuant to Article 11.20(6) of KORUS since it is without any merits.

## 9. RELIEF SOUGHT

9.1 For the reasons set out above and in the Application, the Respondent hereby requests the Arbitral Tribunal to render an award in its favour as set out at paragraph 10.1 of the

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119 *OI European Group B.V. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25, Award 10 March 2015 at paragraph 524-25. *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL, Final Award 1 December 2014 at paragraph 621. *Waste Management Inc. v. United Mexican States*, ICSID ARB(AF)/00/3, Award 30 April 2004 at paragraph 98.

120 *Mondev International Ltd. v. United of States of America*, ICSID Case No. ARB(AF)/99/2, Award 11 October 2002 at paragraph 127.

121 *Jan Oostergetel & Theodora Laurentius v. Slovak Republic*, UNCITRAL, Final Award 23 April 2012 at paragraph 272.

Application.

9.2 The Respondent expressly reserves its right to supplement or add to the above requests.

**Herbert Smith Freehills**
**Yoon & Yang LLC**

## Appendix 1 – Summary of some of the court or administrative tribunals in the UK where non-judges or lay members decide cases

**Administrative Tribunals:**

Employment Tribunal – legally qualified employment judge and two lay members.[122]

Employment Appeal Tribunal – judges and lay members.[123]

Gender Recognition Panel – judges and medical members.[124]

Pathogens Access Appeals – senior judge and 2 experts.[125]

Proscribed Organisations Appeal Commission – senior judge and two other commission members.[126]

Special Immigration Appeals Commission – judge and lay member.[127]

**First-tier Tribunals:**

Care Standards Tribunal – judge and lay panel members.[128]

Criminal injuries compensation tribunal – judge, doctor and lay member.[129]

General regulatory chamber – judge and sometimes lay members.[130]

Mental Health tribunal – judge, tribunal doctor and mental health expert.[131]

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[122] *Practical Law: 'Employment tribunals (21): final hearings'*: https://uk.practicallaw.thomsonreuters.com/1-523-6846?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&navId=333CA8E8322098F2E7DAE8D2BCA46E66&comp=pluk#co_anchor_a163886.

[123] *Practical Law: 'EAT (01): constitution and operation:'* https://uk.practicallaw.thomsonreuters.com/3-376-4635?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&navId=8F7FD61FBB8059B601EE4BF036525EBB&comp=pluk.

[124] S1 Schedule 1 Gender Recognition Act 2004.

[125] *Government Website: 'Appeal to the Pathogens Access Appeals Commission'.* https://www.gov.uk/guidance/appeal-to-the-pathogens-access-appeals-commission.

[126] *Government Website: 'Appeal against a ban on your organisation.' https://www.gov.uk/guidance/appeal-against-a-ban-on-your-organisation.*

[127] *Government Website: 'Apply to the Special Immigration Appeals Commission'. https://www.gov.uk/guidance/appeal-to-the-special-immigration-appeals-commission.*

[128] *Government Website: 'Appeal to the Care Standards Tribunal'. https://www.gov.uk/guidance/appeal-to-the-care-standards-tribunal.*

[129] *Government Tribunal: 'Criminal Injuries compensation tribunal', https://www.gov.uk/criminal-injuries-compensation-tribunal/print*

[130] *Government Website: 'General Regulatory Chamber tribunal hearings and decisions'. https://www.gov.uk/guidance/general-regulatory-chamber-tribunal-hearings-and-decisions*

[131] *Government Website. 'Apply to the Mental Health Tribunal.;* https://www.gov.uk/mental-health-tribunal/print.

Primary Health Lists Tribunal – judge, specialist with professional experience and a non-professional with relevant health experience.[132]

Property Chamber – lawyer, surveyor and layperson.[133]

Social security and child support tribunal – judge and specialist members.[134]

Specialist Educational Needs and Disability Tribunal – judge and two specialist members.[135]

Tax Chamber Tribunal – judge and lay members.[136]

**Upper Tribunals**:

Lands Chamber – judges and specialist members (e.g. surveyors).[137]

Tax Chamber – at least one judge and potentially one *'other member as determined by the Chamber President'*.[138]

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[132] *Government Website. 'Appeal to the Primary Health Lists'. https://www.gov.uk/guidance/appeal-to-the-primary-health-lists-tribunal*

[133] Practice Statement. https://www.judiciary.uk/wp-content/uploads/JCO/Documents/Practice+Directions/Tribunals/property-chamber-composition-15112013.pdf.

[134] *Government Website. 'Appeal a benefit decision'*. https://www.gov.uk/appeal-benefit-decision/print.

[135] *IPSEA. ;The Special Educational Needs and Disability Tribunal: a refresher for existing volunteers. https://www.ipsea.org.uk/send-tribunal-a-refresher-for-existing-volunteers.*

[136] *Government Website. 'Appeal to the tax tribunal'*. https://www.gov.uk/tax-tribunal/print.

[137] *Upper Tribunal (Lands Chamber) Explanatory Leaflet* (definition of member). https://webarchive.nationalarchives.gov.uk/20110206200142/http://www.landstribunal.gov.uk/Documents/ExplanatoryLeaflet.pdf.

[138] *Practice Statement In Relation to Matters On or After 1 April 2009*. https://www.judiciary.uk/wp-content/uploads/2014/08/PracticeStatementontaxcomposition.pdf.