IN THE MATTER OF THE DISPUTE UNDER THE U.S.-KOREA FREE TRADE AGREEMENT OF JUNE 30, 2007 AND DECEMBER 2010 BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF KOREA

BETWEEN

[redacted]

Investor

-and-

THE REPUBLIC OF KOREA

Contracting Party

NOTICE OF INTENT TO SUBMIT DISPUTE TO ARBITRATION

[redacted]

[redacted]

I. PRELIMINARY STATEMENT OF INTENT.

1. In accordance with Chapter 11 of the U.S. – Korea Free Trade Agreement (the "KORUS FTA"), which went into effect on March 15, 2012 following ratification, [redacted] submits this Notice of Intent to Submit Dispute to Arbitration, as required by Article 11.16.2 of the KORUS FTA, and hereby gives you notice of the existence of a dispute between [redacted] on the one hand, and the Republic of Korea ("Korea"), on the other.

2. [redacted] hereby submits this Notice of Intent to Submit Dispute to Arbitration of his claim arising out of breaches of Chapter 11, Section A-B of the KORUS FTA. [redacted] is a citizen of the United States and submits this Notice of Intent to Submit Dispute to Arbitration averring that Korea has breached its obligations under KORUS FTA Chapter 11, Section A, specifically Articles 11.5 and 11.6 and that [redacted] incurred loss or damage by reason of, or arising out of, said breaches.

3. Not only did Korea subject [redacted] foreign investment to expropriation, but now is forcing him to accept an appraisal value that is unfair and way below the current market price.

4. It should come as no surprise to Korea that the destruction of a foreign investor's investment, without the payment of prompt, adequate, and effective relief is impermissible under international law. Notably, such treatment of a foreign investor is in plain violation of Article 11.6 of the KORUS FTA, which is the basis of which [redacted] intends to bring his arbitration claims against Korea.

5. [redacted] intends to bring this arbitration in a well-established and transparent forum, such as the International Center for Settlement of Investment Disputes (the "ICSID") in

[redacted]

Washington, D.C., which is possible since Korea and the United States are parties to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention").

6. On the basis of Korea's breach of the KORUS FTA, our client is entitled to no less than $4,224,628.00 USD in damages in compensation on the basis of direct loss.

7. Although Korea claims that it respects the rule of law, and although it promotes itself as a safe destination for foreign investment, its treatment of [redacted] investment in Korea conclusively shows the perils of investing in the country. No one, and especially not a foreign investor contributing to the economic development and well being of Korea and its citizens, should be subjected to such treatment.

8. To date, a total of seven (7) Investor State Dispute Settlement cases have been filed against Korea through the United Nations, among which 57 percent of them were initiated recently, since 2018.[1] This shows a sharp increase from two (2) cases in 2015.

9. We expect that the circumstances of [redacted]s expropriation of his investment, even after his expression of objection, will, at the very least, serve as a cautionary tale for businessmen considering investing in Korea, and we expect any arbitral proceedings to be followed with great interest by other potential investors in the country.

10. Should Korea be unwilling to negotiate, please have no doubt that Korea will be facing its first international arbitration of 2021 brought on the basis of the KORUS FTA before the ICSID in Washington, D.C.

11. Our notice of dispute will begin by explaining the facts of [redacted] case against Korea (II), before explaining why an investment arbitration tribunal has jurisdiction to rule on

[1] UNCTAD, *Investment Dispute Settlement Navigator, Korea, Republic of*, updated as of July 31, 2020, https://investmentpolicy.unctad.org/investment-dispute-settlement/country/111/korea-republic-of.

this dispute (III). It will then examine Korea's breaches (IV), prior to turning to the issue of the compensation [redacted] is seeking to repair his harm (V).

II. FACTUAL HISTORY REGARDING [redacted] INVESTMENT IN THE REPUBLIC OF KOREA.

12. [redacted] is an individual citizen of the United States of America, and [redacted] United States passport is attached hereto as **Exhibit A**.

13. [redacted] current address is [redacted].

14. [redacted] submits this Notice of Intent to Submit Dispute to Arbitration as an investor on his own behalf.

15. The legal counsel for [redacted] is [redacted] Email: [redacted]. All correspondence should be directed to the attention of [redacted] at the above address.

16. The Contracting Party, and a potential respondent, is the Republic of Korea, represented by the Ministry of Justice, Office of International Legal Affairs, Government Complex, Gwacheon, Korea. For the avoidance of doubt, the term Contracting Party as used in this Notice includes all subordinate agencies of the Republic of Korea, as well as private parties acting under its direction.

A. [redacted] invests in Korea.

17. On or about May 3, 2011, [redacted] purchased a building in Busan, Korea for about $911,552.90 USD[2].

[2] South Korean Won and United States Dollar currency rate as of January 14, 2021.

[redacted]

18. The building [redacted] purchased is located at [redacted], [redacted] Busan, Korea. The building is named [redacted] and is a residential building.

19. In 2018, [redacted] was naturalized as a U.S. citizen while relinquishing his citizenship in Korea. His passport is attached hereto as **Exhibit A**. [redacted] owns 100% interest in the real property.

20 [redacted] had eighteen (18) tenants who each rented a studio apartment from him for a security deposit of about $4,558 USD[3] and monthly rent of about $365 USD[4].

21. As the owner of the building, [redacted] had family members take care of the building whenever he was abroad and did all his responsibilities by making sure the building is well maintained.

B. Korea Expropriates [redacted] Investment.

22. Since 2013, [redacted] was alerted of talks regarding a potential redevelopment project under Busan-si municipal government in the area where he had his investment property. However, [redacted] did not pay much attention since they were only discussions regarding the possibility of a project, and as a foreign investor, his property was not subject to such redevelopment project.

23. However, in or about October 2020, [redacted] received a final official notice for redevelopment by the Busan-si municipal office – the Busan Regional Construction and Management Administration (the "BRCMA") – informing him of a redevelopment project that will includ[redacted] investment property. *See* **Exhibit B**.

[3] *Id.*
[4] *Id.*

[redacted]

24. The BRCMA is an organization affiliated with the Korean Ministry of Land, Infrastructure and Transport ("MOLIT"), which is a government agency.

25. Subsequently, [redacted] notified the BRCMA by sending a Notice, both in English and Korean, stating that the real property is owned by [redacted], who is a United States citizen, and that the real property is protected by the KORUS FTA. The Notice clearly stated that [redacted] property cannot be part of the redevelopment project as it is foreign investment under the KORUS FTA. Said Notice was also posted at the real property at issue here. *See* **Exhibit C**.

26. In or about October 2020, the BRCMA filed a suit in the Busan District Court against [redacted] due to the fact that such foreign investment property cannot be expropriated for private purposes.

27. In other words, the BRCMA filed a suit against [redacted] and his foreign investment property because it became an obstacle to the redevelopment project.

28. Upon receipt of the Complaint, [redacted] filed an Answer to the Complaint stating that on the basis of Chapter 11 of the KORUS FTA, such foreign investment cannot be subject to expropriation unless it is for a public purpose, which is not the case here.

29. [redacted] actively and clearly expressed his objection to the redevelopment project including his investment property by posting formal Notice, which is attached hereto as **Exhibit C**, prepared by his New York counsel.

30. Despite [redacted] objection, he was forced to become a member of the union of all affected property owners (the "Redevelopment Union").

31. [redacted] has never given consent to join the Redevelopment Union and once he opposed the redevelopment project, the Redevelopment Union kicked him out from its membership.

32. As the owner of the building, [redacted] had family members take care of the building whenever he was abroad and did all his responsibilities by making sure the building is well maintained.

33. [redacted] entrustment related only to "management" and provided [redacted] family members with no authority to enter into or agree to any matter affecting or potentially affecting the ownership of the property.

34. Neither [redacted] nor his attorneys ever received communication from the BRCMA regarding the redevelopment project, his investment property, and/or his objection.

35. On the contrary, the BRCMA proceeded with the project and applied for an injunction prohibiting the transfer of possession to force [redacted] tenants out of his property, which was then granted by the Busan District Court.

36. The BRCMA, in conjunction with the Busan-si municipal office, rendered an opinion regarding the amount of compensation for [redacted] property at [redacted] to be the total of $1,257,943.00.[5]

37. Subsequently, the Redevelopment Union and its administrators trespassed on [redacted] property, destroying about nine (9) door locks and installing new ones, which was a horrific experience for the tenants.

38. A criminal action is currently pending due to said trespass and burglary without [redacted] and the tenants' consent.

[5] *Id.*

[redacted]

39. Since 2017, the Redevelopment Union has sent out numerous letters and made phone calls to [redacted]s tenants, requesting and encouraging their move-out, providing them with about $2,700 USD[6] of moving expenses.

40. This resulted in five (5) tenants moving out in 2017, four (4) tenants moving out in 2018, another four (4) tenants moving out in 2019, and two (2) tenants moving out in 2020.

41. From the eighteen (18) tenants that were living in [redacted] building, only three (3) tenants currently occupy the building.

42. A total of 15 tenants moved out due to the redevelopment project.

43. This caused enormous financial difficulty to [redacted]

44. When discussions about appraisal value began between the Redevelopment Union and the BRCMA, [redacted], once again, strongly objected to participating in such discussions, as his property is not subject to the redevelopment project.

45. Despite [redacted] strong objection, the BRCMA requested an appraisal, and the appraisal was done by a third party appraiser selected by the Mayor of Busan, who considered the published land price as the standard instead of the market value.

46. The BRCMA, in conjunction with the Busan-si municipal office, rendered an opinion regarding the amount of compensation for [redacted] property at [redacted] to be the total of $1,257,943.00 USD.

47. Under Article 11.6(2) of the KORUS FTA, the compensation for appropriation has to be an amount equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation).

48. The amount the BRCMA offered to [redacted] for his investment property is about $1,257,943.00 which is not even forty percent (40%) of the market value of the property,

[6] *Id.*

which, upon information and belief, is approximately between $4,101,988.00 and $4,557,765.00 USD[7].

III. AN ARBITRAL TRIBUNAL HAS JURISDICTION TO HEAR THIS DISPUTE UNDER THE KORUS FTA.

49. On March 15, 2012, the KORUS FTA went into effect following ratification. Among its provisions is Chapter 11, Investment Dispute Mechanism called "Investor State Dispute" (the "ISD"). As stated above factual background, Busan-si Municipal Government and the Korean Government have violated their obligations to [redacted], a U.S. investor under the terms of the KORUS FTA.

50. Article 11.28 of the KORUS FTA defines investment to include "every asset that an investor owns or controls, directly or indirectly, that has every characteristic of an investment" including "other tangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges."

51. The following has been widely accepted by international investment dispute tribunals as typical characteristics of investments; duration, contribution, and assumption of risk.[8] The real property at issue has been owned for over nine years with substantial amount of money invested. [redacted]'s real property ownership constitutes an investment.

52. [redacted]'s ownership of the property is a "covered investment" within the meaning of Chapter 1, Section A, Article 1.4, which provides that a "covered investment" means, with respect to a Party, an investment, as defined in Article 11.28… in its territory of an investor of the other Party that is in existence as of the entry in force of this Agreement or established, acquired or expanded thereafter…"

[7] *Id.*

[8] *See Salini v. Morocco* (ICSID Case No. Arb/00/04) (Decision on Jurisdiction, 23 July 2001).

53. Under Article 11.1, the scope of Chapter 11 is set as to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) covered investments; and (c) with respect to Articles 11.8 and 11.10, all investments in the territory of the Party. The terms "measures adopted or maintained by a Party" refers to measures adopted or maintained by: (a) central, regional, or local governments and authorities; and (b) non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

54. Here, as explained above, the BRCMA is acting under the supervision of MOLIT, which is a government agency, because without the consent or involvement of such governmental authorities, the redevelopment project would not be able to proceed.

55. Under Article 11.17 of the KORUS FTA, each Party to the KORUS FTA consents to the submission of a claim to arbitration and the consent and the submission of a claim to arbitration shall satisfy Chapter II (Jurisdiction of the Centre) of the ICSID Convention, the ICSID Additional Facility Rules, and Article II of the New York Convention.

56. Therefore, this case has sufficient jurisdictional basis under the KORUS FTA to be submitted for international arbitration.

IV. THE REPUBLIC OF KOREA CLEARLY BREACHED THE INVESTMENT TREATY IT SIGNED AND RATIFIED.

57. The actions of Korea described above violate a number of Korea's obligations under the KORUS FTA, notably those obligations concerning the just treatment of foreign investors and investments.

A. Just Treatment of Foreign Investors and Investments

58. Under Article 11.3 of the KORUS FTA, each Party shall accord to investors of the other Party and covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory or investors.

59. Further, under Article 11.4, each Party shall accord to investors of the other Party and covered investments treatments no less favorable than any non-Party or the investment of a non-Party.

60. Article 11.5 states that each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. "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 worlds; and "full protection and security" requires each Party to provide the level of police protection required under customary international law.

61. Certain cases have given the tribunals a guideline to define or identify fair and equitable treatment, or unfair and inequitable treatment:

    a. The host state must act in good faith (*Tecmed,*[9] and *Waste Management*[10]);

    b. The host state's conduct cannot be arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, or lacking in due process (*Waste Management*,[11] *SD Myers*,[12] and *Occidental*[13]);

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[9] *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No ARB(AF)/00/2, Award 29 May 2003, ¶ 153, Available at https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

[10] *Waste Management, Inc. v. United Mexican States*, ICSID Case Np. ARB(AF)/00/03, Award, 30 April 2004, ¶ 138, Available at https://www.italaw.com/sites/default/files/case-documents/ita0900.pdf.

[11] *Supra* note 4, ¶ 98

[12] *SD Myers Inc. v. Government of Canada* (UNCITRAL), First Partial Award, 13 November 2000, ¶ 263, Available at https://www.italaw.com/sites/default/files/case-documents/ita0747.pdf.

c. The host state must act in a transparent manner (*Metalcad,*[14] *Sienens,*[15] *LG&E,*[16] *Saluka,*[17] *Tecmed,*[18] *Maffezini,*[19] and *Waste Management*[20]); and

d. The host state's conduct cannot breach the investor's legitimate expectations (*Tecmed,*[21] *Saluka,*[22] *Azurix,*[23] and *ADC*[24]).

62. As demonstrated above, the host State of investment, which here is Korea, did anything but act in good faith. It did not thoroughly investigate before granting the BRCMA the power to proceed with the redevelopment project. If it did, then it would have found that there was foreign investment at stake.

63. Further, Korea, as the host State of investment, failed to make sure that the BRCMA offered the foreign investor at least the market value of his investment. By offering [redacted] an amount based on the published land price instead of the market value was a decision made by the government alone. [redacted] the property owner, was never involved in any value negotiation.

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[13] *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Final Award, 1 July 2004, ¶¶ 162-63, Available at https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf.

[14] *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Awardm 30 August 2000, ¶ 99, Available at https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

[15] *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (February 6, 2007), at ¶¶ 308-09, Available at https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf.

[16] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International Inc. v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision of Liability (October 3, 2006), at ¶ 128, Available at https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

[17] *Saluka Investments v. Czech Republic*, UNCITRAL, Partial Award (March 17, 2006), at ¶ 307, Available at https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf.

[18] *Supra* note 3, ¶ 154

[19] *Emilio Agustin Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (November 13, 2000), at ¶ 83, Available at https://www.italaw.com/sites/default/files/case-documents/ita0481.pdf.

[20] *Supra* note 4, ¶ 138

[21] *Supra* note 3, ¶ 154

[22] *Supra* note 11, ¶¶ 301-02

[23] *Azurix Corp. v. Argentina*, ICSID Case No. ARB/01/12, Final Award (July 14, 2006), at ¶ 372, Available at https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf.

[24] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Hungary*, ICSID Case No. ARB/03/16, Award (October 2, 2006), at ¶ 424, Available at https://www.italaw.com/sites/default/files/case-documents/ita0006.pdf.

[redacted]

64. Allowing the BRCMA to proceed with the redevelopment project without clearly addressing [redacted]'s issues and objections was arbitrary, grossly unfair, unjust, idiosyncratic, discriminatory, and lacking in due process. The foreign investor was discriminated against because he was a foreign investor, living abroad, without the means and time to be engaged in this matter as much as other Korean nationals. The BRCMA did not even attempt to negotiate or discuss numerous issues regarding this redevelopment project with [redacted] or his counsel.

65. Korea subjected [redacted]'s investment property to its redevelopment project that violates Chapter 11 of the KORUS FTA.

66. Korea has failed to act transparently. When the BRCMA presented [redacted] with an appraisal value, said number was not even close to the property's current market value. The appraisal was done by an appraiser selected by the Mayor of Busan, who holds a governmental position. [redacted] was not involved in the selection of an appraiser, the method of the appraisal, and negotiations regarding the property value.

67. As mentioned above, [redacted] was not provided with sufficient information as to why his property was subjected to Korea's redevelopment project. Without resolving the issue of foreign investment property under the KORUS FTA, Korea just proceeded with the redevelopment project without just compensation, subjecting [redacted], who is a foreign investor, to grave financial damages.

B. Expropriation

68. Under Annex 11-B, the Parties agree that an expropriation involves interference with a tangible or intangible property right in an investment.

69. Here, [redacted]'s building is the subject of expropriation, which is tangible property.

[redacted]

70. The property was taken from him without his consent and against his clear objection without just compensation.

71. Under Article 11.6(2), compensation for expropriation has to be made without delay with an amount that is equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (the date of expropriation).

72. Korea played a part in this redevelopment project when the BRCMA requested MOLIT for an appraisal based on published land price and not fair market value without any discussions with [redacted].

73. Under these circumstances, the Mayor of Busan unilaterally selected a third party who appraised [redacted]'s investment property based on the published land price as the standard instead of the market value.

74. In any case, the form of expropriation is of no importance; international law looks to the effect of the expropriation on the investor's property – the "sole effect doctrine."[25] It is mentioned that the intent of the government is less important than the effects of the measures on the owner, and the form of the measures of control or interference is less important than the reality of their impact.[26]

75. An expropriation does not have to be for the benefit of the host State for it to be unlawful. A state can expropriate an investment, or take measures equivalent to an expropriation in connection with an investment, for the benefit of a third-party. The arbitral tribunal in *Metalclad* clearly recognized that expropriation could also include "covert or incidental interference with the use of property which has the effect of depriving the owner, in

[25] Andrew Newcombe and Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, (Kluwer Law International 2009), pp. 325 and 326.
[26] *Id.*

[redacted]

whole or in significant part, of the use or reasonably-to-be expected economic benefit of property even if not necessarily to the obvious benefit of the host State."[27]

76. The expropriation of [redacted]'s property occurred when the Korean Government authorized the BRCMA to proceed with its redevelopment project and unfair appraisal.

77. It is noteworthy that the BRCMA did not stop or show well-intended steps to compensate [redacted] properly even after he objected several times to the redevelopment project. The BRCMA already started with its project demolishing buildings around [redacted]'s building, making [redacted]'s property improper for its intended use.

78. Tenants were forced to move out, and [redacted] is suffering enormous financial loss.

79. During the process of expropriation of [redacted]'s investment property, Korea and/or its agents committed a violation of the fair and equitable treatment standard prescribed in the KORUS FTA Article 11.5, the Minimum Standard of Treatment.

80. The action of Korea and/or its agents violated [redacted]'s expectations that he could rely on Korea or its agents to avoid reliance on lack of actual consent to join the Redevelopment Union. These actions violated [redacted]'s legitimate expectations.

C. [redacted] is owed at least $4,224,628.00 USD in Compensation for Direct Economic Harm.

81. As mentioned above, [redacted] has suffered enormous financial damages due to this redevelopment project.

82. Eighteen (18) tenants used to occupy [redacted]'s building.

83. Now, only three (3) of them are left.

84. Each tenant was charged a security deposit fee of about $4,558 USD and a monthly rent of about $365 USD.

[27] *Supra* note 14.

85. In 2017, five (5) tenants moved out due to the disruption caused by the redevelopment plan. This amounts to about $65,700 USD[28] only in rent for the past 36 months.

86. In 2018, four (4) tenants moved out due to the disruption caused by the redevelopment plan. This amounts to about $35,040 USD[29] only in rent for the past 24 months.

87. In 2019, four (4) tenants moved out due to the disruption caused by the redevelopment plan. This amounts to about $17,520 USD[30] only in rent for the past 12 months.

88. In 2020, two (2) tenants moved out due to the disruption caused by the redevelopment plan. This amounts to about $4,380 USD[31] only in rent for the past 6 months.

89. Consequently, since 2017 when Korea and the BRCMA commenced with the redevelopment plan, [redacted] accrued rent damages of about $122,640 USD.

90. Further, the amount the BRCMA offered to [redacted] for his investment property is about $1,257,943.00 USD, which is not even forty percent (40%) of the market value of the property, which, upon information and belief, is approximately between $4,101,988.00 USD and $4,557,765.00 USD.

91. In total, [redacted] has suffered monetary damages of at least $4,224,628.00 USD.[32]

V. AMICABLE SETTLEMENT.

92. Given the prior treatment of [redacted], **PLEASE BE ADVISED** that the slightest procedure continuing the redevelopment project and subjecting [redacted]'s investment to expropriation **WILL NOT BE TOLERATED**, and we intend to exercise every legal, diplomatic, political, and economic means available to ensure [redacted]'s rights as a foreign investor.

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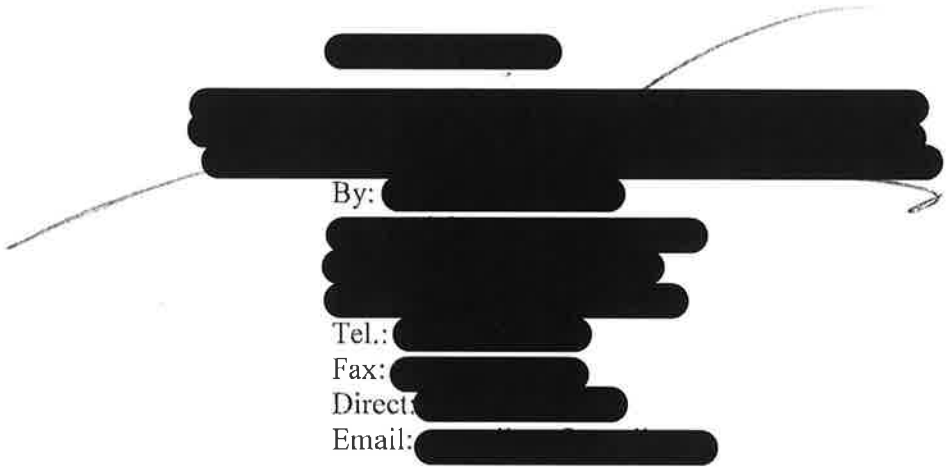
[28] *Supra* note 2.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*

93. If settlement fails, then we, on behalf of [redacted], will immediately initiate an investment treaty arbitration to recover in full the amounts owed to [redacted] under the KORUS FTA, in non-confidential ICSID proceedings that will also serve to warn other foreign investors of the dangers of investing in Korea.

94. Based on this, we trust that you will be willing to negotiate an amicable resolution to this dispute in good faith, and we look forward to hearing from you.

Dated: January 14, 2021
New York, New York



[redacted]