

HKIAC Case No. 18117

**IN THE MATTER OF AN ARBITRATION UNDER THE
FREE TRADE AGREEMENT BETWEEN THE UNITED STATES OF
AMERICA AND THE REPUBLIC OF KOREA (THE “KORUS FTA”)**

-and-

**THE UNCITRAL ARBITRATION RULES (WITH NEW ARTICLE 1,
PARAGRAPH 4, AS ADOPTED IN 2013) (THE “UNCITRAL RULES”)**

-between-

**██████████
(the “Claimant”)**

-and-

**THE GOVERNMENT OF THE REPUBLIC OF KOREA
(the “Respondent”, and together with the Claimant, the “Parties”)**

CONCURRING OPINION OF DR. BENNY LO

Tribunal

Judge Bruno Simma (Presiding Arbitrator)
Dr. Benny Lo
Professor Donald McRae

Assistant to the Tribunal

Dr. Heiner Kahlert

Administering Institution

Hong Kong International Arbitration Centre (“**HKIAC**”)

A. Introduction

1. This Concurring Opinion should be read in conjunction with the Final Award¹ herein by which the Tribunal upheld the Respondent's Preliminary Objection no. 1 and determined that the Tribunal has no jurisdiction over the Claimant's claim ("**Final Award**"). With that conclusion, the Tribunal found it unnecessary to consider Preliminary Objections nos. 2 to 4.²
2. In Part VII of the Final Award, the Tribunal further decided that, while the Claimant was the unsuccessful party, she should not be ordered to bear all the costs of this arbitration. Instead, the Tribunal ordered that each Party shall bear half of the fees and expenses of the Tribunal and the HKIAC, as well as its own legal costs and expenses ("**Costs Order**").³
3. Though I am in full agreement with the Tribunal's conclusions in the Final Award, in deference to counsel's very detailed submissions, I provide below a succinct analysis of the Respondent's Preliminary Objections nos. 2 to 4. It is my view that the Costs Order could be further justified by reference to those objections. In short, despite the skillful submissions of the Respondent's counsel, I agree with the Claimant that the Respondent's Preliminary Objections nos. 2 to 4 lack merit. For this additional reason, I consider it just and fair that the Respondent should be ordered to pay half of the arbitration costs and bear its own costs.

B. Objection no. 2: Fork-in-the-Road

4. The Parties' arguments on the fork-in-the-road objection were particularly contentious⁴ and took up considerable time. Between them they had called three professors to testify on matters of Korean law. Such testimonies took up the entire second day of the Hearing.
5. The relevant treaty provision is Annex 11-E of the KORUS FTA⁵, which reads:-

"1. Notwithstanding Article 11.18.2, an investor of the United States may not submit to arbitration under Section B a claim that Korea has breached an obligation under Section A either:

¹ The defined terms in the Final Award are adopted in this Concurring Opinion.

² Final Award §169.

³ Final Award §§178-183.

⁴ See Final Award §§62-67 for a broad summary of the Parties' arguments.

⁵ This was not in dispute.

(a) on its own behalf under Article 11.16.1(a); or

(b) on behalf of an enterprise of Korea that is a juridical person that the investor owns or controls directly or indirectly under Article 11.16.1(b),

if the investor or the enterprise, respectively, has alleged that breach of an obligation under Section A in any proceedings before a court or administrative tribunal of Korea.

2. For greater certainty, where an investor of the United States or an enterprise of Korea that is a juridical person that the investor owns or controls directly or indirectly makes an allegation that Korea has breached an obligation under Section A before a court or administrative tribunal of Korea, that election shall be final, and the investor may not thereafter allege that breach, on its own behalf or on behalf of the enterprise, in an arbitration under section B.”

“Effective election” necessary

6. Literally read, a final election by a United States investor would have been, or deemed to have been, made if he simply “*makes an allegation*” of the relevant breach before any court or administrative tribunal of Korea. This was indeed the position taken by the Respondent.⁶
7. But treaty interpretation is not purely a literal exercise done in a vacuum. Article 31(1) of the Vienna Convention on the Law of Treaties (1969) provides that a treaty shall be interpreted:-

“in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”
8. The object and purpose of fork-in-the-road provisions such as Annex 11-E, as the Respondent accepts⁷, are to prevent multiplicity of proceedings in multiple fora. Such provisions require an investor to choose between the host State’s domestic courts or tribunals on the one hand, and international arbitration on the other, as the forum to resolve an investment dispute.
9. As the tribunal in *M.C.I. Power Group L.C. and New Turbine, Inc. v. Republic of Ecuador*⁸ observed, “[the] right to choose once is the essence of the ‘fork-in-the-road’ rule”.

⁶ Amended Application for Preliminary Objections §§5.25-5.26.

⁷ Amended Application for Preliminary Objections §5.4. This is also accepted by the Claimant: see Rejoinder to Respondent’s Application for Preliminary Objections §3.5.

⁸ ICSID Case No. ARB/03/6, Award, 31 July 2007, §181 (Exhibit RLA-22).

10. If that is so, would the literal interpretation in §6 above reflect the true intention of Annex 11-E and serve its object and purpose? In particular, would a final election be made, or deemed to have been made, if the investor simply “*makes an allegation*” of the breach in a court or administrative tribunal of Korea *irrespective* whether that forum is competent to determine the allegation and grant relief for it? Or would such an election only be made, or deemed to have been made, if he makes the allegation in a domestic forum that is competent to do so?
11. On this last question, which I referred to as “*effective election*” at the Hearing, the Claimant’s answer was yes. The Claimant argued that such an allegation “*must be made in a context where the claim can be resolved by an authority with decisional powers.*”⁹ During closing submissions, the Claimant reiterated that “*it would be unreasonable to apply [Annex 11-E] when a claim is uttered in a tribunal that has no competence to decide it on the merits.*”¹⁰
12. I find the Claimant’s submissions persuasive. On the other hand, apart from relying on the literal interpretation of Annex 11-E, the Respondent did not put forth any other reasons, whether based on first principle, policy or otherwise, to explain why this is incorrect.
13. In fact, when I explored this issue of “*effective election*” with the Parties in the course of closing submissions, the Respondent’s counsel made the following submission:-

*“In terms of the second part of Mr Lo’s question about whether there is a concept of an effective election, we say the requirement in [the KORUS FTA] is simply to raise an [allegation] before a court or administrative tribunal. There is nothing explicit to say that the court or administrative tribunal must be competent to hear that, although we do accept that such thing is implicit.”*¹¹ (my emphasis)
14. In my view, therefore, in order for Annex 11-E to be triggered, the allegation of breach must be made in a court or administrative tribunal of Korea that is competent to adjudicate upon that allegation and grant relief for it. It is most *unlikely* that any such allegation made in a domestic forum that is *incompetent* to do so would deprive an investor’s right to resort to international arbitration under the KORUS FTA. That could not in my view be the meaning and effect of Annex 11-E when interpreted in good faith in the light of its object and purpose.
15. An important consequence of this is that the domestic proceedings within which the allegation was made must also involve identical parties, identical object and identical causes of action in order for Annex 11-E to be triggered. In other words, the “triple identity” test, as referred to

⁹ Response to Respondent’s Application for Preliminary Objections §7.6, point (iii).

¹⁰ Transcript of the Hearing, Day 3, page 42, line 11 to page 43, line 13.

¹¹ Transcript of the Hearing, Day 3, page 20, lines 17-24.

by the Respondent in a related context¹², must be met. It is only where such “triple identity” is present that it could be said that the investor has effectively elected to bring the relevant claim against the Respondent in the domestic forum. If the investor simply alleges a breach not in the context of bringing a claim against the Respondent, I see no logical, policy or other reason for him to be barred from alleging that breach before an international arbitral tribunal.

Allegations before the Central Land Expropriation Committee

16. On the facts, the Respondent first relied on the Claimant’s two statements made to the CLEC in her appeal against the SLEC’s decision on compensation amount to be paid to her for the Property. The relevant allegations were said to be made in her statement of appeal dated 8 May 2016¹³ and a further written submission subsequently filed on 13 June 2016¹⁴. In my view, the Claimant’s two statements made to the CLEC do not assist the Respondent.
17. First, the Claimant’s statements did not amount to an *effective* election under Annex 11-E as the CLEC did not have the competence to adjudicate on the Claimant’s complaints regarding violations of the KORUS FTA. This is undisputed and confirmed by, *inter alia*, CLEC’s own decision dated 19 January 2017 with respect to the Claimant’s appeal in which it states:-

“... land expropriation committees in their nature may not render any adjudication that invalidates the authorization of a project itself or makes it impossible to implement a project unless the authorization of such project is cancelled by administrative litigation (Supreme Court Decision 93 Nu 19375 rendered on November 11, 1994).

*... In this regard, the claim of the above-mentioned Appellants [i.e. the Claimant and her husband] that such adjudication should be cancelled or their lands should be excluded from the subject zone of the Project may not be accepted.”*¹⁵

18. In fact, after having accepted that it is implicit within Annex 11-E that there would only be an *effective* election if the allegation of breach is made to a forum having competence to hear it, the Respondent did not seem to press those two allegations further by saying:-

“However, we would say that is not a total defence for the claimant. At best, it potentially excuses two of the submissions made. They are the two submissions to the

¹² Respondent’s alternative fork-in-the-road argument: Amended Application for Preliminary Objections §5.28.

¹³ Exhibit R-20.

¹⁴ Exhibit R-21.

¹⁵ Exhibit R-23, page 11 of the PDF. Transcript of Hearing, Day 3, page 19, line 20 to page 20, line 11.

*CLEC ... It does not work, and it is irrelevant, for the submissions before the Seoul Western District Court ... which was clearly a court of Korea and competent to hear such allegations.*¹⁶

19. I am therefore in no doubt that, despite what the Claimant alleged in her two statements, the CLEC could not have adjudicated upon them and granted relief against the Respondent for them. Put simply, the Claimant's statements were irrelevant for the purpose of Annex 11-E.
20. Second, even if the two statements were relevant, when one looks at what the Claimant actually alleged, it is not clear at all whether she actually made allegations of breach in the sense of asking the CLEC to adjudicate upon them and grant relief for them. Given the nature of the CLEC proceedings (see §17 above), the "triple identity" test was clearly not satisfied.
 - 20.1 In the Claimant's statement of appeal dated 8 May 2016, she stated her wish "*to determine all matters within the legal framework of the KORUS FTA*". She went on to say that she "*shall submit a local & international complaint against the [SLEC] and shall hold the [SLEC] responsible*" and that the SLEC "*has no right to expropriate 12-93 [REDACTED] until the arbitration lawsuit is over and also inform that all of these actions are being taken within the boundary of the KORUS FTA laws.*" Reading this statement as whole, what the Claimant requested was, in effect, a suspension of the expropriation process until an arbitration she intended to bring was over. She did not elect for the CLEC to adjudicate upon allegations of treaty breach against the Respondent and grant relief for them; and
 - 20.2 In her further submissions filed on 13 June 2016, the Claimant stated that she has "*the right to file a complaint to the International Court of Arbitration as a KORUS FTA investor.*" She made further complaints about the way the injunction was served at the Property. Though she did allege a breach of the KORUS FTA, the Claimant went on to state explicitly that she would "*claim for punitive damages in the US court*" and that she would raise such violations at the US presidential election. None of these shows that she had elected to seek relief from the CLEC on her alleged treaty breach.
21. Third, and in any event, I am not persuaded that the Respondent has proved, on the evidence before the Tribunal, that the CLEC is "*an administrative tribunal of Korea*" within the meaning of Annex 11-E of the KORUS FTA:-
 - 21.1 To start with, it is undisputed that there is no clear definition of what constitutes an "*administrative tribunal of Korea*" either in the KORUS FTA itself or in Korean law;

¹⁶ Transcript of Hearing, Day 3, page 20, line 17 to page 21, line 7.

- 21.2 While the Respondent referred to a decision of the Supreme Court of Korea holding that the CLEC “*has the characteristics of an administrative tribunal*” and decisions of the Constitutional Court of Korea holding that the procedure before the CLEC “*possesses the characteristics of an administrative appeal*” and that a decision of the CLEC “*is final and conclusive*”¹⁷, none of these holdings is directly on the point;
- 21.3 Having acknowledged that there is little arbitration jurisprudence on this question, the Respondent then referred the Tribunal to *Azurix Corp. v. Argentine Republic*¹⁸ and suggested that an administrative tribunal¹⁹ should be independent, serve a judicial function and render a final and conclusive decision like that of a court decision;
- 21.4 But even on this basis, it is not clear to me that the CLEC fits those criteria. Rather, it is noteworthy what the Constitutional Court of Korea had to say about the CLEC²⁰:-

“Procedure of an appeal against the decision of Land Expropriation Committee is a dispute resolution mechanism performed by Central Land Expropriation Committee regarding unlawful adjudication on expropriation. That is, the procedure of the appeal substantially has a characteristic of administrative proceeding in nature. Therefore, unless otherwise stipulated under special cases of the Act, Administrative Adjudication Act is applicable (Supreme Court’s decision rendered on June 9, 1992, Case No. 92Nu565). And the decision of the Central Land Expropriation Committee, as one of its final judgment regarding the appeal of this case, is quasi-judicial procedure in principle.

*In the case of administrative adjudication, due to quasi-judicial nature of adjudication, it separates the “adjudicating authority” (i.e. the immediate upper-level administrative agency of disposition authority and “decision making authority” (i.e. administrative adjudication committee) (Articles 5 and 6 of Administrative Adjudication Act). Also, in the course of administrative adjudication, oral hearings are expanded and the right to request an examination of the evidence is guaranteed for fair adjudication and substantial remedy. **In a procedure of an appeal against adjudication by Land Expropriation Committee, on the other hand, Central Land Expropriation Committee shall be in charge of both adjudication on expropriation and on an appeal filed against expropriation (both Central and Local Land***

¹⁷ Amended Application for Preliminary Objections §5.18.

¹⁸ ICSID Case No. ARB/01/12, Decision on Jurisdiction, 8 December 2003, §92 (Exhibit RLA-4).

¹⁹ For the purpose of the 1991 Treaty Concerning the Reciprocal Encouragement and Protection of Investment between the Argentine Republic and the United States of America.

²⁰ Constitutional Court’s judgment, Case No. 2000Hun-ba77, dated 28 June 2001 (Exhibit RL-4), Section (B).

Expropriation Committee have the power to make a ruling on expropriation adjudication, but Article 35(2) stipulates that Local Land Expropriation Committee has a limited jurisdiction, only over projects of which enterpriser is City/Gun/Gu). Further, adjudication on expropriation and on an appeal have identical procedures (Article 28 of the Act, Article 25(4) of Enforcement Decree of the Act, Article 7 of Managerial Regulation of Central Land Expropriation Committee). In light of the fact that appeal against the adjudication is in fact repetition of process that was already carried out during the adjudication of expropriation regarding the areas of land to be expropriated and compensation for loss, such appeal has a characteristic as an appeal against administrative adjudication and as a redetermination under which adjudication on expropriation by the Land Expropriation Committee is reviewed and confirmed.” (my emphasis);

- 21.5 What the Constitutional Court seems to have suggested was that the CLEC:-
- (a) were not sufficiently independent, as it was in charge of both adjudication on expropriation and appeal (albeit in relation to different geographic areas); and
 - (b) did not have the procedure of expanded oral hearing and the right to examine evidence present in administrative adjudication²¹; and
- 21.6 Thus, despite the helpful expert evidence put forward by both sides, it seems to me that this decision of the Constitutional Court has casted material doubts as to whether the CLEC was an “*administrative tribunal of Korea*” within the meaning of Annex 11-E, even applying the guidance from *Azurix Corp.* as suggested by the Respondent.

Allegations before the Seoul Western District Court

22. Apart from the CLEC, the Respondent also relied on the Claimant’s three other statements made in connection with eviction proceedings filed before the SWDC by the Redevelopment Association against, *inter alios*, the Claimant and her husband on 9 December 2015.²²
23. Before going to each of those statements, it is worth noting that those proceedings were brought against the Claimant by the *Redevelopment Association* (a private entity formed by

²¹ According to the Claimant’s expert Prof. [REDACTED], the hearing before the CLEC on 19 January 2017 was held over 2.5 hours during which 190 cases were decided, and the Claimant’s case was the 65th case to be decided: see Response to Respondent’s Application for Preliminary Objections §7.9.1.5.

²² Exhibit R-24 (Complaint filed by the Redevelopment Association).

property owners and *not* an organ of the Respondent²³), and that the Claimant was *defending* an eviction suit. There was no suggestion that the Claimant would, even if she wanted to, be able to make a treaty claim against the Respondent within those eviction proceedings.

24. Thus, in my view, the “triple identity” as discussed above was again absent and the three statements made before the SWDC were again irrelevant for the purpose of Annex 11-E.
25. In any event, having reviewed each of the three statements, I do not think it can be said that the Claimant had made allegations of breach, in the sense of having elected for the SWDC to adjudicate upon such allegations and grant relief against the Respondent for them:-
 - 25.1 In the Claimant’s 1st preparatory statement dated 6 December 2016²⁴, the Claimant only principally noted her right under the KORUS FTA and stated her view that redevelopment does not qualify as public works projects under international law. While she attached a copy of the KORUS FTA, what the Claimant sought was for “*the eviction lawsuit to be dropped as soon as possible*”. Nothing stated shows that the Claimant had elected to claim for a treaty breach by the Respondent in the suit;
 - 25.2 As to the Claimant’s 2nd preparatory statement dated 13 December 2016²⁵, she pointed out that the eviction lawsuit was a dispute between the Redevelopment Association and an individual. She indicated what she would do *if* she lost the eviction suit, including filing a claim before the International Court of Justice and the United States courts to address various complaints, including the manner in which the injunction order was served on the Property which affected her physical well-being. Though the Claimant purported to seek “*full protection and security*”, again nothing shows that she had elected to make a claim for a treaty breach by the Respondent in the suit; and
 - 25.3 Finally, in the Claimant’s written appeal dated 21 February 2017²⁶, it is true that the Claimant had raised the issue of adequacy of compensation for expropriation of the Property. I am also inclined to agree with the Respondent that the subsequent withdrawal of her appeal would not nullify the effect of her statement, if that statement amounted to an effective election under Annex 11-E in the first place. But reading her written appeal in full, again it cannot be said that the Claimant was alleging a treaty breach by the Respondent and elected to make her claim there. As stated under “Purpose of Appeal”, she was only seeking to revoke the eviction order.

²³ §36 of the Final Award; Claimant’s closing submissions: Transcript of Hearing, Day 3, page 47, lines 13-20.

²⁴ Exhibit R-25.

²⁵ Exhibit R-26.

²⁶ Exhibit R-27.

“Same fundamental basis”?

26. For completeness I also deal with the Respondent’s alternative fork-in-the-road argument based on the “same fundamental basis” test. In this regard, the Respondent submitted that:-

“... even if the Claimant did not specifically allege the same breaches of KORUS before the Korean courts or administrative tribunal that she now raises in this arbitration, her claims in those fora have the same fundamental basis she now brings in this arbitration and on that basis she should not be permitted to run the same claims again.”²⁷

27. The Respondent contended that the “fundamental basis test” is the proper test as opposed to the “triple identity test” (i.e. same parties, same object and same cause of action) considered in some fork-in-the-road decisions.²⁸ Citing *Pantechniki v. Albania*²⁹, the Respondent emphasized that the test is whether the “fundamental basis of a claim” sought to be brought in the international forum is “*autonomous of claims to be heard elsewhere*” and the key is to assess “*whether the same dispute has been submitted to both national and international fora*”.

28. The Claimant on the other hand argued that the “fundamental basis test” is inapplicable, as the “asymmetrical” fork-in-the-road provision in Annex 11-E (which only applies to United States investors as against the Respondent) removes any need for resorting to such a test.³⁰

29. I am not persuaded by the Respondent’s argument. To start with it is unclear why the “fundamental basis test” should be applicable, given the materially different treaty language (e.g., the Greece-Albania BIT)³¹ in which this test was said to apply elsewhere. In any event, as noted above, the Claimant had not, whether before the CLEC or the SWDC (including the appeal form SWDC), in fact brought any claims now advanced herein in those domestic fora.

30. All in all, I do not accept that the fork-in-the-road objection has been made out.

C. Objection no. 3: Time limitation

31. The Respondent’s next objection based on time limitation was initially directed at both the Claimant’s allegations of breach of Articles 11.5 (fair and equitable treatment) and 11.6

²⁷ Amended Application for Preliminary Objections §5.27.

²⁸ Amended Application for Preliminary Objections §§5.28-5.29.

²⁹ ICSID Case No. ARB/07/21, Award, 30 July 2009, §§60-68 (Exhibit RLA-30).

³⁰ Rejoinder to Respondent’s Application for Preliminary Objections §3.8.

³¹ As the Respondent accepted in the Amended Application for Preliminary Objections §5.30.

(expropriation) of the KORUS FTA.³² After the Claimant's explanation that her claim in relation to Article 11.5 was not directed at the forged consent *per se*, but the failure of the Respondent to take action in relation to it³³, the Respondent then directed its time limitation objection solely against the Claimant's claim regarding expropriation under Article 11.6.³⁴

32. The relevant provision in the KORUS FTA is Article 11.18, which reads, pertinently:-

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

33. The Respondent contended that the Claimant acquired knowledge of:-

33.1 the purpose of the redevelopment; the method by which the Redevelopment Association had been formed and its plans; and her likely compensation (or the method by which her compensation would be calculated) by 25 August 2014; and

33.2 the finalization of the management and disposal plan by 12 March 2015, when *"the Claimant had lost all practical and economic use of the Property and the only question which remained was the amount of her compensation, albeit by this date she knew also the parameters by which her compensation would be calculated."*³⁵

34. The Respondent thus argued that the Claimant's claim filed on 12 July 2018 was time-barred.

35. On the plain meaning of Article 11.18, the three-year "limitation clock" only starts running when the Claimant first acquired knowledge of two matters:- (i) *"the breach alleged"* under Article 11.16.1 in the present arbitration; and (ii) that she *"has incurred loss or damage"*.

Knowledge of "the breach alleged"

36. Starting with *"the breach alleged"*, it seems to me plain, by reading the Claimant's Notice of Arbitration, that the Claimant's expropriation claim is explicitly founded on allegations of

³² Amended Application for Preliminary Objections §§6.1-6.30.

³³ Response to Respondent's Application for Preliminary Objections §8.4.1.

³⁴ Reply to Response to Application for Preliminary Objections §§7.1-7.14; Respondent's Opening Statement – Counsel Speaking Note pages 42-46; Respondent's closing submissions (see Transcript of Hearing, Day 3, page 12, line 23 to page 18, line 20).

³⁵ Respondent's Opening Statement – Counsel Speaking Note pages 44-45.

actual expropriation of the Property³⁶. “*The breach alleged*” is not any of the preparatory steps leading up to the actual expropriation. Thus, what is relevant is the Claimant’s first knowledge of the *actual* expropriation, and not that of any of those preparatory steps.

37. For a “*breach*” to have occurred, there must have been in existence, at that point in time, sufficient (alleged) facts to constitute a cause of action enabling the Claimant to bring a claim. As the Claimant submitted³⁷ and as the tribunal in *Spence International Investments LLC, Berkowitz, et. al. v. Republic of Costa Rica*³⁸ so held, the first knowledge of the breach:-

“must rest on a breach that gives rise to a self-standing cause of action in respect of which the claimant first acquired knowledge within the limitation period.”

38. Indeed, at §21 of its Non-Disputing Party Submission, the United States also submitted:-

“In the context of Article 11.6, a breach is manifest where a KORUS Party (1) takes a measure (or measures) that effects a direct or indirect expropriation and (2) fails to do so in conformity with at least one of the four criteria set forth in subparagraphs (a) through (d) of Article 11.6.1. Where, at the time of the expropriation, a host State does not compensate or make provision for the prompt determination of compensation, the breach occurs at the time of the taking. In contrast, “where a State provides a process for fixing adequate compensation, but then ultimately fails to promptly determine and pay such compensation,” a breach of the compensation obligation may occur later, subsequent to the time of the taking.” (my emphasis)

39. I respectfully agree. It is the Respondent’s actual taking or expropriation of the Property, when not done in conformity with Article 11.6, that amounts to a breach of its treaty obligation. The Claimant could not have acquired knowledge of “*the breach alleged*” on 25 August 2014 or 12 March 2015 as the actual taking or expropriation had not even occurred.
40. There is no serious dispute that the date of expropriation itself was 29 January 2016³⁹. That was when the SLEC issued a Written Adjudication⁴⁰ formally ordering that:-

³⁶ Notice of Arbitration, Section VII (pages 12-14).

³⁷ Rejoinder to Respondent’s Application for Preliminary Objections §4.1.2.

³⁸ ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, §210 (Exhibit RLA-37).

³⁹ Response to Respondent’s Application for Preliminary Objections §8.4.2; Respondent’s closing submissions (see Transcript of Hearing, Day 3, page 14, line 11 to page 16, line 11).

⁴⁰ Exhibit R-19.

“1. The Project Implementer shall expropriate the lands mentioned in the attachment hereto for the above-mentioned project and relocate any articles or items. And, KRW 83,218,925,080 shall be paid as compensation for loss...

2. The commencement date of expropriation shall be March 18, 2016.”

41. In my view, therefore, the date on which the Claimant first acquired or should have first acquired knowledge of “*the breach alleged*” was 29 January 2016. The Claimant’s Notice of Arbitration was filed within three years on 12 July 2018. Accordingly, the Respondent has failed to make out the first limb of its limitation argument under Article 11.18.

Knowledge of having “*incurred loss or damage*”

42. As to the knowledge of having “*incurred loss or damage*”, the Respondent relied on *Ansung Housing Co. Ltd v. People’s Republic of China*⁴¹ and *Spence International Investments LLC, Berkowitz, et. al. v. Republic of Costa Rica*⁴² and submitted that:-

*“[In] interpreting Article 11.18.1 of KORUS, the Arbitral Tribunal is not required to look at the date the Claimant finally had knowledge of the quantum of her loss, but the date on which she first appreciated (or should have appreciated) loss or damage will be incurred. This date was well before January 2017 and at the very latest was August 2014 when the Claimant wrote to say “we will not, under any circumstances, vacate our house”. ”*⁴³

43. In §20 of its Non-Disputing Party Submission, the United States submitted that:-

“With regard to knowledge of “incurred loss or damage” under Article 11.18.1, the term “incur” broadly means “to become liable or subject to.” Therefore, an investor may “incur” loss or damage even if the financial impact (whether in the form of a disbursement of funds, reduction in profits, or otherwise) of that loss or damage is not immediate. As the Grand River tribunal correctly held, “damage or injury may be incurred even though the amount or extent may not become known until some future time.””

⁴¹ ICSID Case No. ARB/14/25, Award, 9 March 2017, §110 (Exhibit RLA-2).

⁴² ICSID Case No. UNCT/13/2, Interim Award (Corrected), 30 May 2017, §213 (Exhibit RLA-37).

⁴³ Reply to Response to Application for Preliminary Objections §7.9.

44. Meanwhile, the Claimant's position was that she only first acquired such knowledge on 29 January 2016, being the same date as her first knowledge of "*the breach alleged*".⁴⁴
45. While I would agree that it is not necessary for the Claimant to know the full extent or amount of the "*loss or damage*" before she can be regarded as having acquired first knowledge of "*incurred loss or damage*", the question remains when the Claimant has done so on the facts.
46. For Article 11.18 to apply, the Claimant's knowledge of "*the breach alleged*" and that of her having "*incurred loss or damage*" must both be present. This suggests that the "*loss or damage*" referred to must be that flowing from "*the breach alleged*". If, on my above analysis, "*the breach alleged*" did not occur until 19 January 2016, that must also be the earliest date when the Claimant "*incurred loss or damage*" and acquired knowledge of it.
47. Accordingly, I consider that the Respondent has also failed to make out the second limb of Article 11.18 of the KORUS FTA. The Claimant's expropriation claim was not time-barred.

D. (New) Objection no. 4: Part of the claim is manifestly without legal merit due to lack of evidence

48. The Respondent's final Preliminary Objection relates to the Claimant's claim for breach of the fair and equitable treatment standard under Article 11.5 of the KORUS FTA.
49. Although the objection is based on Article 11.20.6 of the KORUS FTA, i.e. that the claim is "*manifestly without legal merit*", the Respondent argued that the Claimant had not adduced *factual* evidence in support of the claim. As the Respondent submitted, in closing:-

*"We say that for something to have legal merit, there is a requirement that there is something to support it. Now, we accept that the bar for what constitutes "support" can be low. Particularly at this preliminary objections stage. But we say there must be something; something cannot have legal merit if it is just a bare assertion."*⁴⁵

50. The Respondent also argued that "*there is simply no evidence that the Claimant raised these issues with the Korean authorities beyond the Claimant's bald assertion that she did so.*"⁴⁶
51. On the other hand, the Claimant relied on her allegations stated in the Notice of Arbitration⁴⁷ in which the Claimant made the following statements:-

⁴⁴ Response to Respondent's Application for Preliminary Objections §8.4.3.

⁴⁵ Respondent's closing submissions (see Transcript of Hearing, Day 3, page 78, lines 9-22).

⁴⁶ Reply to Response to Application for Preliminary Objections §8.6.

- 51.1 “The Union later used these forged documents to claim consent by [REDACTED] and her husband despite [REDACTED]’s and [REDACTED]’s constant objection and claim for forgery from the beginning of the dispute. CE-12” (page 9 of the Notice of Arbitration);
- 51.2 “During the negotiation process, including the meetings on February 1, 2017 and March 23, 2017 as well as other meetings, [REDACTED] kept raising the issue of fraud by appealing to [REDACTED] government officials who were present at the meetings and yet [REDACTED]’s claim for fraud was ignored...” (pages 10-11 of the Notice of Arbitration); and
- 51.3 “It is alleged that the [REDACTED] government had a motive to disregard these claims since the Supreme Court of Korea had rendered an opinion to invalidate the establishment of Development Union based on fraud in 2012 and set a precedent. It is to be recalled that the Redevelopment Union representative was also the representative of the [REDACTED] Redevelopment Union which had been declared invalid.” (page 11 of the Notice of Arbitration).
52. It seems clear to me that Article 11.6 of the KORUS FTA is provided for expedited objections in connection with, and *only* with, questions of law. This is indeed supported by §5 of the Non-Disputing Party Submission of the United States which states:-
- “Paragraph 6 and 7 establish complementary mechanisms for a respondent State to seek to efficiently and cost-efficiently dispose of claims that cannot prevail as a matter of law, potentially together with any preliminary objections to the tribunal’s competence ...”* (my emphasis)
53. Absent cogent support, I am not attracted by the argument that “*manifestly without legal merit*” within Article 11.6 covers situations whereby a claimant’s case is not supported by *factual* evidence. Plainly, what is relevant here are claims which are “*manifestly without legal merit*” but not “*manifestly without merit*” (or “*devoid of evidential support*”). It would have been easy for the drafter of the KORUS FTA to use the latter language if it was so intended.
54. In any event, the Claimant explained in her testimony that she did complain to government departments and officials about the forgery issue in 2017.⁴⁸ The Respondent’s responses to this in closing were that “*none of that was in the record before*” and that “*there was additional testimony provided which throws further questions over that*”.⁴⁹ Even if there were issues with the credibility of the Claimant’s testimony, I consider that this cannot be said to be

⁴⁷ Rejoinder to Respondent’s Application for Preliminary Objections §5.2.

⁴⁸ Transcript of Hearing, Day 1, page 136, line 14 to page 137, line 3.

⁴⁹ Transcript of Hearing, Day 3, page 78, line 15 to page 79, line 14.

a case of “*manifestly without legal merit*” under Article 11.6 of the KORUS FTA which, as mentioned above is obviously directed at questions of law but not questions of fact.

55. Accordingly, the Respondent has in my view failed on this ground of objection.

E. Conclusion

56. For all these reasons, had it been necessary for the Tribunal to determine the Respondent’s Preliminary Objections nos. 2 to 4, for my part I would have rejected them.

Dated this 24th day of September 2019

A handwritten signature in black ink, appearing to read "Benny Lo", written over a horizontal line.

Dr. Benny Lo
Arbitrator