IN THE MATTER OF AN ARBITRATION UNDER THE FREE TRADE AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE UNITED STATES OF AMERICA

AND

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

Mr. HUN WON (a/k/a/ Jason H. Won)

Claimant

-v-

REPUBLIC OF KOREA

Respondent

RESPONSE TO NOTICE OF ARBITRATION

4 JUNE 2021

International Dispute Settlement Division

Ministry of Justice, Republic of Korea

Building #1, 47 Gwanmun-ro Gwacheon-si
Gyeonggi-do, 13809
Republic of Korea

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I. INTRODUCTION

1. Pursuant to the Free Trade Agreement between the Republic of Korea (the "**ROK**" or "**Respondent**") and the United States of America (the "**Treaty**") and in accordance with Article 4 of the UNCITRAL Arbitration Rules as revised in 2010 (the "**UNCITRAL Rules**"), the ROK submits this Response to the Notice of Arbitration (the "**NOA**")[1] submitted by Hun Won ("**Won**" or the "**Claimant**").[2]

2. The Claimant submits that this case concerns the ROK's expropriation without just compensation, and as a result, the Respondent violates its obligations under the Treaty.

3. The Claimant's claims, however, are not within the jurisdiction of the Arbitral Tribunal for various reasons. Moreover, his assertions are unfounded and based on a misunderstanding of the redevelopment process, and lack factual and legal merits.

4. The ROK will further elaborate on the Claimant's failure to meet the burden of proving not only his factual and legal claims, but the existence of the Arbitral Tribunal's jurisdiction according to the schedule established by the Arbitral Tribunal at a later stage. In this Response, the ROK sets out below its preliminary responses to the Claimant's assertions made in the NOA.

II. FACTUAL BACKGROUND

5. This dispute concerns an ongoing redevelopment project in Busan, ROK which includes Chelsea Studio—a building formerly owned by the Claimant in this dispute, and which Claimant argues had not been justly compensated for—with the address of 22 Hoam-ro 25 Beon-gil, Gwangan-dong, Suyeong-gu, Busan Metropolitan City ("**Busan**"), ROK (the "**Gwangan Project**"). When the Gwangan Project is completed, a total of 1,237 apartment units will be constructed.[3]

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[1] Article 11.16.4(c) of the Treaty requires that the claimant's notice of arbitration be submitted "together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules." Exhibit RLA-1. The Claimant, however, submitted his NOA without the requisite statement of claim. The ROK, nevertheless, in good faith effort, submits this Response pursuant to the Treaty and the UNCITRAL Rules. The ROK reserves all of its rights in relation to this matter.

[2] The NOA was delivered to the ROK via certified mail on 10 May 2021. The ROK hereby submits this Response within the 30-day period in accordance with Article 4 (1) of the UNCITRAL Rules.

[3] Exhibit R-1, Suyeong-gu Public Notice no. 2017-107.

A. REDEVELOPMENT AND COMPENSATION IN THE ROK[4]

6. After decolonization from Japanese rule in 1945 and the Korean War in the 1950s, industrialization and rapid growth of urban areas resulted in a wide spread of dilapidated substandard structures. Accordingly, one of the main tasks of the city administrative agencies was the development of their deteriorating downtown areas in order to improve safety, hygiene, and the aesthetic appeal of urban areas.

7. Urban planning was first designed with the advent of the Act on Urban Planning in 1962 with the purpose of encouraging healthy development of the urban environment and to enhance public welfare. When the Act on Urban Planning was amended in 1971, redevelopment projects were further added to urban planning projects.

8. In 1976, redevelopment projects began to be regulated separately under the newly enacted Act on Urban Redevelopment, and other improvement projects were further adopted. For instance, reconstruction projects were adopted in the Act on Housing Construction Promotion in 1972, and residential environment improvement projects were introduced in the Act on Temporary Measures for Improvement of Residential Environment for Low-income Urban Residents in 1989. In 2003, the Act on Improvement of Urban Areas and Residential Environment (the "**Urban Improvement Act**") was newly enforced in order to provide comprehensive regulation and to guarantee coherency within the various urban planning schemes, including redevelopment projects.

9. The purpose of the land improvement scheme under the Urban Improvement Act is to improve the urban environment and quality of residential environment by systematically improving areas that require recovery of urban functions or areas with substandard residential environment.[5] Among various types of land improvement projects, a redevelopment project focuses particularly on reforming the residential or commercial environment in a designated area with poor infrastructure or cluster of

[4] To assist the Tribunal's understanding on improvement and redevelopment schemes in the ROK, the ROK sets forth an overview based on the latest version of relevant laws, unless otherwise specified.

[5] Exhibit R-2, Urban Improvement Act [Enforcement Date 1 April 2021] [Act No. 17171, Amendment by Other Act 31 March 2020], Article 1.

defective or outdated buildings, collectively defined as the "dilapidated and substandard structure", to recover its urban function.[6]

10. While the ROK will put forth a detailed outline of the process of a redevelopment project in later submissions, the ROK hereby sets out an overview of the procedures relevant to this dispute—(i) redevelopment projects under the Urban Improvement Act; and (ii) compensation for properties eligible for cash settlement.

1) Redevelopment projects under the Urban Improvement Act

11. (Formulating a master plan) Improvement projects in general are operated pursuant to a ten-year master plan to improve urban and residential environments in each municipal jurisdiction.[7] In order to formulate and amend the proposed master plan, the opinion of residents and the local council shall be considered.[8] The proposed master plan shall further be reviewed by the relevant local urban planning committee and be made public before adoption.[9] The aforementioned master plan contains the basic policy aimed at pursuing improvement projects with a long-term and comprehensive perspective.[10] In this regard, the contents of any master plan are comprehensive in nature, are binding only on administrative agencies and relevant bodies, and do not affect the rights and obligations of individuals.

12. (Designating an improvement area) Each municipal jurisdiction may designate a new area eligible for the improvement project (the "improvement area") and prepare for an improvement plan.[11] One of the most common and typical examples of an improvement area is the area concentrated with dilapidated and substandard

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[6] *Id.*, Articles 2(2)(b) and 2(3).

[7] *Id.*, Article 4. A master plan shall include the following: basic direction-setting for improvement projects; the period anticipated for implementing each improvement project; details about population, structures, land use, fundamental infrastructure a plan for constructing common facilities and a traffic plan, an environmental plan for green areas, landscaping, energy supply, disposal of waste; and others. *Id.*, Article 5(1).

[8] *Id.*, Article 6.

[9] *Id.*, Article 7. For reference, Busan Regional Land Planning Committee consists of 25-30 members, more than 2/3 of whom are members of the city council, public officials having relations to urban planning, and persons with ample knowledge and experience in urban planning and/or relevant fields. Busan Ordinance on Urban Planning, Article 53.

[10] *Id.*, Article 5.

[11] *Id.*, Article 8(1).

structures.[12] The purpose of designating an improvement area is to confirm the boundaries of where the improvement project will be implemented. Thus, the details of the improvement project shall be separately regulated through the relevant improvement plan.

13. (Formulating an improvement plan) A proposed improvement plan[13] shall be prepared by gathering opinions from residents[14] as well as the local council,[15] and be reviewed by the relevant local urban committee.[16] After the determination of the improvement area's eligibility for the improvement project, details of the improvement area and improvement plan shall be notified in the public gazette of the relevant municipal government.[17] Any person who intends to build a structure, install an artificial structure, change the form or quality of land, and/or become involved in other relevant activities in an improvement area shall obtain a permit from the head of relevant municipal government.[18]

14. (Redevelopment Association) A redevelopment project, which is part of the improvement project, may be implemented by any of the following methods: (i) an association may solely operate the project, or (ii) an association may jointly operate the project with the head of the relevant municipal government, the Korea Land and Housing Corporation, or others.[19] As is the case for the Gwangan Project, a redevelopment project is generally run by an association formed by property[20] owners in the designated area (the "redevelopment association").

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[12] *Id.*

[13] *Id.*, Article 9. An improvement plan shall include the followings: the name of the improvement project; the improvement area and its size; a plan for constructing common facilities; a plan regarding main uses, the building-to-land ratio, the floor area ration and height of each structure; a plan for environmental conservation and disaster prevention; and others.

[14] *Id.*, Article 15(1).

[15] *Id.*, Article 15(2).

[16] *Id.*, Article 16(1).

[17] *Id.*, Article 16(2).

[18] *Id.*, Article 19(1).

[19] *Id.*, Article 25(1)-1.

[20] Land and buildings are treated as separate real estate properties under the Korean Laws. *See, e.g.*, The Registration of Real Estate Act, Article 14(1). For the sake of arguments in the following paragraphs, land and buildings will be collectively referred to as "property" or "properties".

15. Designated property owners are required to form a redevelopment association by obtaining both (i) the consent of no less than 75% of the property owners in the designated area, provided that they represent owners of at least 50% of the land area; and (ii) the approval from the head of the relevant municipal government.[21] Executive officers of a redevelopment association are comprised of a president, directors and auditors who are residents or owners of the properties in the improvement area[22], and are usually elected by the votes of members of the association.[23]

16. A duly established redevelopment association is recognized as a legal entity[24] that has the authority to independently decide on matters regarding the redevelopment project, including (i) the usage of the improvement project fund, (ii) the selection or replacement of the general contractor, designer and appraiser, (iii) the formulation and amendment of the project implementation plan, as well as (iv) the formulation and amendment of the management and disposal plan—through general meetings.[25]

17. (Project implementation plan) Among various issues decided and operated by the redevelopment association, the most important matter is the project implementation plan of the redevelopment project. Following the formulation and amendment of the project implementation plan—which must be passed as a resolution at the general meeting according to the Articles of Association formed by the members—the redevelopment association shall submit its project implementation plan to the relevant municipal government authorities.[26] A project implementation plan shall include (i) a land use plan, (ii) fundamental infrastructure and common facilities plan, and (iii) resident relocation plan.[27] Once the project implementation plan is approved by the relevant municipal government, it shall further be notified in the public gazette of the relevant local government.[28] At the same time, the design for the new building is confirmed and the project operator (which is usually the redevelopment association)

[21] Exhibit R-2, Article 35(2).
[22] *Id.*, Article 41(1), (3) and (5).
[23] *Id.*, Article 45.
[24] *Id.*, Article 38.
[25] *Id.*, Article 45.
[26] *Id.*, Article 50(1) and (5).
[27] *Id.*, Article 52.
[28] *Id.*, Article 50(9).

should proceed with the improvement project in accordance with the approved project implementation plan.

18. (Applications to purchase building site or unit) Within 120 days from the date of approval on the project implementation plan, the project operator shall notify the property owners of the followings: (i) the details and price of each land or building incorporated in the project, (ii) the estimated amount of share of expenses to be borne by each owner, and (iii) the period for submitting the purchase application.[29] The same shall be announced in the daily newspaper in the relevant region.[30]

19. Any owners willing to apply for the purchase of a site or unit of the new building shall submit an application within the required period (30-60 days from the date of notice), and any owner who did not submit such application shall proceed to the consultation phase for compensation with regard to the land or building subject to the project.[31] Therefore, every member of the redevelopment association is given a choice either (i) to purchase a property in the redevelopment area by paying the difference between the value of the original property and the value of the redeveloped property to be purchased (so-called "parcelling out");[32] or (ii) to receive a cash settlement based on an assessment of the value of the original property.[33]

20. (Management and disposal plan) Upon expiration of the application period for the purchase of a building site or unit pursuant to the redevelopment project, the project operator shall formulate a management and disposal plan, which includes setting up a plan for sales of the building site or unit, identifying the addresses and names of the eligible purchasers, and calculating an estimated value of the new building site or unit.[34] The purpose of the management and disposal plan is to reasonably distribute the new

[29] *Id.*, Article 72(1).
[30] *Id.*
[31] *Id.*, Article 72(2).
[32] *Id.*, Article 72.
[33] *Id.*, Article 73.
[34] *Id.*, Article 74.

building site or unit under a comprehensive consideration of various factors such as the location, size, usage purpose or landform.[35]

21. The management and disposal plan shall further be subject to resolution by the redevelopment association, public inspection and opinion gathering, and finally obtain approval from the municipal government.[36] The approved management and disposal plan shall be notified in the public gazette of the relevant municipal government, and be notified to each applicant.[37]

2) Compensation for properties eligible for cash settlement

22. When cash settlement is selected and upon receipt of the cash compensation, the property owner loses his/her title to the property and ceases to be a member of the redevelopment association.[38] Such cash settlement is regulated pursuant to the rules and procedures set out in the Urban Improvement Act, and matters not regulated thereunder are governed by relevant provisions in the Act on Acquisition of and Compensation for Land, etc. for Public Works Project (the "**Compensation Act**")[39]. The Compensation Act aims to ensure appropriate protection of property rights through efficient compensation for any losses required for the public projects.[40]

23. The project operator shall nominate three different appraisal business entities and request assessment in order to estimate the most appropriate compensation amount for cash settlement.[41] Within 90 days from the date of approval and public notice of the management and disposal plan, the project operator shall proceed to consult with cash settlement candidates. In the event consultation fails within the 90-day period, the project operator shall file for either an adjudication on expropriation or a lawsuit seeking the sale of the property within 60 days of the date of consultation failure.[42]

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[35] *Id.*, Article 76(1).
[36] *Id.*, Article 74(1).
[37] *Id.*, Article 78(4) and (5).
[38] *Id.*, Article 40(1); Exhibit R-3, Articles of Association, Article 11.
[39] Exhibit R-2, Article 65 (1).
[40] Exhibit R-4, Compensation Act [Enforcement Date 5 January 2021] [Act No.17868, Partial Amendment on 5 January 2021], Article 1.
[41] *Id.*, Article 68(1).
[42] Exhibit R-2, Article 73(2).

B. BUSAN'S MASTER PLAN TO IMPROVE URBAN AND RESIDENTIAL ENVIRONMENTS AND THE CLAIMANT'S PURCHASE OF CHELSEA STUDIO

24. On 21 September 2005, the Mayor of Busan[43] announced through a public notice the "2005 Master Plan to improve Busan's urban and residential environment" which included the plan to redevelop Gwangan District 2, in which Chelsea Studio is located (the **"Master Plan"**).[44] Following the public notice, property owners in the designated area established the Committee for Promoting the Establishment of the Association on 7 December 2005 according to Article 13(1) and Article 2.9 of the Urban Improvement Act.[45] On 13 June 2008, Busan announced an invitation for submission of improvement project model proposals for the selection of an improvement project model,[46] which indicates that the improvement project had already been initiated early on following the announcement of the Master Plan.

25. On 20 October 2010, the Mayor of Suyeong-gu collected the opinions of the residents to determine and designate the improvement area.[47] On 8 June 2011, the Mayor of Busan issued a public notice announcing the designation of Gwangan District 2 as the improvement area for the redevelopment project.[48]

26. Before Gwangan District 2 was designated as the improvement area, the Mayor of Busan evaluated the condition of every property building in the area by taking into consideration various aspects, including, but not limited to, the age of the building, any defects therein, and whether the building was constructed upon obtaining a legitimate

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[43] The metropolitan cities of the ROK consist of municipal districts called *gu* or *gun* and Busan consists of fifteen *gu*s and one *gun*. Among the municipal districts of Busan, Chelsea Studio is located in Suyeong-gu. According to the Urban Improvement Act, the Compensation Act as well as other relevant laws, the authority to approve applications or issue public announcements regarding the redevelopment project is divided between the Mayor of Busan and the Mayor of Suyeong-gu.

[44] Exhibit R-5, Busan public notice no. 2005-267.

[45] Exhibit R-6, Urban Improvement Act [Enforcement Date 12 July 2005] [Act No.7597, 13. July 2005, Partial Amendment], Article 13(1) and Article 2.9.

[46] Exhibit R-7, *Busan Metropolitan Government, public invitation for submissions of excellent models for maintenance projects, such as redevelopment and reconstruction*, NEWSIS, 13 June 2008.

[47] Exhibit R-8, Suyeong-gu public notice no. 2010-564.

[48] Exhibit R-9, Busan public notice no. 2011-210.

building permit. Out of the 277 buildings evaluated, 58.5% of them were found to be dilapidated and substandard structures.[49]

27. In the meantime, the construction of Chelsea Studio was completed on 16 November 2010 and the Claimant purchased the building for KRW 865,000,000 on 3 May 2011.[50] The Claimant's assertion that he purchased the building for KRW 1 billion[51] is incorrect, or otherwise unsupported.

C. THE REDEVELOPMENT PROCESS AND RELEVANT DOMESTIC LITIGATION

28. The redevelopment association of Gwangan District 2 (the "Association") was established on 14 March 2013 through the adoption of the Articles of Association as well as the appointment of executive officers through the consent of at least 75% of the property owners in the designated area, provided that they represent owners owning at least 50% of the land area.[5253] As a result, the Claimant automatically became a member of the Association in accordance with Article 19 of the Urban Improvement Act.[54] The Claimant himself acknowledged that he was already aware of the redevelopment improvement project around 2013.[55]

29. On 25 February 2014, the Association designated SK Engineering & Construction (currently SK Ecoplant) as the general contractor—the company responsible for planning, leading, executing, supervising and inspecting the overall construction

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[49] Exhibit R-10, Gwangan District 2 Improvement Area Designation (Draft) Assessment Report, p. 2. "Dilapidated and substandard structures" includes (i) a structure unlikely to maintain its functions due to deterioration or damage, such as the water supply system, the drainage system, (ii) a structure where the cost of repairing and reinforcing its structure to use it for 40 years from the date of completion is estimated to exceed the construction cost of a new structure after demolition. Exhibit R-11, Enforcement Decree of Urban Improvement Act [Enforcement Date 4 April 2011] [Presidential Decree No. 22829, 4 April 2011, Amendment by Other Act], Article 2.

[50] Exhibit R-12, Real estate registration certificate.

[51] NOA, para. 29.

[52] Exhibit R-13, Urban Improvement Act [Enforcement Date 2 February 2013] [Act No.11293, 1 February 2012, Partial Amendment], Article 19.

[53] Exhibit R-14, Approval for the establishment of the Association (No. 2013-2).

[54] Exhibit R-13, Article 19.

[55] Exhibit F, para. 22.

project—at the general meeting and continued to prepare for the implementation of the redevelopment project.[56]

30. After approximately three years of preparation, including collecting the residents' opinions, on 25 October 2017, the Association applied for the approval of the project implementation plan—which subsisted of the land use plan, relocation measures for residents, housing and relocation measures for tenants, and construction plan—to the Mayor of Suyeong-gu, following the majority consent of the members at the general meeting. The Mayor of Suyeong-gu approved the project implementation plan according to Article 28 of the Urban Improvement Act and publicly announced the approval through Busan's public gazette.[5758] The approved project implementation plan listed Chelsea Studio in the details of the land for expropriation.

31. Afterwards, the Association publicly announced to its members through Busan's major newspaper, *Kookje*, that it would start receiving applications for the purchase of apartment units that were to be constructed as a result of the redevelopment project.[59] The members were required to submit applications and report their rights to the Association between 20 November 2017 and 22 December 2017. The deadline for the application was later extended to 10 January 2018.[60] The Association also individually sent application guidelines to its members, including the Claimant, via registered mail.[61]

32. However, the Claimant did not submit an application and, accordingly, lost his membership to the Association pursuant to Article 11 of the Articles of Association the

[56] Exhibit R-15. *SK Engineering & Construction, Wins Contract for Busan Gwangan District 2 Redevelopment Project*, Advertisement of SK Engineering & Construction, 25 February 2014.
[57] Exhibit R-16, Urban Improvement Act [Enforcement Date 24 October 2017] [Act No.14943, 24 October 2017, Partial Amendment], Article 28.
[58] Exhibit R-1, Suyeong-gu Public Notice no. 2017-107.
[59] Exhibit R-17, *Public Announcement regarding Gwangan District 2 no. 2017-02*, KOOKJE.
[60] Exhibit R-18, *Public Announcement regarding Gwangan District 2 no. 2017-03*, KOOKJE.
[61] Exhibit R-17, *Public Announcement regarding Gwangan District 2 no. 2017-02*, KOOKJE; Exhibit R-18, *Public Announcement regarding Gwangan District 2 no. 2017-03*, KOOKJE.

next day upon expiration of the application deadline[62] and became eligible for cash settlement according to the Urban Improvement Act.[63]

33. On 5 April 2019, the Association gained approval of the management and disposal plan from the Mayor of Suyeong-gu. According to the Urban Improvement Act, a redevelopment association must start consulting with the former members of the association, who have not filed for application for the purchase of apartment units, the day after the date of approval and public notice of the management and disposal plan.[64]

34. As briefly explained above in paragraph 23, if the redevelopment association and the owner eligible for cash settlement decide to appraise the land or structure for compensation, (i) the redevelopment association, (ii) the owners of the concerned property now eligible for cash settlement, and (iii) the Mayor of Busan each designates an independent appraisal business entity. Consultation is then based on the arithmetic mean of the appraised values produced by each entity.[65]

35. On 10 May 2019, the Association publicly announced its plans for compensation through *Segye Ilbo*, a major newspaper, and notified the owners eligible for cash settlement, including the Claimant, of its plan to conduct a basic investigation on the properties concerned. According to the above mentioned process,[66] three appraisal business entities—Daeil, Gaon, and A-One—were designated.[67] The Association visited Chelsea Studio with the designated appraisers, but the Claimant refused to cooperate.[68]

36. If the appraisal and negotiation processes are delayed, the resulting burden—such as the additional expenses due to the delay in construction of the new apartment and the

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[62] Exhibit R-3, Articles of Association, Article 11.
[63] Exhibit R-16, Article 20(1)3.
[64] Exhibit R-19, Urban Improvement Act [Enforcement Date 13 October 2018] [Act No.15676, 12 June 2018, Partial Amendment], Article 73.
[65] Exhibit R-20, Enforcement Decree of the Urban Improvement Act [Enforcement Date 13 December 2018] [Presidential Decree No. 29360, 11. December 2018, Amendment by Other Act], Article 60(1); Exhibit R-21, Compensation Act [Enforcement Date 27 March 2018] [Act No.15309, 26 December 2016, Amendment by Other Act], Article 68.
[66] *See* Response, para. 34.
[67] Exhibit R-22, Official notices requesting consultation, 16 April 2020, 29 April 2020, 15 May 2020.
[68] Exhibit R-23, Land Protocol; Exhibit R-24, Goods Protocol.

resulting delay in the move-in dates—is borne by the members of the redevelopment association. The Association, in order to preserve its rights to access the property for assessment,[69] filed for a preliminary injunction before the Eastern Branch of the Busan District Court, requesting the Court to order the Claimant to transfer property to the execution officer, allowing the officer to enter the property, and to prohibit the Claimant's tenants from occupying the property. The Court granted this request on 8 September 2020.[70]

37. In accordance with the injunction order from the Court, the enforcement officers and appraisers visited Chelsea Studio on 18 September 2020 and 22 September 2020, but as indicated in the Claimant's criminal complaint,[71] the Claimant interfered with the enforcement process and, as a result, the enforcement officers were able to enforce the order on only 3 out of 18 units subject to injunction.

38. Meanwhile, the Association attempted several times to consult the compensation amount with the Claimant, but both the Claimant and his representative refused any talks with the Association (May 2019) or consultation pertaining to the compensation amount (16 April 2020, 28 April 2020, 15 May 2020).[7273] On 26 May 2020, the Mayor of Suyeong-gu urged the owners who had refused to consult to cooperate with the consultation through a public announcement pursuant to Articles 4 and 8 of the Enforcement Decree of the Compensation Act.[74]

39. As also indicated in paragraph 23, if consultation does not lead to an agreement, the redevelopment association may apply for adjudication on expropriation to a competent land tribunal or file for sale of the property according to Article 73(2) of the Urban Improvement Act. After having satisfied the requirements—including the issuance of

[69] Exhibit R-25, Urban Improvement Act [Enforcement Date 23 April 2019] [Act No.16383, 23 April 2019, Partial Amendment], Article 65(1); Exhibit R-26, Compensation Act [Enforcement Date 1 July 2019] [Act No.16138, 31 December 2018, Partial Amendment], Article 9(1).

[70] Exhibit R-27, Order, Eastern Branch of Busan District Court Case No. 2017Kadan103394 (Preliminary injunction), 8 September 2020.

[71] Exhibit D.

[72] Exhibit R-23, Land Protocol; Exhibit R-24, Goods Protocol; Exhibit R-28, Consultation Report.

[73] Exhibit R-22, Official notices requesting consultation, 16 April 2020, 29 April 2020, 15 May 2020.

[74] Exhibit R-29, Enforcement Decree of the Compensation Act [Enforcement Date 1 July 2019] [Presidential Decree No.29916, 25 June 2019, Partial Amendment], Articles 4, 8.

certain public notices, gathering residents' opinions, adjustments following the gathering of opinions, designation of appraisers according to the law, public announcement or individual notifications of the compensation plan, issuance of reading notices, settlement attempts through consultation—the Association applied for adjudication on expropriation with the Busan Regional Land Tribunal concerning the property owned by 39 former Associate members who had failed to reach an agreement with the Association.

40. The Office of Suyeong-gu issued perusal announcements regarding the application for adjudication on expropriation together with relevant documents, and requested the owners to provide their opinions.[75] Despite the opportunity to provide his opinion, the Claimant did not participate.

41. Afterwards, on 23 September 2020, the Busan Regional Land Tribunal designated two appraisal business entities—Samchang and Daehwa—for appraisal, and on 5 October 2020, requested the owners including the Claimant to cooperate for appraisal.[76] In response, on 22 October 2020, the Claimant sent a written notice to the Busan Regional Land Tribunal stating that the concerned real estate was not subject to expropriation according to Article 11.6(1) of the Treaty since he was a U.S. citizen.[77]

42. The two appraisal business entities conducted their assessments by setting 23 November 2020 as the assessment date. The appraisal value was based on the published land price of 1 January 2017[78] (which had increased by 53% since the Claimant's purchase of the building in 2011) and reflected various aspects of the property—such as the transportation system, the environment, administrative

[75] Exhibit R-30, Submission on the result of perusal announcement of application for adjudication on expropriation, 23 September 2020.

[76] Exhibit R-31, Compensation Act [Enforcement Date 8 October 2020] [Act No.17225, 7 April 2020, Partial Amendment], Article 58.

[77] NOA, para. 45

[78] According to article 65(2) of the Urban Improvement Act, [Enforcement Date 9 July 2020.] [Act No.17219, 7 April 2020, Partial Amendment] (Exhibit R-32), Articles 70(1), 70(3) and 70(4) of the Compensation Act [Enforcement Date 8 October 2020] [Act No.17225, 7 April 2020, Partial Amendment] (Exhibit R-31), the compensation amount must be based on the arithmetic mean of the appraisal values which in turn must be based on the assessment incorporating the published land price of the date nearest to the date of compensation, and this date must come before the public notice of the relevant authority's approval of the project implementation plan. The date of this published land price is referred to as the base date. In this case, the base date was 1 January 2017.

restrictions, and the condition or level of deterioration of the building. The appraisal value also reflected the land prices of Suyeong-gu as well as the trends of increase in the actual transaction prices by applying an adjusted figure. The Busan Regional Land Tribunal made its final decision based on the appraisal report, deciding the compensation amount of the land as 843,524,160 and the building as KRW 538,836,400—in total KRW 1,382,360,560.[79][80] The Association deposited the above amount at Shinhan bank.[81]

43. Apart from applying for the adjudication process, on 27 July 2020, the Association filed a complaint against the Claimant, requesting the transfer of property before the Eastern Branch of the Busan District Court (**"Property Transfer Claims Lawsuit"**). On 21 October 2020, the Claimant submitted a response stating that Chelsea Studio was not subject to expropriation according to Article 11.6(1) of the Treaty since he was a U.S. citizen.[82]

44. On 7 April 2021, the Court decided in favor of the Association, finding that redevelopment projects are implemented for the public purpose of supporting the healthy development of urban environment and the promotion of public welfare, and the defendant (the Claimant in this case) was also subject to the restrictions of expropriation following the implementation of the housing redevelopment project.[83] The decision was finalized on 28 April 2021 as the Claimant did not submit an appeal.

D. THE CLAIMANT'S POSTERIOR U.S. CITIZENSHIP THROUGH NATURALIZATION

[79] Exhibit R-33, Adjudication Case No.20Suyong0089. The ROK notes that the Claimant has provided in Exhibit E of the NOA, a copy of the Adjudication together with a translation. However, the ROK finds it more appropriate to refer only to the relevant parts of the Adjudication, translation of which the ROK provides separately.

[80] As explained in footnote 19, the Korean law distinguishes between the ownership of land and the ownership of buildings, and since the Claimant owned both Chelsea Studio and the land in which it is built upon, both the land and the building were appraised—the total amount becoming the basis for compensation.

[81] Exhibit E.

[82] Exhibit R-34, Response, Eastern Branch of Busan District Court, 2020GaDan217603 (Property Transfer Claims Lawsuit), 27 July 2020.

[83] Exhibit R-39, Decision, Eastern Branch of Busan District Court, 2020GaDan217603 (Property Transfer Claims Lawsuit), 7 April 2021.

45. The Claimant submits that in 2018, he obtained U.S. citizenship and relinquished his citizenship in the ROK.[84] Both in the NOA and Notice of Intent, the Claimant fails to disclose the exact date of naturalization, and makes nothing but an ambiguous statement that he was naturalized as a U.S. citizen "in or about 2018."[85] The only evidence the Claimant provides is a copy of his passport, which confirms its date of issuance as 8 March 2020.[86]

46. The ROK notes a number of indications that lead to doubts as to the Claimant's acquisition of U.S. citizenship. For instance, the Claimant identified in the NOA its current address as "Yangpyeong, Gyeonggi-do, Republic of Korea."[87] Moreover, the Claimant's Individual Register, which shows his residency status and any changes thereto, confirms that he lost his Korean nationality on 14 April 2020.[88]

47. Considering all the information on record, the Claimant was a Korean national at the time he purchased Chelsea Studio, and remained a Korean national or held dual citizenship for at least until 2020.

E. THE PARTIES' ATTEMPT TO AMICABLY SETTLE THE DISPUTE

48. The Claimant provides a lengthy explanation regarding the parties' consultations that occurred during the consultation period under the Treaty.[89] The Claimant seriously misrepresents the dialogue between the parties' discussions during the preliminary consultations and afterwards. When it comes to this arbitral procedure, the Respondent does not consider it necessary to rebut all of the Claimant's groundless allegations. The Claimant does not even explain how those allegations may have any bearings on the issues of the Respondent's obligations under the Treaty. However, in order to prevent any misunderstanding that can potentially be created by the Claimant's

[84] NOA, para. 36; Declaration of Hun Won dated 23 April 2021 ("**Won Declaration**"), para. 5.
[85] Won Declaration, para. 5 ("In or about 2018, I was naturalized as a U.S. citizen while relinquishing my citizenship in the Republic of Korea.").
[86] Exhibit A.
[87] NOA, para. 24.
[88] Exhibit R-36, Individual Register.
[89] NOA, paras. 159-180.

misleading allegations regarding the Respondent's good faith efforts to amicably settle this dispute, the ROK wishes to briefly address the Claimant's assertions.

49. After receiving the Claimant's Notice of Intent, the Respondent contacted the Claimant to discuss the details to hold a preliminary consultation in accordance with Article 11.15 of the Treaty.[90] With the Claimant's agreement on the date and format of the consultation, the ROK fully prepared the necessary arrangements for the consultation.[91]

50. On 25 March 2021 (KST), the Claimant and the ROK held a preliminary consultation through a video conference. The consultation was carried out in a sound manner, with the Claimant first laying out the basis for his claims, followed by the ROK raising questions about the facts and grounds of the Claimant's claims.

51. The Claimant's illustration of the "fair market price" dialogue during the preliminary consultation is incorrect.[92] The ROK responded that the offered amount of USD 1,236,221.28 was calculated on the basis of the formula provided under the relevant rules and regulations, having the published standard land price as the basis and looking into the market prices of nearby properties for further reference. The Respondent further clarified that (i) the Claimant's position that the price indicated in the appraisal report does not reflect the fair market price is incorrect; and (ii) the appraisal report was prepared in consideration of both the official land price of the Claimant's property and the market price of nearby properties, in accordance with the relevant laws and regulations.

52. Furthermore, the Claimant contends that the redevelopment association (which the Claimant indicates as the "Redevelopment Union") made a concession that is contrary to the ROK's representation made during the preliminary consultation.[93] The referenced adjudication rendered by the Busan Regional Land Tribunal simply reiterates the standards and procedures for compensation set forth in the relevant laws

[90] Exhibit R-37, Email dated 29 January 2021.
[91] Exhibit R-38, Email dated 12 March 2021; Exhibit R-39, Email dated 16 March 2021; Exhibit R-40, Email dated 23 March 2021.
[92] NOA, paras. 165-166.
[93] NOA, para. 166; Exhibit E.

and regulations, which is completely in line with the explanation provided by the ROK to the Claimant during the consultation.[94] The adjudication provides no concession that refutes or undermines the authenticity of the statements made by the ROK explaining the compensation standards for the redevelopment project.

53. Not only has the Claimant mischaracterized the ROK's response and explanation with regard to the nature of the offered price, but further attempted to distort the facts as if the ROK intentionally refused to provide relevant documents and information.[95] In response to the Claimant's request for additional documents on 26 March 2021 (KST)[96], the ROK provided a detailed response explaining the necessary steps for the Claimant to obtain the requested documents.[97]

54. The Claimant requested documents which could only be obtained through procedures under the Official Information Disclosure Act. In this regard, the ROK kindly informed the Claimant with the followings: (i) a general explanation that the requested appraisal report could only be obtained by the property owner himself (the Claimant) through submitting a written request to the relevant government authority, (ii) the application process and necessary paperwork, (iii) a detailed description on relevant laws and regulations, and finally, (iv) the information disclosure application form to assist the Claimant's document search.[98]

55. If the appraisal report is the most important document in pursuing this dispute, as the Claimant contends,[99] he should have filed for disclosure soon after the ROK outlined the procedures in detail. Given the nature of the document disclosure process in the ROK, the Claimant has no reason to blame the ROK for not providing the appraisal report, which can only be obtained by the Claimant himself.

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94 Exhibit E.
95 NOA, paras. 170-171.
96 Exhibit R-41, Email dated 26 March 2021.
97 Exhibit R-42, Email dated 30 March 2021.
98 *Id.*
99 NOA, para. 172.

56. As the Claimant also admits, the ROK requested for documents that it deemed relevant and necessary to prepare for further consultation.[100] This is because the Claimant's Notice of Intent contained limited information which resulted in great difficulty for the ROK to understand the underlying factual and legal grounds for the Claimant's claims. Unfortunately, the Claimant only provided the ROK with documents relating to the Claimant's alleged rental business to date, and the provided documents themselves were insufficient to substantiate the Claimant's claims.

57. During the preliminary consultation, the ROK exerted its best efforts to grasp the nature of the Claimant's claims. In this regard, the ROK asked for information pertaining to the core issues such as (i) the Claimant's acquisition of U.S. citizenship; (ii) whether the Claimant had knowledge of the potential redevelopment plan when he acquired the property; (iii) whether the Claimant is involved in the administrative or criminal process in relation to the project; and (iv) whether the Claimant is willing to hold further consultation. Unfortunately, however, the Claimant refused to answer to the ROK's request or to cooperate.[101] It is the Claimant who failed to fulfil his obligation to make good faith efforts to resolve the dispute amicably in accordance with Article 11.15 of the Treaty.

III. THE ROK'S RESPONSES TO CLAIMANT'S CLAIMS

A. THE CLAIMANT'S CLAIMS LACK JURISDICTION

58. As shown in the facts section of this Response, the Claimant has presented the facts of the present case in a highly selective and distorted manner. Yet the Tribunal ultimately need not assess the factual issues, because the Claimant's case fails at the very jurisdictional threshold. The Tribunal has no jurisdiction in this arbitration and the ROK provides below its preliminary analysis on each of the relevant grounds.

1) The acts or omissions of the Association are not attributable to the ROK

59. Article 11.1.3 of the Treaty provides:

[100] Exhibit R-43, Email dated 19 February 2021.
[101] *See, e.g.*, Exhibit R-44, Email dated 7 April 2021.

> For purposes of this Chapter, measures adopted or maintained by a Party means 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.[102]

60. In order to engage the Arbitral Tribunal's jurisdiction over the Claimant's claims, the Claimant should prove that the alleged measures were adopted or maintained by the Respondent in accordance with the above-mentioned provision. However, the Claimant has failed to do so.

61. As the United States, the other State Party to the Treaty, has expressed in another case under the Treaty, which we agree with, the term "governments and authorities" under Article 11.1.3. of the Treaty means "the organs of a Party, consistent with the principles of attribution under customary international law."[103] Moreover, attribution of conduct of a non-governmental body requires that the conduct is governmental in nature and that the measures adopted or maintained by the non-governmental body are undertaken "in the exercise of powers delegated by" the government or an authority of a Party.[104]

62. As the Respondent explained, the redevelopment project in the present case has been run and administered by the Association, which comprises of owners of the affected properties. The Claimant has not explained how the alleged acts or omissions of the Association, an independent legal entity, can be attributable to the Respondent in accordance with Article 11.1.3. of the Treaty. As set out in the facts section of this Response, the Association is established through the consent of over 75% of the affected property owners who are private parties. The Claimant himself was aware that "the redevelopment at issue is not a project directly conducted by the State."[105]

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[102] Exhibit RL-1, KORUS FTA (Chapter 11), Article 11.1.3.

[103] Exhibit RL-2, Submission of the United States of America in *Elliott v. Republic of Korea*, PCA Case No. 2018-51, para. 3. *See also* Exhibit RL-3, International law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, With Commentaries, Article 4 (2001).

[104] Exhibit RL-1, Article 11.1.3(b).

[105] Exhibit R-39, Decision, Eastern Branch of Busan District Court, 2020GaDan217603, 7 April 2021, p. 3.

63. The acts or omissions of the Association cannot be the measures adopted or maintained by "central, regional, or local governments and authorities" or "non-governmental bodies in exercising powers delegated by central, regional or local governments or authorities," and therefore, are not attributable to the ROK. In this regard, the jurisdiction of the Arbitral Tribunal over Claimant's claims should be denied. The Respondent will further elaborate on this point in due course.

2) There is no ratione personae

64. Article 11.1(a) of the Treaty stipulates that the scope of protection for investment applies to "investors of the other Party"[106]—*i.e.*, the Claimant must be an investor of the United States. However, the Claimant was not a qualifying investor under the Treaty as he was a Korean national at the time of his purchase of Chelsea Studio in 2011. The ROK reserves its right to fully address whether the Claimant is an investor under the Treaty at the appropriate juncture.

3) There is no ratione materiae

65. Article 11.1(b) of the Treaty further stipulates that the scope of protection for investment applies to "covered investment"[107]—*i.e.*, Chelsea Studio must be a covered investment. Article 1.4 of the Treaty defines a covered investment as 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 date of entry into force of this Agreement or established, acquired, or expanded thereafter. Moreover, Article 11.28 of the Treaty requires that an investment have the characteristic 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.

66. The Claimant was not "an investor of the other Party" at the time of his alleged investment in 2011 as he was not a national of the United States. Furthermore, there is no evidence that the Claimant established, acquired, or expanded his investment after

[106] Exhibit RL-1, Article 11.1.
[107] *Id.*

he obtained U.S. nationality. Also, the Claimant did not make an investment as defined in Article 11.28 of the Treaty as the characteristic of an investment is not satisfied. The Respondent reserves its rights and will further elaborate on this matter in due course.

4) There is no ratione temporis

67. The Arbitral Tribunal further lacks *ratione temporis* as all of the Claimant's claims are time-barred. The purpose of a time-bar provision is "to require diligent prosecution of known claims and insuring that claims will be resolved when evidence is reasonably available and fresh, therefore to protect the potential debtor from late actions."[108]

68. Article 11.18.1 of the Treaty stipulates a three-year limitation period for claims made under the Treaty. Based on the text of this provision, the Claimant is precluded from submitting claims in respect of his loss or damage of which he first became aware, or should have first become aware, more than three years before the date he submitted the NOA by courier on 10 May 2021. Put in other words, the Claimant is precluded from advancing claims in respect of loss or damage of which he first became aware, or should have become aware, before 10 May 2018.

69. It is clear from the Claimant's own pleadings as to the facts in the NOA and exhibits attached thereto that he first acquired, or should have first acquired, knowledge of the alleged loss or damage "by exercise of reasonable care of diligence"[109] as early as in 2013 when he was "alerted of talks regarding a potential redevelopment project",[110] or at the latest in 2017 when five of his tenants moved out and the redevelopment project was officially approved by the City with proper notice.[111]

[108] Exhibit RL-4, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, Decision on Jurisdiction, 22 August 2008, para. 3.5.4.5.
[109] Exhibit RL-4, para. 209.
[110] Exhibit F, para. 22.
[111] NOA, para. 55.

70. For these reasons, the Claimant's claims are clearly and objectively time-barred and outside the Arbitral Tribunal's jurisdiction, warranting dismissal of his claims. The Respondent will explain this matter in more detail at the appropriate juncture.

5) The Claimant failed to comply with the waiver requirement of the Treaty

71. As Article 11.18(2) of the Treaty clearly establishes, the Clamant may not submit any claims to arbitration under the Treaty unless the NOA is accompanied by the Claimant's written waiver of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures.

72. As the arbitral tribunal in *Renco* rightly observed, "an arbitration agreement will be formed under the Treaty *only if* the investor satisfies *formal* and *material* waiver requirements" of the relevant treaty and "an investor's waiver must be given in writing and it must be clear, explicit and categorical'."[112]

73. In the present case, the Claimant has not waived its right to initiate or continue before any administrative tribunal or court under the domestic law or other dispute settlement procedures as stipulated in Article 11.18(2) of the Treaty. On the contrary, the Claimant has expressed its intent or willingness to "commence a lawsuit, if necessary" other than filing for an ISDS claim in connection with the redevelopment project at issue[113] and provides no other information or statement that effectively withdraws such intent or willingness.

74. In this regard, the Arbitral Tribunal lacks jurisdiction over the Claimant's claims. The Respondent will further elaborate on this point in due course.

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[112] Exhibit RL-5, *The Renco Group, Inc. v. Republic of Peru [I]*, ICSID Case No. UNCT/13/1, Partial Award on Jurisdiction, July 2016, paras. 73-74.

[113] Exhibit B. On a separate note, and for information, Exhibit B in the NOA contains a notice both in English and Korean versions but with a slight discrepancy. The Korean version provides at the outset that, in literal translation, "an Investor-State Dispute has been commenced under the Treaty"; whereas the English version contains no statement to this effect but only that Mr. Won's Building is subject to protection under the Treaty. The Korean version further reads, in translation, "should Mr. Won's investment incur physical or financial damages due to forced destruction of the Property, Mr. Won will take all legally permitted measures as well as file for punitive damages and immediate suspension of every pending, illegal procedures is urged."

B. THE CLAIMANT'S CLAIMS FAIL ON THE MERITS

75. Even if the Arbitral Tribunal finds that it has jurisdiction in this case, the Claimant still has no case on the merits. In this regard, the ROK rejects every argument made by the Claimant in the NOA and denies that it has breached any of its obligations under the Treaty.

76. The Claimant makes a number of allegations regarding the ROK's acts or omissions concerning the acquisition of Chelsea Studio. However, the Claimant solely and broadly argues that "[t]his dispute principally concerns the Respondent's breach of Chapter 11, Section A-B of the KORUS FTA"[114] and requests a declaration that the ROK "violated its obligations by breaching Chapter 11, Section A-B of the KORUS FTA"[115] without particularizing the specific provisions or obligations.[116]

77. While the Claimant's case deserves no attention due to its lack of clarity and specificity, for good order, the ROK will provide following observations in response at this stage to show the Claimant has no case whatsoever. Nothing in this Response should be taken as the ROK's acceptance of any aspect of the Claimant's allegations and the ROK reserves the right to present its position in detail at the appropriate juncture.

1) Expropriation without just compensation

78. The Claimant argues in the NOA that the redevelopment project is an expropriation without just compensation, violation of fair and equitable treatment, and breach of the due provisions under the Treaty. The Claimant's factual and legal claims are purely unjustified and prejudicial.

79. A number of arbitral tribunals have found that the determination of public purpose requires an analysis of "whether the measure had a reasonable nexus with the declared public purpose or in other words, was at least capable of furthering that purpose,"[117] or

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[114] NOA, para. 10.
[115] NOA, para. 207.
[116] The Claimant's lack of due diligence and specificity is further demonstrated by its citation in para. 17 of the Notice of Arbitration which reads "*See generally*, KORUS FTA".
[117] Exhibit RL-6, *Vestey Group Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/06/4, Award, 15 April 2016, para. 296; Exhibit RL-7, *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, paras. 429-432.

whether the government acted in good faith based on proper legal and policy basis under the domestic law.[118]

80. Further, arbitral tribunals have widely recognized the discretion of the government in terms of public purpose. For example, the tribunal in *Vestey Group v. Venezuela* held that "the state is 'free to judge for itself what it considers useful or necessary for the public good'" and that a State's public policy determination should be given broad deference unless the State blatantly misuses its power to set public policies.[119] Relatedly, the arbitral tribunal in *Quiborax and Non-Metallic Minerals v. Bolivia* found that the determination of the national and public interest is a "sovereign right".[120]

81. With respect to the redevelopment project in question, its public purpose or nature has been demonstrated and confirmed by the facts as set forth in the facts section of this Response. In the Property Transfer Claims Lawsuit, for instance, the Eastern Branch of Busan District Court found that "housing redevelopment project is a project implemented in accordance with law for the purpose of improving residential environment in the areas concentrated with dilapidated and substandard structures. As such, the primary objective of the redevelopment project rightly serves public purpose and the fact that individual participants can benefit from such project is an ancillary matter."[121]

82. In conclusion, the acquisition in this case was carried out to serve a public purpose of advancing the quality of residential environment and develop the urban environment by systematically renewing Gwangan District 2, full of dilapidated and substandard structures and lagging behind compared to other districts. Unlike the Claimant's arguments, the acquisition of Chelsea Studio in this case has been conducted in accordance with Article 11.6 of the Treaty and the relevant Korean law. The Claimant's allegations that the redevelopment project benefited solely the

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[118] Exhibit RL-8, *Liberian Eastern Timber Corporation (LETCO) v. The Government of the Republic of Liberia*, ICSID Case No. ARB/83/2, Award, 31 March 1986, paras. 664-667.
[119] Exhibit RL-6, paras. 294-296.
[120] Exhibit RL-9, *Quiborax S.A. and Non-Metallic Minerals S.A. v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 245.
[121] Exhibit R-35, p. 3.

redevelopment association and the construction company are simply a speculation without proof.

83. In terms of compensation, Article 11.6.2(b) of the Treaty requires it to be "equivalent to the fair market value of the expropriated investment immediately before the expropriation took place" though it provides no further explanation as to how the fair market value is to be evaluated.[122] Meanwhile, the Treaty requires for "prompt, adequate, and effective compensation"[123] which shall "not reflect any change in value occurring because the intended expropriation had become known earlier."[124] This notion is equally reflected in the Compensation Act which specifies that the objective assessment of the land price excludes any change in value due to the intended expropriation, the constitutionality of which has been confirmed by the Constitutional Court, details of which will follow.

84. Specifically, Article 70(1) of the Compensation Act stipulates that for any land acquired through consultation or adjudication on expropriation, compensation shall be provided on the basis of "the published land prices under the Act on the Public Announcement of Real Estate Values".[125] The Compensation Act further requires that such compensation be provided at "a reasonable price" that takes into consideration the fluctuation rate of the land price prescribed by Presidential Decree for the area, the producer price inflation rates, and other conditions of the land, such as its location, form, environment, and usage.[126] Article 67(1) of the Compensation Act provides that the computation of compensation shall be "based on the price at the time of yielding an agreement where consultation is held", but that any price fluctuation due to the relevant public works shall be excluded from the computation.[127] As such, any potential development profits are not part of consideration for the calculation of compensation.

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[122] Exhibit RL-1, Article 11.6.2(b).
[123] Exhibit RL-1, Article 11.6.1(c).
[124] *Id.*, Article 11.6.2(c).
[125] Exhibit R-7, Compensation Act, Article 70(1).
[126] *Id.*
[127] *Id.*, Article 70(4).

85. The legitimacy of this provision including the assessment of the amount of compensation is demonstrated by a decision of the Constitutional Court of the ROK. The Constitutional Court, concerning a petition for review of the constitutionality of this provision, ruled that the provision does not violate the principle of just compensation prescribed in Article 23(3) of the Constitution.[128] In its reasoning, the court found that "development profits are incurred only by the implementation of the project by the project operator and, thus, are of a nature that is not necessarily attributable to the landowner, but rather to the project operator or, ultimately, the public; and therefore they cannot be considered to form part of the objective value of the land in question."[129] The court further held "published land price . . . rightly reflects the objective value of the standard land on the base date; the selection of the standard land is appropriate for the finding of a similarity in price between the land subject to acquisition and the standard land, and the base date correction method that calculates any changes in the market value of the land since the base date is appropriate; and, as such, calculation of the compensation amount based on the published land price reflects the objective value of the land subject to acquisition at the time of expropriation."[130]

86. In the case of the present arbitration, during the period for consultation concerning compensation between April and May of 2020, three independent appraisers (Daeil, Gaon, A-One) determined the amount of compensation for the land at the arithmetic mean of different prices obtained by considering various correction factors, which included not only the published standard land price but also the land price fluctuation rate, correction of the base date reflecting wholesale inflation rate, regional factors considering the location, form, environment and usage of the land, site-specific factors and other factors. Similarly, on 23 November 2020, Busan Regional Land Tribunal, in its adjudication on expropriation, also considered the above factors and calculated

[128] Exhibit RL-10, Petition for review of the constitutionality of Article 70(1) of a former Act on Acquisition of and Compensation for Land, etc. for Public Works Project, 2011HeonBa162, Decision, 26 December 2013, p. 1. Article 23(3) of the Constitution provides "Expropriation, use or restriction of private property from public necessity and compensation therefore shall be governed by Act: Provided, that in such case, just compensation shall be paid." The Constitution of the ROK.

[129] Exhibit RL-10, Petition for review of the constitutionality of Article 70(1) of a former Act on Acquisition of and Compensation for Land, etc. for Public Works Project, 2011HeonBa162, Decision, 26 December 2013, p. 4.

[130] *Id.*, p. 4.

the amount of compensation by arithmetically averaging two evaluations respectively provided by two independent appraisers (Daehwa and Samchang).

87. The published land price, therefore, is not uniformly applied when calculating the amount of compensation, but various correction factors are also taken into consideration including the location, usage, and transactions history of the adjacent lands. In light of the above, the amount of compensation calculated for the land acquisition in this case can be considered to be equivalent to the fair market value. The Respondent will further elaborate on this and provide relevant evidence in due course.

2) Minimum Standard of Treatment (MSOT)

88. The Claimant asserts that the ROK breached its minimum standard of treatment obligation of the Treaty.[131] However, such arguments are mere allegations without proper legal or factual support and are based on a misunderstanding and misinterpretation of the Treaty and other applicable laws.

89. The fair and equitable treatment clause in the Treaty differs from typical, or other commonly-seen, fair and equitable treatment clauses. Article 11.5.2 of the Treaty explicitly provides the customary international law minimum standard of treatment as the applicable standard in this provision.[132] This is also confirmed by the consistent position of the United States that the minimum standard of treatment provision "prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party."[133] The international jurisprudence is also clear that "the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of States"[134] and it is the Claimant's burden to establish the existence and

[131] NOA, para. 68.
[132] Exhibit RL-1, Article 11.5.
[133] Exhibit RL-12, Submission of the United States of America in *Vento Motorcycles v. Mexico*, ICSID Case No. ARB(AF)/17/3, para. 10. *See also* Exhibit RL-2, para. 13.
[134] Exhibit RL-13, *Jurisdictional Immunities of the State* (*Germany v. Italy*), *Judgment, I.C.J. Reports 2012*, p. 99, para. 55 (citing *Continental Shelf* (*Libyan Arab Jama-hiriya/Malta), Judgment, I.C.J. Reports 1985*, p. 13, para. 27).

applicability of a relevant obligation under customary international law that satisfies such requirements.[135]

90. Once the Claimant establishes a rule of customary international law, whether the respondent State acted in violation of that rule must then be demonstrated.[136] The threshold for finding an MSOT violation yet "remains high".[137] The burden is high in that the determination of a breach "must be made in the light of the high measure of deference that international law generally extends to the right of domestic authorities to regulate matters within their borders."[138] Several arbitral tribunals including *Waste Management v. Mexico (II),*[139] *Genin v. Estonia,*[140] and *Biwater Gauff v. Tanzania*[141] have confirmed the high threshold for establishing unfair and inequitable treatment. The arbitral tribunal in *Thunderbird Gaming Corporation v. Mexico* in this regard considered "acts that would give rise to a breach of the minimum standard of treatment prescribed by the NAFTA and customary international law as those that, weighed against the given factual context, amount to a gross denial of justice or manifest arbitrariness falling below acceptable international standards."[142]

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[135] Exhibit RL-14, *Cargill v. Mexico*, ICSID Case No. ARB(AF)/05/2, Award, 18 September 2009, para. 273 ("the proof of change in a custom is not an easy matter to establish. However, the burden of doing so falls clearly on Claimant."). *See also* Exhibit RL-2, para. 16.

[136] Exhibit RL-2, Submission of the United States of America in *Elliott v. Republic of Korea*, PCA Case No. 2018-51, para. 17.

[137] Exhibit RL-15, *International Thunderbird Gaming Corporation v. The United Mexican States*, UNCITRAL, Arbitral Award, para. 194. Arbitral awards under NAFTA, including this case, and the reasoning therein can be of reference because, like Article 11.15 of the Treaty, the minimum standard of treatment provision of Article 1105 of NAFTA prescribed that contracting parties afford the customary international law standard of treatment to investments made by investors of other contracting parties, and that the concepts of fair and equitable treatment and full protection and security require no further treatment beyond what is required by that the MSOT standard. This is expressly confirmed in the NAFTA Free Trade Commission's Notes of Interpretation and demonstrated by the consistent stance of the United States in its submissions. Exhibit RL-16; Exhibit RL-2, para. 16; Exhibit RL-2, paras. 9-13.

[138] Exhibit RL-17, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL (NAFTA), First Partial Award, 13 November 2000, para. 263.

[139] Exhibit RL-18, *Waste Management v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, 30 April 2004, para. 98. This case considered a claim under NAFTA Article 1105 which materially replicates the language of Article 11.5 of the Treaty.

[140] Exhibit RL-19, *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, para. 367.

[141] Exhibit RL-20, *Biwater Gauff (Tanzania) v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, para. 597.

[142] Exhibit RL-15, para. 194.

91. Legitimate expectation, which the Claimant claims to have been violated due to the ROK's Treaty breach,[143] is also not a sufficient ground to provoke an international obligation. The International Court of Justice, for instance, noted that while there may be references to legitimate expectations in investor-State arbitration awards that apply treaty clauses providing for fair and equitable treatment, "[i]t does not follow from such references that there exists in general international law a principle that would give rise to an obligation on the basis of what could be considered a legitimate expectation."[144] The United States, likewise, opined in a case that "[t]he concept of 'legitimate expectations' is not a component element of 'fair and equitable treatment' under customary international law that gives rise to an independent host State obligation."[145]

92. Even so, the Claimant still cannot argue for any violation of legitimate expectation or even that he had legitimate expectation under the Treaty to begin with. The Claimant has failed to indicate whether the ROK or the legal framework governing foreign investment at the time of his purchase of Chelsea Studio provided safeguards that he was legally entitled to rely upon in making his investment, and that the ROK then altered investment conditions in such a way as to undermine his expectations, if any, about the investment regime.[146]

93. The Claimant's allegations come nowhere close to satisfying his burden to establish that the ROK has violated its minimum standard of treatment obligation under the Treaty and merit a dismissal in their entirety.

3) National Treatment

94. The Claimant asserts that he "was discriminated against because he was a foreign investor, living abroad, without the means and time to be engaged in this matter as much

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[143] NOA, para. 152.

[144] Exhibit RL-21, *Obligations to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Judgment, I.C.J. Reports 2018*, p. 507, para. 162.

[145] Exhibit RL-22, Submission of the United States of America in *Lone Pine v. Canada*, ICSID Case No. UNCT/15/2, paras. 26-27.

[146] Exhibit RL-23, *Tecnicas Medioambientales Tecmed SA v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, para. 154; Exhibit RL-24, Separate Opinion of Prof. Thomas Walde in *Thunderbird Gaming v. United Mexican States*, UNCITRAL (NAFTA), 1 December 2005.

as other Korean nationals."[147] As with other claims, this allegation is unjustified and groundless.

95. Article 11.3 of the Treaty is the relevant provision for this analysis. The Claimant similarly bears the burden to prove that he or his investment were accorded "treatment"; were in "like circumstances" with domestic investors or investments; and received treatment "less favourable" than that accorded to domestic investors or investments.[148]

96. Likewise, the Claimant has failed to meet that burden. He has failed to show even one incident where and how the Respondent has discriminated against the Claimant.

C. THE CLAIMANT'S DAMAGES CLAIM IS UNSUBSTANTIATED

97. In the NOA, the Claimant asserts, without evidence, that its alleged damages or losses are "estimated to be in the amount of $5,374,875.12".[149] The NOA, however, provides no valuation evidence in support of the Claimant's allegation of the fair market value of its property, or enough factual evidence regarding his alleged losses from rental income.

IV. PROCEDURAL MATTERS

A. THE ROK'S CONTACT INFORMATION

98. Pursuant to Article 11.27 and Annex 11-C of the Treaty, the ROK confirms that its address for service is:

Address: **International Dispute Settlement Division**
Ministry of Justice, Republic of Korea
Building #1
47 Gwanmun-ro Gwacheon-si
Gyeonggi-do, 13809
Republic of Korea

[147] NOA, para. 119.
[148] Exhibit RL-1, Article 11.3.
[149] NOA, para. 207

B. THE ARBITRATION AGREEMENT AND APPLICABLE ARBITRATION RULES

99. The Claimant has submitted its claim against the ROK to arbitrate under Article 11.16 of the Treaty[150] and selected the 2010 UNCITRAL Rules.[151] In this regard, the ROK understands that the 2010 UNCITRAL Rules shall apply to this arbitration.

C. APPOINTMENT OF ARBITRATOR

100. The ROK agrees that the Arbitral Tribunal shall consist of three arbitrators. Pursuant to Article 11.19(3) of the Treaty, the Claimant and the Respondent shall each appoint one (1) arbitrator and agree on a method to appoint the third who shall act as the presiding arbitrator.

101. The ROK appoints as Arbitrator **Bernardo María Cremades**. Mr. Cremades's contact details are as follows:

Address:	B Cremades y Asociados Goya, 18, 28001 Madrid, Spain
Telephone:	(+34) 91 423 72 00
Facsimile:	(+34) 91 576 97 74
Email:	bcremades@bcremades.com

102. To the best of the ROK's knowledge, Mr. Cremades is independent and impartial of the parties. The ROK is unaware of any circumstances, past or present, likely to give rise to justifiable doubts as to Mr. Cremades's independence or impartiality.

D. LANGUAGE(S) OF ARBITRATION

103. Pursuant to Article 11.20.3 of the Treaty, English and Korean shall be the official languages of this arbitration. The ROK agrees with the Claimant's proposal that English and Korean be the official languages to be used in this arbitration with a caveat which shall be separately consulted between the parties in due course.

[150] *Id.*, para. 181.
[151] *Id.*, para. 1.

E. PLACE OF ARBITRATION

104. Pursuant to Article 11.20 of the Treaty, the Parties may agree on the legal place of arbitration. If the Parties fail to agree, the Arbitral Tribunal shall determine the place in accordance with the UNCITRAL Rules, provided that the place be in the territory of a State that is a party to the New York Convention.

105. The Claimant proposed Washington D.C., United States as the place of arbitration[152]. The ROK does not agree. The parties shall separately consult each other on this matter.

F. ADMINISTRATION OF THE ARBITRATION

106. The ROK notes that the Claimant has proposed the International Centre for Settlement of Investment Disputes (ICSID) as the administering institution[153]. The ROK does not dispute that the ICSID is a well-respected and highly-experienced institution for the administration of arbitral proceedings. However, the parties may consider other options, taking into consideration the nature of this arbitration and other circumstances. The parties shall separately consult each other on this matter in due course.

V. REQUEST FOR RELIEF

107. For the reasons outlined above and that will be supplemented later in these proceedings, the ROK respectfully requests that the Arbitral Tribunal

(a) DECLARE that the Claimant's claims are barred for lack of jurisdiction;

(b) DECLARE that the Respondent did not breach any of its obligations under the Treaty;

(c) ORDER the Claimant to pay all costs and fees reasonably incurred in connection with this arbitration; and

(d) ORDER any further and/or additional relief for the Respondent as the Arbitral Tribunal may deem just and appropriate.

[152] *Id.*, para. 184.
[153] *Id.*, para. 1.

VI. RESERVATION OF RIGHTS

108. The ROK expressly reserves all of its rights in full, including, without limitation, its right to:

(a) Raise preliminary objections for determination on an expedited basis or otherwise; and

(b) Amend and supplement the positions set out in this Response, including its prayers for relief, including, without limitation, with respect to matters of jurisdiction and merits.

Respectfully submitted on 4 June 2021

International Dispute Settlement Division
Ministry of Justice, Republic of Korea
Changwan Han
Heungsae Oh
Young Shin Um