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:

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(Claimant)

and

THE REPUBLIC OF KOREA

(Respondent)

THE RESPONSENT'S RESPONSE TO NON-DISPUTING PARTY SUBMISSION

12 July 2019

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 Paragraphs 14.2, 16.2 and Annex I of Procedural Order No. 1, this is the Respondent's Response to the Non-Disputing Party Submission filed by the US on 19 June 2019 (the "**NDP**").

1.2 Unless otherwise stated, defined terms used in this Response to the NDP 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 The NDP supports many of the positions on treaty interpretation adopted by ROK in this arbitration. In particular (and as explained further below) the NDP confirms that:

2.1.1 The evidential burden is on the Claimant to establish that the Tribunal has jurisdiction. The Claimant must prove the facts it alleges are true and the requirement under Article 11.20(6) KORUS to accept the Claimant's facts as true does not apply to challenges made under Article 11.20(7) KORUS. The Claimant has failed to prove to a reasonable degree of certainty any of the new "facts" she introduced in her amendment to the Notice of Arbitration dated 1 April 2019 and therefore these new "facts" cannot just be accepted as true, even at this preliminary objections stage.

2.1.2 The US does not support the Claimant's argument that the phrase "*characteristics of an investment*" (as used in the definition of KORUS) should be limited to the issues of commitment of capital, expectation of gain or profit or the assumption of risk. Those are only some (but not all) of the factors to be "*included*" in the "*characteristics of an investment*". Moreover, the fact the Claimant's Property is immovable property does not guarantee that it meets the definition of investment if the asset does not otherwise have the "*characteristics of an investment*".

2.1.3 A claimant has knowledge of an alleged treaty breach (and therefore the limitation clock starts to run) when a state *"(1) takes a measure (or measures) that effects a direct or indirect expropriation and (2)* ***fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 11.6.1***"[1] (emphasis added). Regardless of the date on which the Claimant knew her compensation would not meet her expectations (which ROK says was also well outside the limitation period), the Claimant clearly knew the purpose of the redevelopment in January 2012 and thus must have known that "*at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 11.6.1*" had not (on her case) been satisfied.

3. THE BURDEN OF PROOF

3.1 ROK's Application was always made under Articles 11.20(6) and 11.20(7) KORUS. While ROK was (and is) prepared to accept the background facts as presented by the Claimant as correct as required under Article 11.20(6),[2] there is no such requirement in Article 11.20(7). Moreover, once the Claimant amended its Notice on 1 April 2019 to introduce new alleged facts about renting out the Property, making home improvements and the

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1 Paragraph 21 of the NDP

2 Paragraph 3.2 of the Application

alleged objections to her power of attorney she raised before the Korean authorities, ROK pointed out she had not met her burden of proof.[3]

3.2 The Claimant's answer to ROK's burden of proof arguments has two limbs, being: (1) to argue (sometimes) that the Claimant has only submitted a Notice of Arbitration and does not need to provide a more detailed Statement of Claim;[4] and (2) Article 11.20.6(c) KORUS requires the Tribunal to assume the Claimant's facts to be true.[5]

3.3 The first limb (i.e. the question of whether the Claimant has submitted a Notice of Arbitration or Statement of Claim) is not covered in the NDP and therefore ROK does not comment further on it here; ROK will address this issue at the hearing as required.

3.4 However, the NDP does address the second limb. In particular, the NDP is clear that:

> "*As such, when a respondent invokes paragraph 7 to address objections to competence, there is no requirement that a tribunal "assume to be true claimant's factual allegations." To the contrary, there is nothing in paragraph 7 that removes a tribunal's authority to hear evidence and resolve disputed facts…*
>
> *… Finally, nothing in the text of paragraph 7 alters the normal rules of burden of proof. In the context of an objection to competence, the burden is on a claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim*".[6]

3.5 ROK made the same arguments in its Reply.[7]

3.6 It is clear therefore that the Claimant is required to prove the existence of the new facts introduced in her amended Notice of Arbitration and any other facts required to establish that the Tribunal has jurisdiction; the Claimant has failed to discharge this burden.

3.7 In relation to the alleged rental of the Property, the Claimant has failed to provide basic documents required to evidence these allegations such as rental contracts, agent contracts or receipt of rental fees.[8]

3.8 Indeed, despite the Claimant claiming that "*four rental units … were rented **continuously** from 2003*"[9] (emphasis added), Exhibit C-4 that the Claimant has provided to support this assertion actually suggests otherwise. In particular:

3.8.1 The Claimant only received money from five individuals during this entire period. They were: *** (March 2003 to January 2004); *** (March 2003 to May 2003); *** (March 2004 to September 2007); *** (August 2014 to January 2016); and ** * (August 2015 to November 2016). (The remainder of the Exhibit appears to show that her husband made payments to certain individuals who are stated to have been "tenants", but no evidence is provided of these "tenants" ever paying any money to the Claimant or her husband.)

3.8.2 As noted above, no rental contracts, agent contracts or receipts are provided for any of these "tenants". One "*Confirmation of Facts*" is provided by ***

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3 Paragraphs 4.38 to 4.40 of the Amended Application
4 Paragraph 4.1 of the Response; see also paragraph 1.3 of the Rejoinder
5 Paragraph 4.1 of the Response; see also paragraphs 1.3 to 1.6 of the Rejoinder
6 Paragraphs 12 and 13 of the NDP
7 Paragraph 4.8.2 of the Reply
8 ROK made this same point at paragraph 4.9 of the Reply
9 Paragraph 5.10.2 of the Response

, but that document fails to comply with the requirements for a witness statement as set out in paragraph 18.3 of Procedural Order No. 1 and therefore should be inadmissible.

3.9 In relation to the alleged home improvements, there is no evidence for any of it, beyond the bare assertions made in the Claimant's witness statement CW1. No photographs, invoices or any other supporting documents have been provided.

3.10 As for the allegation that the Claimant raised the issue of her alleged forged consent to join the Redevelopment Union with "*government officials*" in February and March 2017 (which is the basis for the Claimant's fair and equitable treatment claim), there is simply no evidence for the bare allegations the Claimant has made beyond what is written in the Claimant's written pleadings (i.e. there is not a single document or other evidence alleging when this was raised, what was said, or to whom it was said);[10] indeed, the Claimant has submitted a witness statement in this arbitration, but this statement fails to provide any details of these alleged encounters with the government officials.

3.11 The Claimant must do more than make bare assertions in order to establish jurisdiction. To state the obvious, if this was not the position, any claimant could make any allegation and respondent states would have to spend years defending the allegations in a full merits hearing. Of course, that is not the position; as both the ROK and the NDP note, the burden is on the Claimant to prove the necessary and relevant facts to establish that a tribunal is competent to hear a claim.[11] The Claimant has failed to meet this burden.

4. DEFINITION OF "INVESTMENT"

4.1 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*".

4.2 There is a debate between the parties about what constitutes the "*characteristics of an investment*". The Claimant says the characteristics are limited to those spelt out in KORUS, namely commitment of capital, expectation of gain or profit or assumption of risk.[12] ROK says the Tribunal can look beyond those three criteria and in particular look for some form of development to the host state in order for an asset to be considered an investment.[13]

4.3 The NDP is supportive of ROK's position. In particular, the NDP notes that not all assets (and not all immovable property) are investments and that in order to be considered an investment, an asset must "*still always possess 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).[14]

4.4 Importantly, the NDP does not say that the "*characteristics of an investment*" are limited only to the commitment of capital, expectation of gain or profit, or the assumption of risk (i.e. the argument the Claimant is running in this arbitration).

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10 Paragraph 8.6 of the Reply
11 Paragraph 13 of the NDP; paragraph 4.38.3 of the Application
12 Paragraph 5.2 of Response; paragraph 2.1 of the Rejoinder
13 Paragraphs 4.5 to 4.9 of the Application; Paragraphs 5.7 to 5.18 of the Reply
14 Paragraph 15 of the NDP

4.5 Accordingly, in order to be considered an "*investment*" an asset must have the "*characteristics of an investment*". This can *include* a commitment of capital, expectation of gain or profit or an assumption of risk, but those factors are not determinative of whether or not an investment exists.

4.6 Accordingly, in ROK's submission, the Tribunal must also consider whether the asset has provided a contribution to the host state's development. The fact this is part of the "*characteristics of an investment*" is clear not only from a number of leading academics (*Schreuer; McLachlan, Shore, Weiniger; and Douglas*[15]), but also the Preamble to KORUS.[16]

4.7 And there can be no credible debate about whether the purchase of one residential property in 2001 by a national of that host state contributed to the host state's development; it did not.

4.8 In any event, as ROK has said before, this debate is largely academic because the asset at the heart of this arbitration also did not satisfy the requirements of commitment of capital, expectation of gain or profit or the assumption of risk.[17]

5. LIMITATION PERIODS

5.1 Article 11.18.1 of KORUS provides that:

> "*No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 11.16.1 and knowledge that the claimant (for claims brought under Article 11.16.1(a)) or the enterprise (for claims brought under Article 11.16.1(b)) has incurred loss or damage*".

5.2 ROK's position is that the Claimant missed this three year limitation period. In particular, the Claimant had knowledge of the Redevelopment Project (and whether or not is purpose was for a public purpose) at the latest in January 2012 and the amount of her likely compensation at the latest in July 2014.[18]

5.3 The Claimant does not dispute she had knowledge of the purpose of the Redevelopment Project or her likely amount of compensation in January 2012 and July 2014 respectively, but argue that the "*breach*" of KORUS did not occur until 29 January 2016[19] (being the date the Seoul Land Expropriation Committee issued its decision on the amount of compensation).

5.4 ROK has always said the Claimant's position is flawed. There is clear authority in *Ansung v China* and *Spence v Costa Rica* (the latter case also cited in the NDP) that limitation periods start when an investor first had knowledge of the fact it had incurred loss or damage, not when it gains knowledge of the quantum of that loss.[20]

5.5 The NDP further supports ROK's position. In particular, the NDP notes that:

> "*an investor may "incur" loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or*

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15 Paragraph 5.16 of the Reply
16 Paragraph 5.18 of the Reply
17 Paragraphs 5.19 to 5.36 of the Reply
18 Paragraph 7.2 of the Response
19 Paragraphs 4.1 and 4.2 of the Rejoinder
20 Paragraph 7.8 of the Reply

damage is not immediate. As the Grand River tribunal correctly held, "damage or injury may be incurred even though the amount or extent may not become known until some future time".[21]

"*With regard to knowledge of the "alleged breach" under Article 11.18.1, a "breach" of an international obligation exists "when an act of th[e] State is not in conformity with what is required of it by that obligation." In the context of Article 11.6, a breach is manifest where a KORUS Party (1) takes a measure (or measures) that effects a direct or indirect expropriation and (2) fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 11.6.1*".[22]

5.6 The second quotation from the NDP above is particularly important in light of the position the Claimant has adopted in this arbitration. In particular, even if the Claimant did not know about the exact amount of compensation she would receive until January 2016, she clearly knew about the "*purpose*" of the redevelopment much earlier; as the NDP makes clear, that is all that is needed to establish knowledge of the "*alleged breach*" in order to start the limitation clock.

5.7 As ROK has said all along, the Claimant's expropriation claims are time barred under Article 11.18.1 KORUS[23] and the NDP only further supports this conclusion.

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21 Paragraph 20 of the NDP
22 Paragraph 21 of the NDP
23 Paragraphs 6.1 to 6.30 of the Application; paragraphs 7.1 to 7.14 of the Reply