IIK1AC C«HNU. 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 ETA")

-and-

THE UNCITRAL ARBITRATION RILES (WITH NEW ARTICLE 1, PARAGRAPH 4, AS ADOPTED IN 2013) (THE "UNCITRAL RULES")

-between-

[redacted]

(thc "Claimant")

-and-

THE GOVERNMLN I OF THE REPUBLIC OF KOREA

(the "Respondent", and together with the Claimant, the "Parties")

FINAL AWARD

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'')

I. INTRODUCTION

1. The present arbitration concerns the expropriation in 2016 of property in Seoul owned by the Claimant. The Claimant asserts that the expropriation violated Article 11.6 of the KORUS FTA because the Respondent failed to pay adequate compensation and because the evpropriation wae nether for a public purpose nor was it **conducted in a non-**discriminatory manner **and In accordance** With due process. Moreover, the Claimant *argues* that the Respondent violated the fair and equitable treatment guarantee laid down in Article 11.5 of the KORUS FTA because the Respondent allegedly relied on a forged document that purported to constitute consent by the Claimant to the redevelopment of the area in which her property was situated and thereby amounting to a denial of justice

2. Pursuant to Articles 11.20.6 and 11.20.7 of the KORUS FTA, the Respondent requested that the Tribunal decide on on expedited basis on four preliminary objections (the **"Application for Preliminary Objections")** and thus dismiss the case on grounds of lack of jurisdiction, lack of admissibility and/or manifest lack of legal merit.

3. This award represents the Tribunal's decision on the Application for Preliminary Objections.

ii. PROCEDURAL HISTORY

4. This section does not purport to be a comprehensive account of every proceduial step taken in this arbitration. Instead, the following paragraphs merely provide a summary of the most important steps. The entire **procedural** history is a matter of record of these proceedings.

5. On 12 July 2018, die Claimant served the Respondent with a Notice of Arbitration under **Article** 11.16.1(a)(i)(A) of the KORUS FTA, after having failril io resolve the subject dispute following (i) the service of a Notice of Intent to Submit a Claim to Arbitration to the Respondent on 9 September 2017 pursuant to Article 11.16.2 of the KORUS-FTA, and (ii) an attempt to resolve the dispute by consultation and negotiation pursuant lo Article 11.15.

6. The Claimant **subsequently** served amendments to her Notice of Arbitration on 29 August 2018, 13 September 2018 and 1 April 2019. In the second amendment, the Claimant appointed Dr. Benny Lo, of Des Voeux Chambers, 38/F, Gloucester Tower, The Landmark, Central, Hong Kong, as arbitrator (having proposed for him to be appointed as sole arbitrator in the original Notice of Arbitration and the first amendment thereof).

7. On 13 August 2018, the Respondent served the Claimant with a Response to the NOlice of Arbitration.

8. On 30 October 2018, the Respondent appointed Professor Donald McRae, of the Faculty of Law, **Common Law Section, University of** Ottawa, S7 Louis Pasteur, Ottawa, Ontario, KIN 6N5, Canada, as arbitrator.

9. On 29 November 2018, the Respondent informed **Dr.** LO and **Prolessor** McRae that the Parlies had **agreed** that the HKIAC will administer this arbitration subject to the application of the UNCITRAL Rules, and the scat of the arbitration and the venue of hearings will be Seoul, Korea. In the same letter, the Respondent also informed Dr. Lo and Professor McRae of the Parties' agreed "list procedure" for the selection and appointment of the presiding arbitrator and sought their assistance in compiling the Hsl" for this purpose.

10. On 12 January 2019, pursuant to that procedure, Judge Bruno Sinuna, of the Iran-United States Claims Tribunal, Parkwcg 13, 2585 JH The Hague, The Netherlands was appointed as the presiding arbitrator whereupon the Tribunal was duly constituted.

11. On 26 February 2U19, the Respondent submitted the Application for Preliminary Objections.

12. On 5 April 2019, the Tribunal issued a written Decision on Claimant's Application to Submit 3rd Amendment to Notice of Arbitration and Respondent's Request for a Hearing on its Application for Preliminary Objections. Therein the Tribunal granted permission for the Claimant to file the 3rd amendment to the **Notice** Of Arbitration and acceded to the Respondent's request for a hearing in respect of the Application for Preliminary Objections.

13. On 11 April 2019, the Tribunal issued its Procedural Order No. 1, which includes within it a procedural timetable for the preliminary objections phase of this arbitration.

14. On 12 Aptil 2019, the Respondent submitted an amendment to the Application for Preliminary Objections, as permitted by the Tribunal, following the filing of the Claimant's third amendment to her Notice of Arbitration.

15. On 19 June 2019, the United Slates of America filed a **non-dlSpUting** party submission pursuant **to** Article 11.20(4) **of** the KORUS FTA and Procedural Order No. 1. Tl**r** Claimant and the Respondent tiled responses thereon on 11 and 12 July, respectively.

16. Following a pre-hearing conference call held on 12 July 2019, the Tribunal issued its Procedural Order No. 2 in which, ***inter a!iay*** it was decided that the Claimant COUid be CTOSS-examined in idation to her testimony at the hearing on the Application for Preliminary Objections (the "Hearing"), and that she may file a pre-hearing motion by 19 July 2019.

17. The Claimant filed a pre-hearing motion on 19 July 2019, to which the Respondent replied on 25 July 2019. The Tribunal issued a decision on the pre-hearing motion on 26 July 2019, ruling that (i) certain portions of the Respondent's expert reports shall be excluded from testimony at the **Hearing**. and (ii) two alleged tenants of the Claimant, namely [redacted] and [redacted] be summoned to appear as witnesses at the Hearing.

18. ITie Hearing wfas held in Seoul from 31 July to 2 August 2019.1 At the Hearing, the Claimant and one of lici alleged tenants, [redacted]. wrcre heard as witnesses.[2]

[1] The persons who were present at the Hearing are listed in the Annex to this Final Award.

Moreover, two expert witnesses picsemcd by **the Respondent** (**Professors** [redacted] **and one** expert witness presented by the Claimant (Professor [redacted]) testified on Korean law. The Heating concluded with oral closing submissions from both Panics.

19. After the Hearing, the Pardee submitted their rcapovlivc costs Statements. On 19 August 2019, the Respondent sought leave to make a bnef additional submission, which request was objected to by the Claimant and dismissed by the Tribunal on 4 September 2019.

iff. FACTUAL BACKGROUND

20. Before setting out the salient tacts of this case, the Tribunal notes that for the purposes of the Tribunal's ruling on the Application for Preliminary Objections, the Respondent expressly accepted almost all of the Claimant's factual allegations, with the only three exceptions being highlighted in the account of facts below.[1] Equally, beyond the three areas of disagreement just referred 10, the Claimant did not dispute any of the Respondent⋀ factual allegations that supplemented or were additional to the Claimant's own factual assertions.[4]

21. Accordingly, the facts summarized in this section are undisputed between ihe Parties, save for the few facts for which the Tribunal has expressly noted otherwise.

A. The Claimant

22. The Claimant was bom in Koiea on [redacted] and wfas a Korean citizen. After having moved to California in 2004, the Claimant obtained the status of a permanent US resident in 2008.5

23. In early 2013, the Claimant returned to Korea due to a serious medical condition of her falher. On 23 May 2013, the Claimant was naturalized as a US citizen and lost her Korean citizenship.

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[2] The oilier alleged tenant summoned by the Tribunal was unable to attend the Hearing due to a serious medical condition.

[3] Amended Application for Prelimimtiy Objections, paTOS. 3.2 and 4.38; Respondent's Reply to the Response to the Application for Preliminary Objections, para. 4.8.2.: Respondent's Response to Non-Disputing Paity Submission; Respondent's clarification at the Hearing, see the Transcript of Day 3, from page 29, line 6 to page 30, line 10.

[4] The Tribunal notes that while the Claimant took issue with the Respondent's suggestion that she may have obtained US citizenship in order to come under the protection of KORUS FTA, ihc Respondent did not actually submit that this was the case. Rather, it reserved the right to make such argument at a later stage, sec the Application for Preliminary Objections, at paras. 9.2 ("reairvey *its rights*") and 9.3 (*"appears possible that the Claimant is claiming US citizenship simply so she can bring a claim under KORUS"*).

[5] Claimant's Witness Statement (Exhibit CW1), para 6.

B. The KORUS FTA

24. On 15 March 2012, the KORUS FTA entered into force.

C. The Property

25. On 4 April 2001, the Claimant signed a contract to purchase 76.14/87 onnteresni ^niiece of land, the size of which was 187.8 square meters, located in 12-93, [redacted] (the "Land").[6] The purchase price was KRW 330,000,000 (approximately USD 300,000 at the time). This purchase included the two residential houses situated on the Land. One house had two stories (the "Twu-Ston House") while the other had only a single story (the "Single-Story House").

26. The purchase was registered in the land registry, and ownership of the said share was thus completed, on 8 June 2001.[7]

27. On 17 August 2001, the Claimant purchased the remaining 10.86/87* of interest in the Land. This purchase was registered in the land registry on 23 August 2001, following which the Claimant became the sole owner of the Land.[8]

28. On 23 October 2003, the Claimant transferred 47 1/187.8* of interest in the Land to Let husband, [redacted] together with the title u= the Single-Story House.[9] The Claimant continued to owm the remaining share in the Land, and the Two-Story House (together with her share in the Land, the "Property"), until the Property was expropriated in 2016.

29. At the time of her purchase of the 1 and, and until 2010, the Claimant's parents lived on the second floor of tl>e Two-Story House, on the basis Of a one-time deposit that the parents had paid to the previous owner of the Laud.[10] In Korea, there are twfo alternative ways of paying rent. One way is to pay a small deposit plus a monthly rent. 1he other way is to pay only a large one-time deposit, which the landlord can then invest and try to make a profit out of it during the lease period; at the end thereof, the deposit is usually returned in full (and tenants nowadays increasingly take out insurance against the risk of the landlord being unable to repay the whole deposit).[11]

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[6] Real Ertaie Sale and Purchase CuiiUdCl (Exhibit Cfc-J).
[7] Cci tificaie of All Matters ot Registration – Land (Exhibit CF-4), row 14 (p. 4 of the PDF).
[8] Certificate of All Matters of Registration – Land (Exhibit CE-4), row 16 (p. 4-5 of the PDF). (The Tribunal notes that no sale and purchase agreement for this transaction was submitted in this arbitration; however, the respective allegation by the Respondent has remained undisputed, and the registry in fact indicates, as "*grounds Jor registration*"."*Aug. 17. 2001· Trading*".)
[9] Certificate of All Matters of Registration – f and (Fxhibit CE-4), row 17 (p. 5 of the PDF).
[10] Claimant's Witness Statement (Exhibit CW1), paras. 1-2.
[11] The respective explanations given by Claimant's counsel at the Hearing may be seen from the Transcript of Day 1, at page 90, lines 2-6 and the Transcript of Day 3, at page 82, line 12 to page 83, line 11.

30. In 2011, the Claimant's family (comprising at that time the **Claimant**, her husband, their Children **and the Claimant's** father) moved to the second floor of the Two-Story House and continued to live there[12] until they vacated the Property in May 2017 in the context of the expropriation.[13]

31. It is disputed between the Parties whether the Singlc-Stuiy House and the TWO-StOTy House had in fact been rented out. The Claimant asserts,[14] but the Respondent disputes, that the two houses were partially rented out as follows:

- Room 1 (Single-Story House): Rented from March 2003 to January 2004 and from August 2014 until April 2017 (albeit without the Claimant requiring rent payment as of December 2016)
- Room 2 (Single-Story House): Rented from March 2003 to May 2003, from March 2004 to September 2007 and from May 2011 to June 2017
- Room 3 (First lloor Ot the Two-Story Home): Rented from 2007 to Novcmbci 2016 (albeit without the Claimant requiring rent payment as of July 2016)
- Room 4 (First floor of the Two-Story House): Rented from 2003 to July 2017 (albeit without the Claimant requiring rent payment as of December 2016)
- Second floor of the Two-Story House: Rented between July 2010 and April 2014.

32. It is likewise disputed between the Parties whether certain wrorks were undertaken on the Property. The Claimant asserts,[15] but the Respondent disputes, that the following work was earned out, and that she paid for some of the works hereelf, out of her rental income (with the rest paid for by her husband):

- In March 2014, the parking lot was paved with concrete, which cost KRW 1,050,000 (USD 960).
- A fence and a gate were installed around the parking lot in December 2014, which cost KRW 2,000.000 (USD 1,800).
- From early 2014 to late 2015, an amount exceeding KRW 2,000.000 (USD 1,800) was spent on wallpaper and floor oil-paper for rooms 1-4.

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[12] However, the Claimant's father passed away in June 2014, see Claimant's Witness Statement (Exhibit CWI), para. 12.
[13] Claimant's Witness Statement (Exhibit CWI), paras. 11ff and 38.
[14] Claimant's Witness Statement (Exhibit CWI), paras. 26-37.
[15] Claimant's Witness Statement (Exhibit CWI), paras. 15-25.

- In Fcbiudiy 2016, a "huf" that formed part ol the Two-Story House was renovated into a room. Specifically, an amount of KRW 400,000 (USD 360) was paid fui installing a door and door frame; a boiler was purchased for KRW 350,000 (USD 320); a further amount ol KRW 650,000 (USD 600) was paid for the purchase of electricity equipment, a toilet and oil-paper, all of which was installed for KRW 1,000,000 (USD 900).

O. The Redevelopment of [redacted] and the Expropriation of the Property

33. On 27 December 2007, the Seoul Metropolitan City, being the local government for the city of Seoul, designated the [redacted], where the Land is located, as a redevelopment area (the "Redevelopment AreiTV*

34. Under Korean law, the designation of a redevelopment area means that ihc owners ot properties in that area arc entitled (but not obliged) to initiate a redevelopment project aimed at improving living conditions. In order to do so, the property owners must establish a redevelopment association, which requires (1) the consent of no less than 75% of the property owners in the designated area, provided that they represent owrncrs owning at least 50% of the land area, and (ii) the approval of the head of the relevant District.[17] If a redevelopment association is so established, it becomes a legal entity with authority to plan and implement the redevelopment project.[18]

35. Every person who owns property in the designated area automatically becomes a member of the redevelopment association, irrespective of whether that person gave its consent to the cstablisluncnt of the redevelopment association.[IV] After the redevelopment association's redevelopment plan is approved by the head of the *devout District, every member ol the redevelopment association is given the choice of either (i) purchasing a property in the redevelopment aica (so-called "parcelling-out") by paying the difference between the value ol this person's property in the area, and the value of the redeveloped property lo be purchased, or (ii) receiving a cash settlement based on an assessment of the value of this person's property in the are*.[20] If the first option io chozcn, the title lo the member's property will be transferrcd lo the redevelopment association in exchange for the title in the redeveloped property; by contrast, if the second option is chosen, the property owner loses

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* Exhibit CE-5.

[17] Act on the Maintenance ami Improvement of Urban Areas and Dwelling Conditions fnr Residpnts, No. 12640 (Exhibit tt-15, the "Urban Improvement Act"), at Articles 13(1) and 16(1). (The Tribunal notes that when the Head of the Mapo Disctrict approved the Project on 16 May 2008, the applicable law was Act No. 8970, which came into force on 12 April 2008 (see footnote 8 in the Application for Preliminary Objections). Neither party has provided a copy of that Act, nor made any argument* based on it. Accordingly, the Tribunal is satisfied that both parties agree that any differences between Act. Nu. 8970 and the Maintenance and Improvement Act arc irrelevant for the presmt dispute.)

[18] Urban Improvement Act (Exhibit CE-15), Articles 8(1) and 18(1).

[IV] Urban Improvement Act (Exhibit CE-15), Article 19(1).

[20] Urban Improvement Act (Exhibit CE-15), Articles 46, 47 and 57.

title upon receipt of the cash **compensation** and **ceases to be** a **member of** the redevelopment **association.**[21]

36. In early 2008, a consent form was sent to the Claimant and to the other property owners in oidei for them to establish and become members of the redevelopment association (the "Redevelopment Association") for the redevclopinull of the Redevelopment .Area (the "Redevelopment"). Signed and Stamped consent forms were returned under the name of the Claimant and her husband. However, the Claimant asserts that (his was done without their knowledge, with the Claimant's sister having fraudulently used their personal authorization stamps and an unknown person forging their signatures. In any case, even without the Claimant's and her husband's consent, a majority of more than 75% of property owners had consented to the establishment of the Redevelopment Association, which was finally established on 16 May 2008 by virtue of the approval of the Head of Mapo District.[23]

37. On 19 January 2012, the Mapo District authorized the redevelopment plan for the Redevelopment Area.[23] Under Korean law, this triggered a duty for the Redevelopment Association to notify the property **owners** about the details of the parcelling out, and a corresponding deadline for the properly owners to apply for the purchase of a parcelled-out property in the Redevelopment .Area.[24]

38. On 30 April 2014, the Claimant and her husband applied to purchase a parcelled-out property in the Redcvclopmuil Area.[4*]

39. On 23 July 2014, the Redevelopment Association WTOte to the Claimant and all other owners u! property in the Redevelopment Area, informing them of *"the estimated value of each site or structure to he parcelled-out to each person entitled to parcelhnv-out"* and providing a *"detailed Statement of previous land or structures held by each person entitled to parcelling nut and the price thereof*. According to that **Irlirr**, the *"total assessed value"* o! the Land was KRW 611,165,055, with an amount of KRW 462,008,398 being attributable to the Property.[26]

40. Shortly thereafter, on 30 July 2014, the **Claimant's husband came** to the office of the **Redevelopment Association and** removed the Claimant'e application to purchase a parcelled-out property.[27]

41. On 25 August 2014, the Claimant and her husband wrote to the Redev'elopment Association formally requesting the withdrawal of their application to purchase a parcelled-out

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[21] Expert Report of Professor [redacted], para. 37; Expert Report of Professoi[redacted], para. 76.
[25] Exhibit R-1.
[23] Exhibit R-2.
[24] Urban Improvement Act (Exhibit CE-15). Arlirlr 46.
[25] Reference to this application is made in Exhibit R-11.
* Exhibit R-7.
[27] Referenced to in Exhibit R-11.

property,[28] which was accepted by the Redevelopment Association by a letter of 7 March 2015.[29]

42. On 12 March 2015, the Mapu District posted the official notice authorizing the management and disposal plan for the Redevelopment Area.[30]

43. On 28 October 2013, the Redevelopment Association filed an application for adjudication on the appropriate value of the Property with the Land Expropriation Committee of the Seoul Metropolitan City (the "**SLECV**

44. On 9 December 2015, die Redevelopment Association filed a complaint for eviction before the Western Seoul District Court against the Claimant, her husband and four other persons living on the Land.[32] The Claimant asserts, but the Respondent disputes, that in these proceedings (and in subsequent negotiations with the Mapu District municipal government) she invoked the alleged forgery of her and her husband's consent to the establishing of the Redevelopment Association.[33]

45. On 8 January 2016, the Seoul Western District Court awarded an injunction against the Claimant and her husband to prohibit the transfer of the Property, as requested by the Redevelopment Association. An enforcement officer visited the Property on or about 19 January 2016 bur could not enter the Claimant's home and thus failed to execute the injunction.[34] On die ncxi day, accompanied by representatives of the Redevelopment Union and with the assistance of a locksmith, the enforcement officer entered the Claimant's home and notified her in person of the injunction, thereby executing it under Korean law. Subsequently, the Claimant suffered from menial and emotional distress and has sought medical assistance until recently. Die Claimant is still taking medication for this condition.[35]

46. **On 79** January **2016,** the SLEC issued its decision, **ruling dial die** appropriate compensation for the Property was KRW **608.916,500.** and that the "jd]a/tr *of expropriation shall be March 18. 2016*".[36] Subsequently, the Redevelopment Association offered this amount to the Claimant hut she rejected the offer.

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[28] Exhibit R-8.
[29] Exhibit R-11.
[30] Exhibit CE-5.
[31] Exhibit K-18.
[32] **Fxhihit R.?4**
[33] Notice of Arbitration, paras V 7 and V.12.
[34] Exhibit CE-8.
[35] Exhibit CE-10; Notice of Arbitration section IV, pages 7-8.
[36] Exhibit CE-6, pages 4 and S.

17. Baaed on an application by the Claimant, the entry in the land registry for the Property was amended on 5 February 7016 so as to indicate her US nationality. A> *"grounds for registration"* the land registry record indicates *"May 23, 2013: Loss of nationality"*.[11]

48. On 18 March 2016, the Redevelopment Association placed the compensation amount of KRW 608,016,500 **decided** by the 3LEC to be payable to the Claimant into an escrow account for her benetit.[58]

49. On 8 May 2016, the Claimant filed an appeal with the Central Land Expropriation Committee (the **"CLECT)** against the SLEC's decision. The statement of appeal dated 8 May 2016,[39] as well as a further submission filed on 13 June 2016[40] in that proceeding, contained references to the KORUS FTA. A subsequent submission filed by the Redevelopment Association in November 2016 responded to those references to the KORUS FTA.[41]

50. On 6 and 13 December 2016, the Claimant filed two submissions with the Seoul Western District Court making reference to the KORUS FTA.[42]

51. On 11 January 2017, the Seoul Western District Court found in favour of the Redevelopment Association with respect to the eviction of the Claimant and her husband.[43]

52. On 19 January 2017, the CLEC upheld the decision Ot the SLEC hut increased the compensation amount to KRW 641,526,550 for the Claimant.[44]

53. On 21 February 2017, the Claimant filed an appeal against the decision rendered by the Seoul Western District Court, *inter alia* referencing the KORUS FTA and mentioning that 3hc was *preparing an ISD5 lawsuit 7°* I he Claimant subsequently withdrew the appeal on 27 February 2017.*

54. The additional compensation grained by the CLEC was put in escrow on 8 March 201747

5S In May 2017, the Claimant and her family vacated the Property.[4*]

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[37] **Exhibit Cfc-4, row 16-1.**
[W] **Exhibit CE-7, page 2 of the PDF.**
[*] **Exhibit R-20.**
[40] **Exhibit K-21.**
[41] **Exhibit R-22.**
[J:] **Exhibits R-25 and R-26.**
[41] **Exhibit CE-8.**
[44] **Exhibit R-73**
[45] Exhibit R-27.
[46] **Exhibit R-28.**
[47] **Exhibit CE-7, at page 3 of the PDF.**
[44] **Claimant's witness statement (Exhibit CW-1), para. 38.**

IV. *Ttii* PARTits' SUBMISSIONS

56. The Respondent has raised four separate preliminary objections. The Parties' respective submissions on each of these objections are summarized briefly in turn below.

I. Objection I: No *"investment"* and no **covered investment*

57. The Respondent's first preliminary objection goes to the Tribunal's jurisdiction, and rests on two separate limbs.

58. The first limb is the argument that the Claimant did not make on *uinvestment as* defined in Article 11.28 of the KORUS FTA. The Respondent asserts that none of the three characteristics of an investment expressly mentioned in the said provision (*"commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk"*) is fulfilled in the present case. Moreover, the Respondent claims that the Tribunal ought to apply the *Salini* criteria[49] and, in particular, thp rrquiromont of a contribution to the host State's development, which the Respondent contends was not made here. Also, the Respondent argues that the Tribunal should require a flow of private capital into Korea, and suggests that the Property was presumably purchased with funds originating from within Korea.

59. TTie Claimant argues that the Property qualifies as an *"investment"* as defined in Article 11.28 of the KORUS FTA because she committed capital (the purchase price), assumed nsk (of the asset losing value, not obtaining sufficient rent income, being expropriated and having her home invaded by State officials) and had an expectation of gain or profit (through rental income, noting also that real estate is a widely accepted way to ptoviUc retirement funding). In the Claimant's view, die characierlSllCS Of an investment set out in Article 11.28 of the KORUS FTA arc exhaustive and the Tribunal may not add any other criteria, be it by recourse to the *Salini* criteria or otherwise.

60. As the second limb of its first preliminary objection, the Respondent submits that the Claimant marie no *"covered investment"* ac defined in Article 1.4 of the KORUS FTA. In this respect the Respondent asserts that an *"investment (...) oj an investor of the other Party that is in existence as of the date of entry into force o/* (the KORUS FTA)" was absenl (because the Claimant acquired US citizenship only after the KORUS FTA entered into force), nor has the Claimant thereafter *"established, acquired or expanded"* an investment. Hence, according to the Respondent, neither of the two alternatives provided for in Article 1.4 of the KORUS FTA is present to qualify die Propenv as a *"covered investment"*\

61. The Claimant, in turn, claims that her investment is in fact a *"covered investment"* as defined in Article 1.4 of the KORUS FTA. Specifically, she contends that by having had her US nationality rrgiuered in the land registry, and by withdrawing her application to paiVCi-

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[49] *Salini Costruttori S.p.A. and Italstrade S.p.A. vs. Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 11 July 2001, para. 52 (Exhibit RLA-35).

OUL she *"re-ettahliih-t" her investment. In addition, ehe asserts thot she "*expanded*" the investment by virtue of the alleged addition of a fifth rental unit and the other improvements that were allegedly made to the Property.

2. Objection 2: Fork-in-the-road

62. The Respondent's second objection likewise stands on two pillars, and is raised as a maiter of jurisdiction and of admissibility.

63. The first pillar is the Respondent's argument that because of her submissions on the KORUS FTA before the Seoul Western District Court and the CLEC, in accordance with Annex 11-E of the KORUS FTA the Claimant is barred from bringing her claim before this Tribunal as ahe has alleged ihe same breach before both a court and an administrative tribunal of Korea. In this regard, the Respondent, based on Korean law expert evidence, contends that the CLEC is to be qualified as an administrative tribunal of Korea within the meaning of Annex 11-F of the KORUS FTA.

64. I he Claimant, in turn, submits that her claim does not fall under Annex 11-E of the KORUS FTA. In particular, she contends that none of her references to the KORUS FI A in the proceedings before the CLEC and the Seoul Western District Court amounted to an allegation of such breach, as required by Annex 11-F of the KORUS FTA, given the lack of specificity of her submissions, and also because she was IIOI represented by COUIlsel m those proceedings.

65. Moreover, also based on Korean law expert evidence, the Claimant claims that the CLEC is not an administrative tribunal within the meaning of Annex 11-E of the KORUS FTA, mainly because it lacks independence from the Ministry ol Land and because the Cl FC U merely concerned with an appraisal of the compensation rather than with the facts of ihr case. In addition, the Claimant asserts that the CLEC was not competent to make any ruling on an allegation of breach of the KORUS FTA and that, therefore, allegations made before such forum could not have the result of barring the Claimant from access to this Tribunal.

66. As an alternative basis of its tork-m-the road objection, the Respondent submits that even if Annex 11-E of the KORUS FTA were not pertinent, the Claimant would still be prevented from bringing her claim before this Tribunal because the claim has the same fundamental basis as the proceedings before the Seoul Western District Court and the CLEC.

67. In response thereto, the Claimant argues that Annex 11-E removes any need for a "fundamental basis test".

3. Objection 3: Time limitation

68. As Its third objection, the Respondent contends that the Tribunal lacks jurisdiction and the claim is inadmissible because it is time-harred pursuant to Article 11.18.1 of the KORUS FTA.

69. Specifically, the Respondent argues that, at the latest, the Claimant know or should at lca3t have known about the alleged breach uf die fait and equitable **treaimeni guarantee under** Article 11.5 ol the KORUS FTA on 20 April 2015 (when the Redevelopment Association sent her a copy of the allegedly forged consent), and about the alleged breach concerning expropriation under Article 11.6 ot the KORUS FTA on 12 March 2015 **(when** the management and disposal plan was posted). On this basis, the Respondent submits that when the Claimant commenced arbitration on 12 July 2018, iiioic than ilirec years had elapsed after the Claimant had or should **have** acquired knowledge about either alleged breach, so that the requirements of Article 11.18.1 of the KORUS FTA were met.

70. On the other hand, the Claimant argues that the ordinary meaning of Article 11.18.1 of the KORUS FTA is clca in ilini the limitation period can only start running once a breach has actually occurred. On her ease, the breach of Article 11.6 of the KORUS FTA only occurred on 29 January 2016, when the SLEC rendered its decision on the compensation for the expropriation. Any previous actions by the Redevelopment Association were not acts of the Respondent and could not have triggered the limitation period. Accordingly, the three-year period had not elapsed when the Claimant commenced the aibiliatioil on 12 July 2018.

71. As regards the breach of Article 11.5 of the KORUS FTA, the Claimant argues that the earliest date at which the Claimant requested that the Respondent take action with respect to the forged consent was during the eviction proceedings that commenced on 9 December 2015. This date was likewise less than three years before the commencement of the arbitration.

4. (New) Objection 4: Part of the claim is manifestly without legal merit due to lack of evidence

72. Initially, the Respondent's fourth preliminary objection rested on the ***rationc tempotis*** argument that the Claimant's claim under Article 11.5 of the KORUS FTA exceeded the scope of the KORUS HA, as set out in its Article 11.1.2, because the claim related to alleged acts that occurred prior to the KORUS FTA entering into force.

73. Subsequently, the Respondent alleged, which the Claimant disputes, that the Claimant had changed its position on this point, and replaced the initial fourth preliminary objection with a new objection. This new objection is that the Claimant's claim under Article II.5 of the KORUS FTA is manifestly without legal merit because there was no proof for the underlying assertion that the Claimant ever raised towards officials of the Respondent an allegation that the Claimant's and hpr husband's consent to the establishment of the Redevelopment Association had been finged.

74. The Claimant made no specific response to this latter objection but contends that based on Article 11.20.6(c) of the KORUS FTA, her factual assertions shall he assumed to he imp for the purposes of the Tribunal's ruling on the Application for Preliminary Objections.

V. REQUESTS FOK RFI.IFF

75. In relation to the Application for Preliminary Objections, the Respondent has submitted the following requests for relief:

> *"The Respondent respectfully requests that this Arbitral Tribunal·*
>
> *10./J find and declare that the Arbitral Tribunal lacks jurisdiction over all claims raised by the Claimant and dismiss all claims, in accordance with the Respondent's preliminary objections raised in this Application;*
>
> *10.1.2 order, pursuant to Article 42 of ihe UNCITRAL Arbitration Rules and Article 11.20(H) KURUS, the Claimant to puy ull costs and expenses of this arbitration proceeding, including the fees and expenses of the Arbitral Tribunal and the cost of the Respondent's legal representation, plus pre-award and post-award interest thereon; and*
>
> *10.1.3 grunt any other or additional relief as may be appropriate under the circumstances or as may otherwise be just and proper."*[30]

76. The Claimant, in turn, has submitted the following request for relief:

> *"The Claimant respectfully requests the Tribunal to dismiss the Respondents Application for* ***Preliminary*** *Objection and* ***pursuant*** *to Article 42 of the UNCITRAL Arbitration Rules and KORUS Article 11.20(8) to order the Respondent to pay all costs of this proceeding, including the fees and expenses of the Tribunal, the costs of the HK1AC, mid Claimant V legal fees and expenses."*[51]

vi. LEGAL ANALYSIS

A. Burden of proot

77. The Claimant made certain factual allegations relevant to the Application for Preliminary Objections that were disputed by the Respondent. Therefore, it is necessary fur the Tribunal to determine whether the Claimant bears the burden of proving those facts.

78. The Claimant\ position is that pursuant to Article 11.20.6(c) of the KORUS ITA, the Tribunal shall assume iliusc factual allegations to be true. The tribunal disagrees with this proposition for the following reasons.

79. Article 11.20.6(c) of the KORUS FTA states as follow*:

[VJ] Amended Application for Preliminary Objections dated 12 April 2019, para. 10.1.
[51] Response to Respondent's Application for Preliminary Objections dated 22 April 2019, para. 10.

> *"Itl deciding an objection under thin pavngraph that a claim submitted is not a claim for which ait award in fumr uf the claimant may be made under Article 1J.16. the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNC1TRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rule* The tribunal may also consider any relevant facts not in dispute."* (emphasis added)

80. The meaning of this provision is very clear indeed. The assumption of a claimant's factual allegations being true is confined to only one type of potential objections that a respondent may raise under Article 11 *JO* 6 of the KORUS FTA, namely the objection that the claim is not one for which ait a waul may be made under Article 11.*Ib* 01 the KURUS FTA.

81. Had the drafters of the KORUS FTA intended for Article 11.20.6(c) of the KORUS FTA to apply also to any of the other types of preliminary objections foreseen in Article 11.20.6 and 11.20.7 of the KORUS FTA, they could have easily done so. The drafters chose otherwise, and there is no indication that thia was an inadvertent drafting cum.

82. Accordingly, the Tribunal may only assume the Claimant's factual allegations to be true when deciding on an objection that a claim is not a claim for which an award may be made under Article 11.26 of the KORUS FTA. Given the contents of Article 11.26 of the KORUS FTA. such assumption applies, and *only* applies, to an objection relating to the *type of relief* requested by the Claimant (ef. paragraphs 1 to 4 of .Article 11.26 Ot the KURUS FTA[52]).

81. While the Respondent stated in the introduction to its Application for Preliminary Objections that "*all of the claims raised by the Claimant* [...] *are claims for which an award in fmntir of the Claimant may not be made***[53], none of liter objections actually raised thcicaftci in the Application for Preliminary **Objections** in substance relates to Article 11.26 of tlic KORUS FTA. Instead, all preliminary objections are founded on the alleged lack of either jurisdiction/competence[54] or legal merit, which are clearly distinguished frum an objection that the claim submitted is not a claim for which an award may be made under Article 11.26 of the KORUS FTA. Indeed, the Rcependent never actually raised this lotto type of preliminary objection, despite what is expressly stated in the introduction to its Application tor Preliminary Objections.

84. For this reason alone, the Tribunal finds that it may not assume the Claimant's factual allegations to be true in deciding the Application for Preliminary Objections.

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[52] The Tribunal notes that the other paragraphs of Article 11.26 of the KORUS FTA relate to post-award matters which, by their very nature, cannot be relevant to an objection that the claim is not a claim for which an award may be made.

[53] Amended Application for Preliminary Objections, para. 1.1.

[54] The **Tribunal** notes that for two of the objections, the Claimant argued that besides going to the Tribunal's jurisdiction, they also rendered the claim inadmissible. It is not necessary for the Tribunal to make any finding on this distinction because the subject-matter of those objections does not relate to Article 11.26 of the KORUS FTA irrespective of whether one characterizes them as objections to jurisdiction or admissibility.

85. To the extent that the Respondent's objections concern jurisdiction, the Tribunal hac taken account of rulings of previous tiibunals that dealt with provisions in other US free trade agreements corresponding to Articles 11.20.6 and 11.20.7 of the KORUS FTA. As noted by the Respondent as wdl as by the United States of America, those tribunals have found that objections to a tribunal's competence do not come within llie scope of the provisions corresponding to Article 11.20.6, rendering Article 11 70 6(c) inapplicable to objections of this kind.[35] This Tribunal agrees with the analysis of those picviuus tribunals, which is supported by the plain wording not only ot Article 11.20.6(c) of the KORIJS FTA[56], but also of Article 11.20.7 of the Treaty. The latter explicitly distinguishes between objections under Article 11.20.6 and competence-related objections pursuant to Article 11.20.7 of the KORIJS FTA, without giving any indication that any of the provisions of Article 11.20.6 of die KORUS FTA arc meant to apply also to competence-related objections.

86. Given the absence of any other applicable provision in the KORUS FTA on the burden of proof, the Tribunal finds that the normal rules on burden of proof shall apply, i.e. that the party relying on a disputed fact bears the burden of proving it.[57]

87. Consequently, the 1nbunal holds that the Claimant bears the burden of proving the disputed facts that it seeks to rely on in opposing the Application for Preliminary Objections.

A. Preliminary Objection 1 (first limb): No "investment"

88. Article 11.28 of the KORUS FTA provides the following definition:

> *"investment means every asset that an investor owns or controls, diteclly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, nr the assumption of risk. Forms that an investment may take include:*
>
> [...]
>
> *(h) other tangible or intangible, movable or immovable PROPERTYJ. and related property, rights* [...]"

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[50] See *The Renco Group Inc* v. *Republic of Peru,* UNCT/13/1, Decision as to the scope of the Respondent's Preliminary Objections under Article 10.20.4, IX December 2014, paras. 198 and 208 (Exhibit RI A-3K); *Bridgestone Licensing Servire*. /nr* v *Republic of Panama,* ICSID Cat-e No. .\RB/1634, Decision on **Expedited** Objections, 13 December 2017, para. 110 (authimty nu.4 cited by the United States Of America).

* The Tribunal notes that in the two cases referenced in the previous footnote, the relevant Treaty language was different in that the provision corresponding to Article 11.20 6(c) of the K.ORUS FTA merely referred to *"an objection under this* paragraphTherefore, in those cases, a distinction was drawn only between objections to jurisdiction and other preliminary objections, while in the present case the wording of Article 11.20.6(c) of the KORUS FTA nanows its scope to application even further, namely to one specific type of (non-jurisdictional) preliminary objection.

[57] Same view taken for jurisdictional objections in *Bridgestone Licensing Services, Inc. v. Republic of Pcmumu,* ICSID Case No. ARB/16/34, Decision on Expedited Objections, 13 December 2017, para. 118.

89. It is undisputed between the Parties that the Property qualifies as an "*asset*" within the meaning of Article 11.28 of the KORUS FTA, specifically as "***Immovable property***" listed in subparagraph (h) of the above definition. However, the definition makes clear that not every such asset qualifies. Instead, it must have "***the characteristics of an investmenr.*** The Parties disagree on whether the Property meets this requirement. Before turning to answer this question (see section 2. below), the Tribunal finds ii necessary first to determine the meaning of such requirement.

1. The "*characteristics of an investmenr*

90. In order to determine the meaning of the term "***characteristics of an investmenr.*** the Tribunal will interpret, we believe tor the first time, the definition of "***investment***" in Article 11.28 of the KORUS FTA in good faith in accordance with its ordinary meaning, in its context and in the light of its object and purpose (Article 31(1) of the Vienna Convention on the Law of Treaties).

91. Dosed on its wordiug, the definition of the term "***investment***" in the KUKUS HA **seems** to us to be plainly circular* in that the object of the definition, i.e. an Minvestmentis defined by reference to the "***wcharacteristics***" of that very object.

92. This leads to the next question of what are the relevant "***characteristics of an investment***" and what ie the relationship between them.

93. The Tribunal notes that Article 11.28 of the KORUS FTA expressly mentions three such characteristics: "***the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk***". However, this list is non-exhaustive as it is preceded by **the** words "***including such characteristics as***" **In our** view, **this means that other characteristics may also** be relevant in determining what is an investment under the KORUS **HA**.

94. It is also worth noting that Article 11.28 of the KORUS FTA connects the three listed characteristics with the word "*or*" Thus, not all three characteristics uiuM necessarily be present cumulatively for an asset to quality as an investment. Based on the plural in the phrase "***including such characteristics***" (emphasis added), the Respondent argues that at least two of the mentioned three mentioned characteristics must be present.

95. However, the Tribunal is not attracted by the Respondent's argument. It would have been very easy for the drafters of the KORUS FTA to incorporate such kfclwo out of three" requirement in a very **clear fashion** if that is what was intended Further, the Tribunal finds it highly unlikely that the State parties to the KORUS FTA preferred instead to count on tribunals reaching such result as a matter of subtle linguistics for this important issue of what qualifies as "***investment***" for treaty protection. Instead, the Tribunal considers dial the meaning of the phrase "***including such characteristics***" in .Article 11.28 of the KORUS FTA

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[58] As rightly noted by the Respondent, see its Amended Application for Preliminary Objections, para. 4.9.

is merely to express that the three listed characteristics are examples for "***characteristics of an investment***". However, as the word ***"or"*** implies, none of them is **indispensable.**

96. In any case, the prudent course of action is a global assessment of which characteristics are present and how strongly they show in the asset in question. In doing so, one should stait with the three listed characteristics because they were deemed particularly important by the drafters of the KORUS FTA, before looking into any other characteristics that may also be piocnl.

97. In view of the above analysis, the Tribunal does not accept the Respondent's argument whereby one must add to the three listed characteristics a fourth one from the ***Saiini*** criteria, namely that there must be a contribution to the bust Slate's development, and then consider all four cumulative criteria or requirements in deciding whether the iclcvaiii asset qualifies as an "***investment***". Such interpretation is precluded by the fact that the three listed characteristics are not cumulative requirements (given the word "or"). This cannot, as a matter of logic, change even if one were to add a fourth characteristic.

98. Also, the Tribunal notes ihat the ***Saltni*** criteria serve to identity an investment within the meaning of the ICSID Convention, which does not itself provide any definition of what an investment is. This stands in stark contrast to Article 11.28 of the KORUS FI A, which contains an express definition of die term. The Tribunal does not find it possible or appropriate to replace the wording of said provision (in particular the terms "***including***" and "***or***") with another tribunal's findings made in die context of ICSID arbitration cases.[59]

99. While the Respondent is correct in noting dial the KORUS FTA also allows for ICSID arbitration and that the term "***investment***" should not be given different meanings depending on which forum is chosen,[60] this doas not permit the Tribunal to disregoid the expicss wording of Article 11.28 of **the** KORUS FTA. **Instead**, as noted in ***Salim***,

> "***insofar as the option of jurisdiction has been exercised in favour of ICSID, the rights in dispute must also constitute an investment pursuant to Article 25 of the Washington Convention***"[61] (emphasis added)

100. In other words, if an investor under the KORUS FTA chooses to resort to ICSID arbitration, this does not affect the interpretation of the term "***investment***" within the meaning of the

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[59] Similar in thie regard (in the context of the inapplicability of the ***Saiini*** eiiiciia under the Energy Charter Treaty) ***RREEF Infrastructure (G.P.) Limited and RRELt Pan-buroptan Infrastructure Two Lux S.d r.l.*** v. ***Kingdom of Spain***, ICSID Case No. ARB/13/30, Decision on Jurisdiction, 6 June 2016, para. 157 (Exhibit CLA-1)

[60] Amended Applicaiion for Preliminary Objections, para. 4.y.

[61] ***Saiini Costruttori S.p.A. and Italstrade S.p.A. vs. Morocco***, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para. 44 (Exhibit RLA-35). Further arbitral jurisprudence on this dual test is referenced by ***Schreuer et al***, The ICSID Convention: A Commentary, 2nd edition, 2009, paras. 122 ff (Exhibit RLA-51).

KORUS FTA. but rather adds an additional requirement whereby there must aleo be an investment within the meaning of the ICSID CuuvciUiun.[63]

101. *The* foregoing does not mean that the criteria identified in *Salini* arc completely irrelevant for the purposes of Article 11.28 of the KORUS FTA. In fact, two of them (contiibutions and participation in the risk of the transaction) seem to correspond to two of thr» characteristics expressly mentioned in Article 11.28 of the KORUS ITA (commitment uf capital ui other resources and assumption of risk).[63] Moreover, there is force to the argument that the further, undefined "*characteristics of an investment*" within the meaning of that provision permits consideration of at least one other criterion mentioned in *Salini* (certain duration, see below section 2(d)). However, that does not make the *Salini* test, whose four requirements arc usually undcistood to be exhaustive and cumulative, applicable to the KORUS FTA, which pursues a typological approach that ievolves around a non-exhaustive and non-cumulative list of three important characteristics.

2. Does the Property have the "*characteristics of an inwstment*"?

(a) Commitment of capital or other resources

102. With respect to the question of whether the Claimant committed capital or other resources, the Tribunal does not agree with the Respondent's proposition that such resources must not Originate from within the host State (which may have heen the case here). Article 11.28 of the KORUS FTA requires plainly the commitment of "*capital or other resources*", not "*foreign capitaI or other foreign resources*".

103. In addition, as conceded by the Respondent, multiple other tribunals have likewise accepted that an investment had heen made despite the resources having originated from within the host State.[64] It is true iluti in tlmse cases ihe investor war not a national of the host State when the investment was made and that this added a foreign element (while in the present case the Claimant was a Korean national when she purchased the Property). It is also true that the preamble of the KORUS FTA militates in favour of requiring a foreign clement. **However**, such **foreign** clement comes into play elsewhere in the KORUS FTA, namely when the substantive guarantees require either an investment by an "*investor of the Other*

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[62] See in this regard also *White Industries Australia Limited* v. *The Republic of India*, IJNCITRAL, Final Award, 30 November 2011, para. 7.4.9 (Exhibit CLA-2).

[63] Also the Respondent considers them to he "*tubftantintfy the same*". see Amended Application for Preliminary Objections, para. A.6,

[64] The Respondent referred the Tribunal to *Joseph Lemire* v. *Ukraine*, ICSID Case No. ARB/06/18, Award, 28 March 2011 (Exhibit RLA-19); *Mr Franck Charles Arif* v *Republic of Moldoya*, ICSID Case No. ARB/11/23, Award, 8 April 2013 (Exhibit RI.A-25); *Bernhard von Pezold and Others* v *Republic of Zimbabwe*, ICSID Case No. ARB/10/13, Award, 28 July 2013 (Exhibit KLA-3); *Waguih the George Siag and Clorinda Vecchi* v *The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009 (Exhibit RLA-42). The Tribunal notes that these were all ICSID cases. As the ICSID Convention does not give a definition of "*investment*", one might even say it would have been more open to the requirement of "*foreign capitaF* than the KORUS FTA, which expressly speaks of "*capitaF* without any limitation.

Party an *"investor Qt a non-Party"* or a *"**covered** investment"* (the definition of which includes the requirement of an *"investor **of** the other Party"*, see Article 1.4 of the KORUS HA). hor this reason, the Tnbunal sees no need to read into the definition of *"investment"* a requirement that cannot be derived from the wording of that definition.

104. By contrast, the Tribunal agrees with the Respondent that it is relevant how significant the commitment of capital or other resources is. The purpose of the KORUS FTA, as per its pi tumble, is *inter alia*

> *"to raise living standards, promote economic growth and stability, create new employment opportunities, and improve the general welfare in their territories by liberalizing and expanding trade"*.

105. Of course, it could hardly be expected that each individual investment would single-handedly raise living standards and improve the general welfare (etc.) of an entire nation. Otherwise, only the largest of projects could qualify as investment, and there is no indication that IHi* was what the drafters of the KORUS FTA intended. However, if the capital ui resources committed aie incapable, because of their insignificance, ot contributing in any meaningful way to the objectives of the KORUS FTA, this will usually make it very difficult for the investor to demonstrate dial such commitment was intended to be afforded protection under the KORUS FTA.

106. In the present cace, the Claimant committed an amount of KRW 300,000,000 (approximately USD 300,000 at the time) to acquire the Property.[65] The Tribunal does not find this commitment to be non-significant per se. While this particular asset did nut involve millions or even billions[66] of capital commitments often seen in investment treaty cases, the Trihirnal ha* little doubt that the amount ac cuch would not raise serious concern if the purpose of the cuuuuilinem were **clearly** and **exclusively commercial in nature**, *e.g.* if it were the puichase price fur office facilities or a factory building. **However,** as the Tribunal considers that the purpose of the commitment is rather relevant for the existence of an expectation of gain or profit, it will be dealt with separately belowr.

107. Ae regardf. the first characteristic of an investment mentioned in Article 11.28 of the KORUS FTA, the Tnbunal therefore concludes that there was a sufficient commitment of capital despite its amount.

(b) Expectation of gain or profit

108. The **Respondent** argues **that** the **Claimant** purchased residential real-estate for her family's private dwelling, without any expectation of gain or profit, and also referred die Tribunal to

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[64] The Tribunal notes that this is the price for the purchase of the 76.14/8Th interest in the Land on 4 April 2001. The Claimant did not assert that she paid anything in addition for the transfer of the remaining share on 17 August 2001.

[66] In terms of United States Dollar.

other arbitral awards which required a commercial activity for the relevant asset to qualify as an *"investment"* in the present context.[67] The Claimant, in turn, contends that She rented out part of the Property and thereby did have an expectation of gain or profit. In particular, she argues that it is irrelevant that during the years that her parents lived in the Two-Story House, she allowed them to keep the rent from the other tenants.

109. Reginning with the last point, the Tribunal agrees with the Claimant that it is not relevant whcihci she kept any proceeds from the Property for hcrselt, bestowed them upon her parents, or used them for any other purpose. If there is an expectation of gain or profit, it docs not matter for what purposes such gain or profit is (intended to be) used.

110. Ac regards the arbitral jurisprudence on die icquiiemail of a commercial activity, the Tribunal agrees that investment treaties in general, and the KORUS FTA in particular, aim at stimulating investment in the commercial sphere rather than in the purely private one. This is supported by the preamble of the KORUS FTA, which not only refer* multiple times to the trade between the State parties, but even makes it a specific objective to enhance *'7/ic rnmpptitiveness of their firms"*. However, in the Tribunal's view, there is no sepalale icquilemail of aigaging in a commercial activity because the notion of a commercial context is anyway inherent to other characteristics of an investment such as, in particular, the expectation of gain and profit and the assumption of risk.

111. Therefore, the Tribunal now turns to the question of whether the Claimant had an expectation of gain or profit. Doth Fairies seem lo accept, as does the Tribunal, that it the Property merely served as a private residence for the Claimant, her parents and other members of her family, this does not imply any expectation of gain or profit. Instead, the only source of such expectation could be the alleged renting out of part of the Property.

112. As mentioned befuie, the Respondent has **disputed** that the Claimant did in fact rent out part of the Propcity and generated rental income. The Tribunal has already found that it is for the Claimant to prove the facts. The available evidence for the renting out of the Property consists of the following:

- the Claimant's own testimony as a witness;
- written confirmations by both [redacted] and [redacted] (both allegedly tenants of rooms in the Two-Story House);
- the testimony of [redacted] at the Hearing; and
- bank statements in relation to accounts held by the Claimant and her husband.

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[67] **Notably *Casinos Austria International GmbH and Casinos Austria AhiengcscUschaft* v. *Argentine Republic*, ICSID Case No.** ARB/14/32, **Decision on Jurisdiction, 29 June 2018, paras. 189f (albeit in the context of the *Salini* criteria, but** excluding **the most controversial fourth one)** (Exhibit **RLA 7); *Franz Sedelmayer* v. *The Russian Federation*, Award, 7 July 1998, page 65 (Exhibit RLA-13).**

113. The Tribunal notes at the outset that the Claimant granted thp title to the Single-Story House and 47.3/187.8^ of interest in the Land to her husband un 23 October 2003. **Accordingly**, she no longer owned this pari of the Land when the KORIJS FTA came into force in 2012, or when the alleged Treaty breaches occurred in 2015 and 2016, respectively. Therefore, whether or not the Single-Story House was rented out is irrelevant because it is clear that at least this part of the Land was not at the relevant times an investment *nf the Claimant* in relation to which any breaches of the KORUS FTA could have occurred.

114. In relation to the Two-Story House, the Tribunal is prepared to accept that [redacted] rented Room 3 from August[68] 2015 to November 2016. This was confirmed by [redacted] both in his written statement and his oral testimony, as well as by the Claimant in her witness testimony. However, as testified by [redacted] and as confirmed also by the Claimant in her written witness statement,[69] ihc Claimant relieved him from his duty to pay rent after 1 June 2016.

115. The Tribunal further accepts that [redacted] rented Room 4 in the Two-Story House from Tiily 7015 rn Inly 2017. This is confirmed both by a written statement oi [redacted] who **was** unable to tesiify at the hearing due to a severe health condition) and by the Claimant's own testimony. The Tribunal is aware of the Respondent's argument that the Claimant also testified that she received [redacted] 's monthly rent in cash and deposited it into her uccounh while the available bank statements of the Claimant's bank account (which she testified was her only ftrmimt at the time) do not chow any such deposits. However, the Tribunol considers that the bank statements submitted by the claimant either do not cover the relevant period of time[70] or do not, given the nature of the statement, show any cash deposits/[71] Hence, while it is true that there is no bank statement to support the Claimant's testimony and the written confirmation of [redacted], the Tribunal finds that the available bank statements not showing any such deposits do not tuuliadiU the Claimant's Submission either. However, as per the Claimant's written witness statement, the Tribunal notes that she iclicved [redacted] from her duty to pay any rent after November 2016.72

116. Moreover, the Claimant submitted, and confirmed in her witness testimony, that she rented out the second floor of the Two-Story House to [redacted] from July 2010 till April 2014 for a one-time deposit of KRW 120,000,000, Room 3 *l*o [redacted] **from** 2UU/ till August 2015 for a one-time deposit of KRW 70.000,000, and Room 4 to [redacted] ΛHfrom 2003 to July 2015 for a one-time deposit of KRW 35,000,000.

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[68] The Tribunal notes that in her written witnetc ctaifmrnt (para. 25), the Claimant referred to 1 October 2015 as the dart date. However, an Exhibit C4 refers at page 2 to August 2015, which was confirmed ai the Hearing by both the Claimant and [redacted] in their respective testimonies, the Tribunal assumes that the reference to 1 October 2015 in the written witness statement was an error.

[69] Claimant's witness statement (Exhibit CW-1), para. 35.

[70] This applies tu the bank statement Issued on 6 March 2Uiy (Exhibit C4, pages 7-11), which covers only the period Irom 26 December 2001 till 22 December 2010.

[71] This applies to the hank statements issue 4 March 2019 (Exhibit C4, pages 5-6) and to the different withdrawal statements (Exhibit C4, pages 12-16).

[12] Claimant's witness statement (Exhibit CW-1), para. 36.

117. Also, the Claimant confirmed in her testimony that the one-time deposits of [redacted] and [redacted] were returned in full at tlic end uf the lease.[73] This is corroborated by bank statements that show withdrawals from the Claimant's husband's bank account in August 2015, which add up to KRW 70,000,000 and show the name [redacted] under "***Notes***",[74] as well as withdrawals in May and (mainly) July 2015, which add up to KRW 35,000,000 and show the name [redacted] under "*Notes*". While the Claimant did not say explicitly whether the same occurred with respect to the deposit of [redacted] the Tribunal is satisfied that this was the case. First, the Claimant testified more generally that the normal course of action was to return large one-time deposits when the tenants moved out/[75] which is in line with the explanations provided to the Tribunal by the Claimant's counsel regarding the system of paying rent through one-time deposits in Kore«.[7ft] Second, the Claimant has submitted bank statements which show withdrawals in March and (mainly) April 2014, adding up to KRW 120,000,000, and one of which shows the name [redacted] under "***Notes***".

118. On the basis of the Claimant's testimony and the bank statements submitted, the Tribunal is thus satisfied that [redacted] rented pans of die Property from m/\uaimanHxiM! on one-time deposits, and that those deposits were returned in frill at the end of the respective lease. With respect to the duration of the leases, the Tribunal notes that the end dates asserted by the Claimant correspond largely to the dates on which the deposits were withdrawn from [redacted]'s account, and Tribunal is prepared to accept also the start Hates.

119. In summary, therefore, the Tribunal considers proven that out of the three units that existed in the Two-Story House already when the Claimant purchased the Property, Room 3 was rented out in exchange for rent payment from 2007 through June 2016, Room 4 was rented out from 2003 through November 2016, and the second fluui was reined OUt from July 201U through April 2014. It is undisputed that the new unit allegedly added in February 2016 was nut rented out before the Claimant vacated the Property.

120. In order to determine whether this shows an expectation of profit or gain, the Tribunal must first consider the fart that fnr a very significant period of time, the three units were rented out in exchange for one-time deposits that were returned in full at the end ot the lease. At first sight, this indeed suggests that for this reason alone, there cannot have been any (expectation of) any gain or profit in rcspeci of (his time period, as argued by the Respondent at the Hearing. However, the Tribunal considers that such finding would not truly reflect the reality of the rental market in Korea. It was not disputed by the Respondent that in Korea, one of the traditional forms of making rental payments is a one-time deposit that is returned in lull at the end of the lease. During the period of the lease, the deposit is available to the landlord to invest. In essence, instead of receiving monthly rent, landlords

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[73] 1ranscript ot Day 1, at page 148, line 8-10.
[74] Exhibit C4, at page 12.
[75] Transcript of Day 1, at page 147, lines 5-7.
[*] See above at paru. 29.

receive an interest free loan which allows them to try and *mnice* a profit. *As* both forme of making rental payments arc still prevalent in Kuica, il must be assumed that while each of them will have its advantages and disadvantages for the landlord, both of them are aimed at allowing the landlord to generate income from renting out the property.

121. While the one-time deposits in question were apparently paid into and refunded from th* Claimant's husband's bank account, the Tribunal considers that this docs not ncccssaiily mean tlmi any pioeeeds from using those deposits are not to he considered rental income of the Claimant. In that respect, the Tribunal accepts the Claimant's testimony whereby in Korea, a husband and wife co-usc their bank accounts. Accordingly, if the Claimant chose to have one-time deposits owed to her as the landlord paid into her husband's bank account, this by itsclf docs not necessarily mean that she bestowed upon her husband any proceeds that may be derived from those deposits during the lease.

122. Accordingly, the Tribunal finds that despite the onc-timc deposits having been paid into the Claimant's husband's bank account, and despite those deposits having been returned in full, one cannot disregard the relevant lease periods for the purpose of assessing wliellia llicie was an expectation of profit or gain.

123. As a result, the Tribunal further finds that the Two-Story House was rented out lor approximately half of the time during the Claimant's ownership.[77]

124. Given that there ie no suggestion that either die amounts of the monthly rents or of the one-time deposits were unusual for rental units of the kind offered by the Claimant, the Tribunal does not find it necessary to determine how much rental income exactly the Claimant generated by partially renting out the Property. Instead, the Tribunal is content to limit itself to the findings that rhe Claimant generated approximately half of the income tlidl she could theoretically have generated by renting out the **Two-Story House** completely/*

125. This leads to the question whether there exists an expectation of profit or gain within the meaning of the KORUS FTA if a property is partially used by the purchaser's family and partially rented out. In the Tribunal's view, it is sensible to answer this question by ascertaining which of the two types of use was picdoiniriant in the acquisition Of the property. If the predominant purpose was to use it as a private dwelling, the Tribunal

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[77] The Claimant purchased the Property in 2001 and vacated it in 2017, i.e. she could have rented out the three pre-existing units for 17 years each, yielding a total ni»mhf«r of 51. When counting for each unit the years during which it WJU rented out (not counting the Claimant's parents), this yields a lulal number of *26*. Dividing 26 by 51 yields a percentage of approximately 51%. The Tribunal notes, however, that this is only an approximation as the exact starting and end dates (and in some cases even the relevant months) are not known. Also, it may be unrealistic to assume that the Claimant could still find tenants after the SLFC had decided that the Property would be cApiupi iaicd. Because of ihose points, the percentage could be slightly higher or lower (and thus potentially below 50%).

[78] Assuming that all three pre-existing units in the Two-Story House could have been rented out without any intermission for 17 years., While this may not be an entirely realistic hypothesis, the Tribunal is satisfied that this approximation appropriately reflects the magnitude of the rental income.

considers that there is no expectation of gain or profit If, hy contrast, the predominant purpoce was to rent out the property, there can be little doubt dial its owner reasonably expects to make protits.

126. The percentage to which the Property was rented out, as wc found above, docs not help in determining or inferring the predominant purpose because it is around 50%. However, the Tribunal finds it particularly relevant that for two years after having acquired the Property, the Claimant did not rent out any pan of the Two-Story House other than to her parents. Similarly, between 2003 and 2007, only one of the two units not occupied by her parents was rented out. As the Claimant did not suggest that she tried but failed to find tenants during those years, this creates doubt as to whether, at the time the Claimant purchased the Property, and thus committed capital, she had intended the Property to serve as anything but a home to her family. In fact, the Claimant's family moved to the USA in 2004, i.e. the year after the Claimant started renting out the **Two-Story House**. As a result, the Tribunal finds it more likely that the Claimant had first purchased the Property for private dwelling and then decided, given the family's move to the USA, to rent out the rooms that were not occupied by her parents. On that basis, the Tribunal finds that the predominant use of the Property at the time of acquisition by the Claimant was not to serve as an income-generating investment.

127. While it may not be an absolute requirement that the expectation of gain or profit must exist already when the capital is committed, it is at least very untypical for an investment if there ic no such concurrence. Usually, in ease of an investment, the capital is committed tor the very purpose of making profit, rather than for a different purpose that is subsequently changed into a profit-making venture.

128. Accordingly, the Tribunal is reluctant to assume that the Claimant lias an expectation of profit ui gain in relation to the Property. However, the tribunal does not find it necessary to make a definitive finding at This point given that it will anyway need to assess globally all relevant characteristics. Therefore, the Tribunal can conclude here with the observation that the presence of an expectation of profit or gain was at best weak in relation to the Property.

(c) Assumption of risk

129. As regards the assumption of risk, the Claimant has relied on four different types of risk that she claims to have assumed, each of which the Tribunal will address in turn.

130. First, the Claimant invoked the risk that the value of the Property would decline after the **purchase**. While this may **certainly** be a risk that is relevant to a property owner, the Tribunal agrees with the Respondent that for the purpose of the KORUS FTA, this risk alone cannot be sufficient because it **is** inherent in the purchase of *any* asset. Article 11.28 of the KORUS FTA is clear in that an asset only qualifies as an investment if it has certain clmiactcristies, such as **ihe** assumption ol nsk. **Those characteristics**, including the assumption of risk, must go beyond the features that any asset automatically has. Otherwise, the requirement of the asset showing the characteristics of an investment would be rendered

meaningless. Therefore, the risk of an asset declining in value cannot be the type of risk that the drafter of the KORUS FTA had in mind.

131. Secondly, the Claimant submitted that by acquiring the Property, she assumed the risk of it being expropriated. In the Tribunal's view, if one acquires an asset in another State, this always creates the risk of such **asset** being expropriated. As a consequence, the reasoning from the previous paragraph applies. If one found that this type of risk qualifies for the purposes of AitiUc 11.28 of the KORUS FTA, the characteristic of an assumption of risk would be rendered meaningless. The Tribunal docs not accept that this was the intention of the drafters of the KORUS FTA.

132. Thirdly, at the Hearing, the Claimant added that a fuilliei risk materialized When an execution officer entered the Claimant's house to serve the Seoul Western District Court's injunction on her. According to the Claimant, this hostile incident led her to waive the rent otherwise payable to her by [redacted].[70] The Tribunal accepts dial by acquiring the Property, the Claimant assumed the risk of being subject to Korean laws (which in this case apparently allowed for that entry into her houac). However, once again, tliis is a risk inherent in any asset acquired in the host State. Accordingly, the 1nbunal finds it difficult to accept that the risk of being subject to the laws of the host State qualifies as a risk within the meaning of Article 11.28 of the KORUS FTA.

133. Fourthly, the Claimant referred to the risk of the predicted rental income not materializing. To the Tribunal, this risk is a necessary coiullaiy of an expectation Of profit – Whenever there is an expectation of profit, there is also a risk that such expectation is frustrated. However, the Tribunal would be prepared to still accept that such type of risk qualities for the criterion of *"assumption of risk"*, given that it is not necessarily excluded that some of the charaoterkrir* of an investment overlap. Also, the Tribunal finds that failing lo generate profit by using the acquired asset is in fact a very **typical** nsk of an investment. However, the Tribunal lias already concluded that it is very doubtful whether there was an expectation of profit. As a flipside of the coin, the Tribunal is equally doubtful whether the Claimant assumed the corresponding risk of such expectations not materializing.

134. On this head, the Tribunal accordingly concludes dku since the expectation Of profit OT gain was weak, the presence ot an assumption of risk is equally doubtful.

(d) Other characteristics

135. Finally, the Tribunal turns to other characteristics not expressly mentioned in the definition of the term *"investment"* in Article 11.28 of the KORUS

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[70] The Tnbunal noics dial while [redacted] did not directly confirm this fact in his testimony, he did say, when asked why he thought that his rent was waived: *"At that time I knew the whole area, including the house that I was residing, would be redeveloped. And at that lime I remember that I was somewhat abused verbally by the Redevelopment Union* [...] *And 1 also remember that the landlord told me that she would like to – she would like me to stay here*" (Transcript of Day 3, lines 11(T).

136. Both parties have mentioned the characteristic of duration [80] Indeed, it is widely accepted that a typical characteristic of an investment is that it is made fui a certain duration/[81] While the Claimant owned the Property tor approximately 15 years, it is not quite clear whether this is the relevant period of time, given that the KORUS rTA entered into force only 11 years after the Claimant acquired the Property. In other words, the Claimant owned the property for four years after the KORUS Kl'A came into fore. However, the Tribunal does not find it necessary to decide which of the two periods is the relevant one because it considers four years to be a sufficient period ot time in any event.[82] In addition, the Claimant did not freely terminate her ownership but rather lost ownership due to the expropriation/[83]

137. In the context of the ICSID Convention, some tribunals and commentators have found that a contribution to the economy of the host State is either a mandatory icquircment or at least a relevant clement in establishing the existence of an investment. This view is based on the reference in the preamble of the ICSID Convention to *"economic development"*.[84] Although the preamble of the KORUS H'A expressly mentions the objective *of "promoting economic growth"*, the Tribunal is not convinced that this factor is applicable hue, at least for the icasou that it originates from the ICSID Convention which is not applicable in this case.

(c) Global assessment

138. In summary, out of the three characteristics expressly mentioned in Article 11.28 Of the KORUS FTA, only some contribution ot capital is present. By contrast, the Tribunal is of the view that both the expectation of gain or profit and the assumption of risk arc very weak and taken individually do not meet the requirements of Article 11.28 of the KORUS FTA. Although there was a sufficient duration of the Claimant's commitment, the Tribunal considers that this is outweighed by the said conclusion on the characteristics listed in Article 11.28.

139. Taken together, the Tribunal is not convinced that die KORUS FTA wras meant to protect as an investment the purchase of a relatively modest residential property which is initially used exclusively ae the private dwelling of the owncr's family and only subsequently and partially rented out. The 1nbunal considers that the Claimant's ownership of the Property is simply too far away from the idea of an *"investment"* within the meaning of the KORUS FTA.

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[80] Notice of Arbitration, at paru. VI.3; Amended Application foi Piclijnmajy Objections, at paras. 4.6 and 4.16.
[81] **See notably *Salini Cosrrunori S.pA. and Italstrade S.p.A.* vs. *Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, para. 44 (Exhibit RLA-35); further references given by *Schreuer et a!*, The ICSID Convention: A Commentary, 2ad edition, 2009, para. 162 (Exhibit RLA-51).**
[82] **Othci** tribunals **have found 2-3 years to be sufficient (in ICSID context), see only the references given by *Schreuer et at*, The ICSID Convention: A Commentary, 2nd edition, 2009, para. 162 (Exhibit RLA-51).**
[83] **Sec also In this regard ibid. para. 133, whereby it is the *expectation* of a certain duration that counts, even if there is an early breakdown.**
[84] **Ibid. paras. 164ff.**

B. Preliminary Objection I (second limb): No *"covered investment"*

140. However, even if the Claimant were able to show that her Property had the characteristics of an investment, the Tribunal considers that the Claimant did not hold a ***"covered investment"***, as required by both of the substantive guarantees that the Claimant invokes, i.e. Articles 11.5 and 11.6 of the KORUS FTA.

141. Puisuaui lu Article 1.2 of the KORUS FTA, the term ***"covered investment"*** means

> ***"with respect to a Party, an investment, as defined in Article 11.28 (Definitions), in its territory of an investor of the other Party that is in existence as of the date of*** *entry* ***into*** *force of this Agreement or established,* ***acquired, or expanded thereafter"***.

142. Accordingly, assuming ***arguendo*** that the Claimant's ownership in the Property qualifies as an investment, there arc two alternatives for it to qualify as a ***"covered investment***. While both alternatives require that the investment is one of an ***"investor of the other Party"***, the first alternative TTfjuirpc that the investment ie in existence when the KORUS FTA entered into force, while the second alternative requires that such investment was subsequently ***"established, acquired or expanded"***.

143. As per Article 11.28 of the KORUS FTA, the term ***"investor of a Party"*** means,

> ***"a*** Party ***or state enterprise thereof, or a*** *national* ***or*** *an* ***enterprise of a Puny, lhat attempts to make, is making, or has made an investment in the territory of the other*** Party; ***provided, however, that a*** *natural* ***person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality"***.

144. Accordingly, the first alternative of the definition ***of "covered investment"*** requires that, at the time of entering into force of the KORUS FTA, the Claimant was a national of the United States, for otherwise her owning the Property could not have been, at the relevant point in lime, the investment Ot an ***"investor qf the other*** PartyH However, it is undisputed that the Claimant only acquired US nationality more than a ycaj dfleT the KORUS FTA came into force. Both parties agree, and so does the Tribunal, that for this reason, the first alternative of the definition ***of "covered investment"*** is not applicable here.

145. Consequently, what remains to be determined is whether the Claimant ***"established, acquired or expanded"*** an investment after the **KORUS** FTA entered into force, and after she became an ***"investor of the other Party"*** **by acquiring US nationality**. While **the** Claimant undisputedly did not ***"acquire"*** the investment after she obtained **US** nationality, she claims to have both ***"established"*** and ***"expanded"*** that investment. The Tribunal will address both requirements separately below.

1. Was the investment "*extahlishetT* after the KIORL'S FTA came into force?

146. The claimant has argued that there are two different grounds that she has established the investment, which will be dealt with by the Tribunal in turn.

(a) Registration of the Claimant's US nationality in the land registry

147. The Claimant asserts that she established the investment by having had her US nationality registered in the land registry. The Tribunal is unable to accept this proposition for three distinct reasons.

148. Fiisi, the Claimant's own case is that the breaches of the KORUS FTA occurred on 9 Dcvciiibci 2015 (with respect to Article 10.5 of the KORUS H'A) and 29 January 2016** (with respect to Article 10.6 of the KORUS FTA). However, the Claimant had hci nationality reflected in tlie land registry on 5 February 2016, i.e. alter the alleged breaches had occurred. In the Tribunal's view, an action by the investor that occurred after the alleged **breaches** cannot retroactively bring die investment within the **scope** 01 the KURUS FTA so as to atlord it protection against those past breaches.

149. Secondly, the nationality of the Claimant is relevant only to her personal status as an "*Inwstor of the other Party*". By contrast, her nationality is not relevant in any way to the existence or status of the investment itself. In fact, the Claimant herself argued, and the Tribunal agrees, that an investment within the meaning of the KORUS FTA does not imply a foreign element because such element comes into play when assessing if the investor is an "*investor of the other Party*". Hence, if the nationality of the investor changes, this does not change in any way the characteristics of the investment. Much less can the investment be considered as "*estuO/isheJ*" based merely on a change of nationality of the investor being reflected in the land registry.

150. Thirdly, the Tribunal notes that the only type of investment *nor* covered by the definition of "*covered investment*" is an investment that, at the time the KORUS FTA enters into force, is held by a national of either the host State or a third State, and which investment Is thereafter neither acquired, established or expanded by a national of the other State party to the KORUS FTA.

151. The Tribunal has no doubt that the purpose of this requirement for a "*covered investment*" in Articles 11.5 and 11.6 of the KORUS FTA is to preclude requests for protection from investors of the other State (or of a third State) who are not entitled to protection because they did not have any major involvement with the investment during the existence of the KORUS FTA – neither by holding the investment when the KORUS FTA came into force, nor by acquiring, establishing or expanding it thereafter.

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[15] This position was again confirmed during the Heariug, see Transcript of Day 3, page 41, lines 9-11.

152. This rationale suggests that an investor of the other State party can only claim to have *"established"* on investment if the involvement in the investment is of a similar magnitude as the holding or acquiring ot the investment during the currency of the KORUS FTA. This is also supported by the plain fact that the definition of *^covered investment"* considers the establishing of the asset as an equivalent alternative to the holding or acquiring of an investment, given that each of them allows the investor of the other State party to enjoy the protection of Articles 11.5 and 11.6 of the KORUS FFA.

153. In the Tribunal's view, therefore, the requirement of an investment to be *"established"* must be understood to refer mainly, if not solely, to acts that bring the relevant asset into existence (as opposed to an asset being *"acquired"*, which the Tribunal interprets as referring to a transfer *of an* already existing asset). Typical examples WOUld be the building of a factory or an invention that gives rise to intellectual piupcily liglus.

154. By contrast, the mere registration of the Claimant's nationality in the land registry in relation to the Property, which she had owned for almost 15 years at that time (and for 12 yeairs hrfnre the KORUS FTA came into force), Dimply docs not constitute an involvement with the investment of OK same character as the holding or acquiring thereof.

155. In consequence of the above, the Tribunal docs not accept that the Claimant *Mestablished"* the investment by having her nationality reflected in the land registry.

(b) The Claimant's withdrawal of her application lor parcelling-out

156. The Claimant argues that by withdrawing her application to the Redevelopment Association tor parcelling-out of redeveloped property, she *"re-established"* her interest in the Property, which che had previously given up by agicvilig Io lllC parcelling-OUt.

157. If the initial application had in fact caused the Claimant to lose her rights to the property, and her withdrawal of such application had resulted in a resurrection of those rights, the Claimant's argument would be more plausible. However, the Tribunal is not convinced that, as a matter of Korean law, the Claimants property rights were in any way affected by her applying fut parcelling-out or withdrawing the application.

158. Due to the redevelopment of the Redevelopment Area, it was clear that the Claimant would lose the Property one way or another. The only difference that a parcelling-out application made was that instead of receiving cash compensation, she would have been credited with the value of her Property against the price that she had to pay for the parcelled-out property. This, **however**, does not **attcci** the **Claimant's** rights in the Property Accordingly, the

Claimant neither gave up the Property by applying for parcelling-out nor did her subsequent withdrawal of the said application re-establish lici interest in die property.[84]

159. As a result, the Claimant did not (rc-)csiablish her investment by virtue of such withdrawal.

2. Was the investment "*expanded*"*

160. The Claimant submits that the investment was "***expanded***" after she acquired US nationality. In this respect, she first refers to a number of improvements to the Property (paving the car park with concrete, erecting a fence and gate around it, changing wallpaper and floor oil-paper), which she claims to have cost approximately KRW 5,000,000 (approximately USD 4,000). Second, she alleges rhai a new rental unit was added to the Twro-Story House by renovating a hut into a loom, which cost KRW 2,400,000 (approximately USD 2,000).

161. The Respondent, in turn, disputes that those works were done. Even if they were, the Respondent disputes that they were paid for hy the Claimant, rather than by her husband.

162. In fact, for significant parts ot the asserted works, the only evidence presented by the Claimant is her own witness testimony. However, the Tribunal finds that it can be left open whether the Claimant did in fact spend the asserted amounts on the alleged improvements and expansion. 'JTtis is because even if she did, the Tribunal would not qualify those works as an expansion of the investment within the meaning of the definition of *a "covered investment"*.

163. As already explained above, the definition *of "covered investment"* seeks to exclude cases in which the investor of the other State party did not, during the currency of the KORUS FTA, have any major involvement with the investment dial is similar 10 the holding, acquiring or establishing of the investment. Accordingly, the expansion of an asset can only qualify and bring the investor within the protection of Articles 11.5 and 11.6 of ihe KORUS FTA if such expansion significantly changes the character and/or magnitude of the investment.

164. With respect to *the* car park, the Tribunal notor that it was merely paved and fenced. In uui view, such wuik did nut bring the car park into existence nor did it significantly change the character of the Property. The same holds true even more for the changing of wallpaper and oil-paper, which seem to be acts of maintenance rather than the creation of anything new or additional. In the Tribunals view, the renovation of the hut into an additional room is the act that seems most capable of having changed to some extent the character of the Property. However, the Tribunal notes that the Two-Story House already contained two other rooms in the first story and an apartment in the second story. Adding one additional room in the first story does not appear to the Tribunal to be a very significant change.

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[84] As confirmed by Professor [redacted] (at paras. 31ff of his expert report; Transcript of Day 3, at page 68, lines lOff) and Professor [redacted] (at paras. 25ff of his expert report; Transcript of Day 3, at page 83, lines 16ff).

165. In addition, and crucially, even if one considered the Claimant's allegations proven, the costs of all works combined (KRW 7,400,000) only amount to approximately 2% of the capital initially committed by the Claimant some 13 years earlier (KRW 330,000,000). The Tribunal considers that such small additional commitment cannot qualify as an expansion of the investment within the definition of "*covered investment*". It does not establish an involvement with the investment that is comparable to the other alternatives deemed sufficient by this definition, i.e. the holding, acquiring or establishing of an investment.

166. If one were to accept such minor improvements or additions to an existing investment, investors of the host State or a third State could very easily come under the protection of the KORUS FTA after its entry into force by changing their nationality to that of the other State party to the KORUS FTA, and making very small changes to the investment. The Tribunal considers that this was not the intention of the drafters of the KORUS FTA. In fact, the Tribunal is of the view that one of the very reasons behind the definition of "*covered investment*" was to exclude host State investors, or investors from third States, from benefitting from the protections of the KORUS FTA without having had any significant involvement with the investment during the currency of the KORUS FTA.

167. Consequently, the Tribunal holds that the Claimant did not expand the investment after the KORUS FTA came into force and after she acquired US nationality. Therefore, we hold that there was no "*covered investment*" of the Claimant in relation to which the guarantees of Articles 11.5 and 11.6 of the KORUS FTA could apply or have been breached.

C. Conclusion on the Application for Preliminary Objections

168. Based on the foregoing, the Tribunal upholds the Respondent's Preliminary Objection no. 1 because the Claimant was unable to show that she made an "*investment*" and a "*covered investment*" within the meaning of the KORUS TTA.

169. As a result, the Claimant's interest in the Property falls outside the scope of the KORUS TTA, as per its Article 11.1.1, and the Tribunal concludes that it does not have jurisdiction over the Claimant's claim. Given this conclusion, it is not necessary for the Tribunal to determine Preliminary Objections nos. 2 to 4[87].

VII. COSTS

170. On the pleadings, both Parties have requested that the other Party be ordered to bear all costs and expenses incurred in connection with this application. However, at the close of the Hearing, the Claimant submitted that, unless there are extraordinary circumstances, each Party should bear its own expenses including legal costs whatever the result of the

[87] In his separate Concurring Opinion, Dr. Benny Lo has provided his own analysis on the Respondent's Preliminary Objections nos. 2 to 4.

application[W]. In any event, as directed hy the Tribunal, hnih Parties have submitted cost stotements setting out their respective legal fees and expenses.

171. In relation to costs, Article 11.20.8 of the KORUS FTA provides as follows:

> *"When it decides a respondent's objection under paragraph 6 or 7, the tribunal may, if warranted award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shad consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment."*

172. In addition, Article 11.26.2 of the KORUS FTA reads as follows:

> *"A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules."*

172. The applicable arbitration rules in this ease aie the UNCITRAL Rules, which provides as follows in Article 42 as follows:

> *The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal mav apportion each of such costs between the juirties if it determines that apportionment is reasonable; taking into account the circumstances of the case."*

174. In the Tribunal's view, if an application for preliminary objections pursuant to Article 11.20.6 and or 11.20.7 of the KORIJS FTA result* in a dismissal of the entire car©, the costo decision is governed by Article 11.26.2 of the KORUS FTA. This is because Article 11.20.8 of the KORUS FTA provides for a costs award only iu uanuw circumstances, namely if such award is "warrantedespecially in case of a frivolous claim or objection. In other words, Article 11.20.8 of the KORUS FTA presupposes that in the usual course of events, i.e. when those narrow circumstances are not met. there will he (only) a regular costs decision later on in the proceedingn.

175. Indeed. the purpose of Article 11.20.8 of the KORUS FTA quite clearly is to allow a tribunal to apportion the costs of the pidiuiinary objections phase separately from the other costs of the arbitration if it considers that the parties' submissions in the preliminary objections phase so warrant. If, however, the case does not proceed beyond the preliminary objections phase, there is no room foi scpaiatc appuiliouiiig of the COSIS of the preliminary objections phase because there are no oilier costs incurred thereafter.

176. Therefore, this Tribunal will apply Article 11.26.2 of the KURUS FTA. While this Article refer* In the rules on costs in the arbitration rules, which in this case i3 a reference to Article 42 of the UNCITRAL Rules, the Tribunal notes that the wording of Article 11.26.2 of the

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[W] Transcript of Day 3, at page 83, line 20 to page 84, line 10.

KORUS FTA grants a discretion to the Tribunal (Mttf/?y"). The Tribunal would find it difficult to assume that this con be overridden by the UNCTTRAL Rules. In any case, while Article 42 ot the UNCITRAL Rules provides in its first sentence that the costs **"*shair*** be borne by the unsuccessful party, this is qualified at once with the addition of the term "*In* **principleand** the second sentence mokes clear that the Tribunal may depait from this principle if it deems it reasonable in viewr of the "*circumstances of the catr*".

177. Actuatingly, the Tribunal finds that Article 42 of the UNCITRAL Rules does not remove or fetter the discretion granted in Article 11.26.2 of the KORUS FTA, for which reason it is not necessary to make a definitive finding on which of the two provisions prevail.

178. The Tribunal notes that the Claimant was the unsuccessful party in this arbitration. Applying Article 42 of the UNCITRAL Rules, the starting point in principle is that the Claimant should be made to bear all costs of this arbitration. However, the Tribunal does not find this appropriate in view of the following three circumstances[89].

179. First, *the* Rrspnnripnt raised four separate preliminary objections, all of which were discussed extensively by both Parties in writing and during the Hearing. Both Parties' expert opinions were focussed mainly (in case of the Claimant's expert: solely) on preliminary objection no.3. However, in the end, the Tribunal needed to decide only on preliminary objection no.1, rendering in hindsight a very significant part of the costs unnecessary.

180. Secondly, the Claimant had opposed a hearing. Aftci the Tribunal had granted the Respondent's request for a hearing. the Claimant advocated in favour of a one-day hearing, wrhcreas the Respondent suggested a duration of three days, arguing that more lime was needed for oral pleadings and the taking of evidence. In the end, the Hearing lasted two and a half Hays, corresponding closely to the Respondent's suggestion. As tlic costs of (lie Ilcaiiug fuuii a very significant pan of the overall costs ot this arbitration, the Tribunal considers that the Claimant's opposition to holding a hearing, and to it lasting for more than a day, must be taken into account in the costs decision.

181. Thirdly, the legal fees and expenses claimed hy the Parties are quite unequal, with the Rerpondent claiming approximately foui times the amount claimed by the Claimant.

182. Under those circumstances, the Tribunal would not find it appropriate to order the Claimant, even though she was the unsuccessful Party, to bear all the costs of the arbitration.

183. Instead, in the Tribunal's view, the appropriate approach towards costs in the present case is for each party to bcai lwlf uf the fees and expenses of the Tribunal and half ot the lees and expenses of the HKIAC. In addition, the Trihunal finds it appropriate that each party shall bear its own legal fees and expenses.

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[89] In his separate Concurring Opinion, Dr. Benny Lo has provided additional reasons why he considers (hat the Tribunal's costs order, stated under section VIII below, lu be reasonable and appropriate.

VIII. OPERATIVE PART

For the reasons set ouc above, the Tribunal finally:

1. DETERMINES that the Respondent's Preliminary Objection no. 1 be upheld;
2. DETERMINES that the Tribunal has no jurisdiction over the Claimant's claims;
3. ORDERS that the Claimant's claims be dismissed; and
4. ORDERS that each Party shall bear and pay its own legal fees and expenses, and half of the fees and expenses of the Tribunal and the HKIAC.

Place of Arbitration: Seoul, Republic of Korea

Date of this Award: 24th September 2019

Judge Bruno Simma

Dr. Benny Lo

Professor Donald McRae