

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

ANSUNG HOUSING CO., LTD.

Claimant

and

PEOPLE'S REPUBLIC OF CHINA

Respondent

ICSID Case No. ARB/14/25

AWARD

Members of the Tribunal

Prof. Lucy Reed, President

Dr. Michael Pryles, Arbitrator

Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal

Ms. Geraldine R. Fischer

Date of dispatch: March 9, 2017

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I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes (“ICSID” or the “Centre”) by Ansung Housing Co., Ltd. (“Ansung” or “Claimant”), a privately-owned company incorporated under the laws of the Republic of Korea, against the People’s Republic of China (“China” or “Respondent”). Claimant and Respondent shall be referred to collectively as the “Parties.” Claimant and Respondent shall be each referred to as a “Party.”
2. The dispute relates to Ansung’s investment in a golf course and condominium development project in Sheyang-Xian, China. This dispute was submitted to ICSID on the basis of the Agreement Between the Government of the Republic of Korea and the Government of the People’s Republic of China on the Promotion and Protection of Investments that entered into force on December 1, 2007 (“China-Korea BIT” or “Treaty”), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 (“ICSID Convention”).
3. Before the First Session, China filed “Respondent’s Objection Pursuant to ICSID Arbitration Rule 41(5)” (“Rule 41(5) Objection” or “41(5) Objection”), contending that Ansung’s claim “is manifestly without legal merit.” Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings (“Arbitration Rules” or “ICSID Arbitration Rules” or “Rules”) provides that the Tribunal “after giving the parties the opportunity to present their observations on the objection, shall, at the first session or promptly thereafter notify the parties of its decision on the objection.”
4. The Tribunal conducted the First Session and a hearing on the Rule 41(5) Objection on December 14, 2016 (“Rule 41(5) Hearing” or “Hearing”). This Award embodies the Tribunal’s decision upholding China’s Rule 41(5) Objection, which the Tribunal relayed to the Parties in summary form at the end of the Hearing. Following the letter and spirit of Rule 41(5), the Tribunal determined to provide an oral ruling to save the Parties unnecessary time and resources post-Hearing.

II. PROCEDURAL HISTORY

A. Notice of Intent

5. On May 19, 2014, pursuant to Article 9(5) of the Treaty, Claimant submitted a written notice of intent to arbitrate (“Notice of Intent”), including an invitation to discuss amicable resolution of the dispute, to Respondent’s President, H.E. Xi Jinping, and other senior officials.¹ Respondent did not respond and no discussions ensued.

B. Request for Arbitration

6. On October 7, 2014, ICSID received an electronic copy of a request for arbitration dated October 7, 2014 from Ansung against China together with Exhibits C-001 through C-008, which was supplemented by Claimant’s letters of October 27, 2014 and November 3, 2014 (“RFA” or “Request” or “Request for Arbitration”). The ICSID Secretariat received a hard copy of the Request on October 8, 2014.
7. On November 3, 2014, Ansung submitted a letter to the ICSID Secretary-General (“Secretary-General”) in response to her request for additional information on the claim.
8. On November 4, 2014, the Secretary-General notified the Parties that she registered the Request in accordance with Article 36(3) of the ICSID Convention. The Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID’s Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (“ICSID Institution Rules” or “Institution Rules”).

C. Tribunal Constitution

9. In the absence of an agreement between the Parties on the method of constituting the Tribunal, the Tribunal was constituted in accordance with the formula set forth in Article 37(2)(b) of the ICSID Convention.

¹ C-005, Letter dated 19 May 2014 from Bae, Kim & Lee LLC to H.E. Xi Jinping enclosing Notice of Intent for International Arbitration.

10. On February 4, 2014, Dr. Michael Pryles, an Australian national, accepted his appointment by Claimant as arbitrator, and Mr. J. Christopher Thomas, Q.C., a Canadian national, accepted his appointment by Respondent as arbitrator.
11. On December 3, 2015, the Parties were notified that Mr. J. Christopher Thomas, Q.C. withdrew his acceptance as arbitrator.
12. On July 13, 2016, pursuant to Article 38 of the ICSID Convention, Claimant filed a request for the Chairman of the Administrative Council to appoint the arbitrators not yet appointed in this case.
13. On July 25, 2016, Professor Albert Jan van den Berg, a Dutch national, accepted his appointment by Respondent as arbitrator.
14. On September 2, 2016, Professor Lucy Reed, a U.S. national, accepted her appointment by the Chairman of the Administrative Council, in accordance with Article 38 of the ICSID Convention, as presiding arbitrator.
15. On September 2, 2016, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. The Secretary-General designated Ms. Geraldine R. Fischer, ICSID Legal Counsel, to serve as Secretary of the Tribunal.

D. Respondent's ICSID Arbitration Rule 41(5) Objection

16. On September 15, 2016, China filed its Rule 41(5) Objection together with Legal Authorities RLA-001 through RLA-020. On September 27, 2016, following the Parties' exchanges of correspondence, the Tribunal set the pleading schedule for the Rule 41(5) Objection.
17. On October 28, 2016, Ansung filed its First Observations on the Rule 41(5) Objection ("Claimant's First Observations") together with Legal Authorities CLA-001 through CLA-016.

18. On November 16, 2016, China filed its Observations on its Rule 41(5) Objection (“Respondent’s Observations”) together with Legal Authorities RLA-021 through RLA-040.
19. On December 2, 2016, Ansung filed its Second Observations on the Rule 41(5) Objection (“Claimant’s Second Observations”) together with Legal Authorities CLA-017 through CLA-024.
20. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a First Session and a Rule 41(5) Hearing with the Parties on December 14, 2016 in Singapore.
21. In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following persons were present on behalf of the Parties at the First Session and Rule 41(5) Hearing:

For Claimant:

| | |
|-------------------------|--------------------------|
| Mr. Kap-You (Kevin) Kim | Bae, Kim & Lee LLC |
| Mr. David MacArthur | Bae, Kim & Lee LLC |
| Mr. Junu Kim | Bae, Kim & Lee LLC |
| Mr. Sejin Kim | Bae, Kim & Lee LLC |
| Mr. Jin Woo Pae | Ansung Housing Co., Ltd. |

For Respondent:

| | |
|------------------|---|
| Mr. Barton Legum | Dentons |
| Ms. Anna Crevon | Dentons |
| Ms. Huawei Sun | Zhong Lun Law Firm |
| Mr. Lijun Cao | Zhong Lun Law Firm |
| Ms. Yongjie Li | Ministry of Commerce, People’s Republic of China |
| Mr. Zhao Sun | Ministry of Commerce, People’s Republic of China |
| Mr. Zheng Wang | Jiangsu Provincial Government, People’s Republic of China |

22. During the First Session, the Tribunal and the Parties’ counsel discussed the Parties’ Joint Draft Procedural Order No. 1 and agreed on the procedure that would regulate the

proceeding. Among other things, the Parties confirmed that the Tribunal was properly constituted² and agreed to the following procedural matters:

- a) Arbitration Rules: The applicable Arbitration Rules are those in effect from April 10, 2006.
 - b) Language: The procedural language is English.
 - c) Publication: “The parties consent to ICSID publication of the award and any order or decision issued in the present proceeding. For the avoidance of doubt, the parties do not consent to the publication by ICSID of pleadings, transcripts of hearings or any other document exchanged in the arbitration.”³
23. In light of this Award terminating the arbitration, the Tribunal did not issue Procedural Order No. 1.

E. Post-Hearing Procedure

24. On January 17, 2017, as directed by the Tribunal at the end of the First Session, each Party submitted a Statement of Costs, with the Claimant submitting Legal Authorities CLA-025 through CLA-028 with its Statement of Costs.
25. On January 19, 2017, Respondent objected that Claimant’s Statement of Costs was a submission on costs rather than the costs statement requested by the Tribunal. On January 23, 2017, the Tribunal authorized Respondent to file any responsive submissions. Respondent filed its Observations on Claimant’s Submission on Costs (“Respondent’s Observations on Costs”) together with Legal Authorities RLA-041 through RLA-046 on February 3, 2017.
26. On February 6, 2017, Claimant sought permission to respond to Respondent’s Observations, to which Respondent objected on February 7, 2017. On February 8, 2017, the Tribunal authorized Claimant to file its response by February 15, 2017. Claimant

² Hearing Tr. 6:6-16.

³ Parties’ Joint Draft Procedural Order No. 1 dated December 1, 2016 (transmitted by email from Mr. David McArthur to the ICSID Secretariat on December 2, 2016 at 4:30 a.m. (Washington, D.C. time)).

submitted its Response to Respondent’s Observations on Costs (“Claimant’s Response”) together with Legal Authorities CLA-029 through CLA-050 on February 15, 2017.

27. On February 15, 2017, the proceeding was closed.

III. LEGAL TEXTS

28. ICSID Arbitration Rule 41(5) and (6) provides:

(5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

(6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

29. Article 9 of the China-Korea BIT, headed “Settlement of Disputes Between Investors and One Contracting Party,” provides in relevant part:

1. For the purposes of this Article, an investment dispute is a dispute between one Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party.

...

3. In case of international arbitration, the dispute shall be submitted, at the option of the investor, to:

(a) International Center for Settlement of Investment Disputes (ICSID) under the Convention on the Settlement of Disputes between States and Nationals of Other States, done at Washington on March 18, 1965; or

(b) an ad hoc arbitration tribunal established under UNCITRAL Arbitration Rules or any other arbitration rules agreed upon by both parties;

provided that the Contracting Party involved in the dispute may require the investor concerned to go through the domestic administrative review procedures specified by the laws and regulations of that Contracting Party before the submission to international arbitration.

The domestic administrative review procedures shall not exceed four months from the date an application for the review is first filed including the time required for documentation. If the procedures are not completed by the end of the four months, it shall be considered that the procedures are complete and the investor may proceed to an international arbitration. The investor may file an application for the review during the four months consultation or negotiation period as provided in paragraph 2 of this Article.

Each Contracting Party hereby gives its consent for submission by the investor concerned of the investment dispute for settlement by binding international arbitration.

...

5. An investor submitting an investment dispute pursuant to paragraph 3 of this Article shall give to the Contracting Party in dispute a written notice of intent to do so at least ninety days before the claim is submitted. The notice of intent shall specify:

(a) the name and address of the investors concerned;

(b) the specific measures at issue of such Contracting Party in dispute and a brief summary of the factual and legal basis of the investment dispute sufficient to present the problem clearly, including the provisions of this Agreement alleged to have been breached;

(c) the relief sought including, as necessary, the approximate amount of damages claimed; and

(d) the dispute-settlement procedures set forth in paragraph 3
(a) to (b) of this Article which the investor concerned will seek.

...

7. Notwithstanding the provisions of paragraph 3 of this Article, an investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage.⁴

30. Article 3 of the China-Korea BIT, headed “Treatment of Investment” (“Most-Favoured-Nation Treatment” or “MFN Clause”), provides:

3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as “most-favoured-nation treatment”) with respect to investments and business activities [defined in paragraph 1 as “the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments”], including the admission of investment.

....

5. Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.⁵

31. Article 31(1) of the Vienna Convention on the Law of Treaties (“VCLT”) provides:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁶

⁴ C-001, China-Korea BIT, Art. 9(3), (5) and (7).

⁵ C-001, China-Korea BIT, Art. 3(3) and (5).

⁶ RLA-003, Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, 1155 UNTS 311 (entered into force January 27, 1980).

IV. FACTUAL BACKGROUND

32. For purposes of ruling on Respondent's Rule 41(5) Objection, the Tribunal assumes the truth of the facts alleged by Claimant. The factual background set out below therefore comes from Ansung's Notice of Intent, Request for Arbitration, First and Second Observations on the Rule 41(5) Objection, and oral submissions at the Rule 41(5) Hearing.
33. In April 2005 and April 2006, Mr. Jin Woo Pae, Ansung's CEO, attended several presentations held in Korea by representatives from Yancheng-Shi, China, where he learned about possible investment opportunities to develop and operate a golf course in the Yancheng-Shi district.⁷
34. On or around September 13, 2006, Ansung identified a 1,500 *mu* parcel of land⁸ for a project in Sheyang-Xian (a sub-district of Yancheng-Shi) that had been partially developed by a joint venture company called "Sheyang Seashore International Golf Course Co. Ltd." ("Sheyang Seashore").⁹
35. In November 2006, Ansung's management decided to build a golf resort in Sheyang-Xian by acquiring the Sheyang Seashore joint venture. Ansung planned to build a 27-hole golf course and related facilities on 3,000 *mu*, which included Sheyang Seashore's 1,500 *mu* land and an additional 1,500 *mu* in adjacent lands. Ansung filed an application with the Communist Party of the Sheyang Harbor Industrial Zone Administration Committee ("Committee") to obtain an investment approval from the local Sheyang-Xian government, which application attached a report outlining Ansung's overall scheme for a golf course project with more than 18 holes and not more than 36 holes.¹⁰
36. On December 12, 2006, Ansung entered into an Investment Agreement with the Committee "under which the Committee acknowledged that the related authorities of

⁷ RFA, para. 21.

⁸ A "mu" is a unit of land in the Chinese market system, approximating 666 2/3 square meters. RFA, n. 5.

⁹ RFA, paras. 19, 23. Sheyang Seashore was established in 1991 between a Japanese company and the Sheyang Animal Husbandry and Fisheries General Company. RFA, para. 23.

¹⁰ RFA, para. 27 and n. 10.

Jiangsu-Sheng and Sheyang-Xian had approved the development of the 1,500 *mu*" (referred to as the "first phase" of the project), with "1,200 *mu*, for the development of an 18-hole golf course and 300 *mu* for related facilities."¹¹ The related facilities were to be luxury condominiums and a clubhouse to house employees and serve administrative functions.¹² The Investment Agreement also provided that the Committee "would reserve an additional 1,500 *mu* adjacent to the first phase land," as the joint venture "intended to develop another 9-hole golf course on that 1500 *mu* once the first phase of the project had been completed" (the "second phase" of the project).¹³

37. As requested by the Committee, on January 16, 2007, Ansung's officers briefed local government officials on Ansung's "master plan" to build a 27-hole golf course on 3,000 *mu*.¹⁴ On January 29, 2007, Ansung's officers met with Committee Secretary You Dao-jun to ask whether the local government could provide the entire 3,000 *mu* at the outset, but Secretary You informed the officers that "the government would provide the additional 1,500 *mu* for the second phase immediately after the completion of the first phase."¹⁵
38. On March 5, 2007, Ansung commenced construction work for the first phase of the project. Throughout the work, blueprints and concept drawings for the 27-hole golf course and related facilities were posted in front of the construction site.¹⁶
39. In March 2007, shortly after initiating construction of the first phase, Ansung observed that a nearby park called "Sheyang Island Park," which was to be operated by a Chinese company, was apparently being developed as a golf course.¹⁷
40. On April 5, 2007, Ansung's CEO, Mr. Jin Woo Pae, expressed his concern to Committee Secretary You Dao-jun about "the illegal development of a golf course in Sheyang Island

¹¹ RFA, para. 30 (citing C-002, Agreement between Sheyang Harbor Industrial Zone Administration Committee and Ansung Housing Co., Ltd. dated December 12, 2006).

¹² RFA, n. 18.

¹³ RFA, para. 31.

¹⁴ RFA, para. 32.

¹⁵ RFA, para. 33.

¹⁶ RFA, para. 34.

¹⁷ RFA, para. 36.

Park.”¹⁸ Secretary You reassured him that no other golf course could be legally developed or operated in Sheyang-Xian and Sheyang Island Park was being developed as an amusement park.¹⁹ In April and May 2007, several other local government officials confirmed Secretary You’s message about the nature of development in Sheyang Island Park.²⁰

41. On or around June 27, 2007, when Ansung requested the 300 *mu* necessary for the related facilities for the first phase, Secretary You explained that China had changed its real estate policy so the Committee could no longer provide the land at the price stipulated in the Investment Agreement and Ansung would have to apply for land use rights through a public sale at higher prices. He informed Ansung that the joint venture would not be eligible to develop a clubhouse and condominiums on this 300 *mu* without establishing a Chinese subsidiary.²¹
42. On July 10, 2007, after further discussions with Secretary You, Ansung established a Chinese company, “Sheyang Mirage Field Co., Ltd.” (“Mirage”), for the sole purpose of building a clubhouse and condominiums on the 300 *mu* as part of the first phase.²²
43. On May 20, 2008, the Committee requested Ansung, through Mirage, to agree to pay a substantially higher price for the 300 *mu*. Given its already substantial investment and the importance of a clubhouse, “despite the Committee’s outright repudiation of the Investment Agreement, Ansung had no alternative but to build the clubhouse” by paying the higher price.²³

¹⁸ RFA, para. 37.

¹⁹ *Ibid.*

²⁰ RFA, para. 38.

²¹ RFA, paras. 39-41.

²² RFA, para. 43.

²³ RFA, para. 44.

44. On May 27, 2008, the Sheyang-Xian government awarded Ansung the land use rights for 100 *mu* at a price higher than originally agreed, and refused to provide the further 200 *mu*. This left Ansung unable to develop the condominiums.²⁴
45. On June 30, 2009, with the first phase almost complete, the Committee arranged for a third-party development company to loan funds to Mirage to expedite construction of the clubhouse.²⁵
46. In August 2009, Ansung learned that Sheyang Island Park had become an operating 18-hole golf course, and complained to various government officials.²⁶ Although the officials represented that they would intervene, “it is clear that the Sheyang-Xian government took no measures to enjoin the illegal operation of the golf course in the Park as it has been illegally operating the golf course up to the present date.”²⁷
47. Ansung completed the 18-hole first phase of the project in November 2010. At that time, Ansung repeatedly requested the Committee to provide the additional land necessary for the second phase, in order to avoid bearing costly construction-related expenses, but “officials avoided giving clear answers and only advised Ansung to wait” or rejected Ansung’s meeting requests.²⁸
48. On March 24, 2011, Ansung’s Chairman Jin Woo Pae visited Secretary Xu Chao, the Communist Party Secretary of Sheyang-Xian, to request the additional land. Chairman Pae received assurances from Secretary Xu that he would “take the steps necessary to address the problem.”²⁹ On March 25, 2011, “the very next day, Secretary You contacted Chairman Pae to inform him that Secretary Xu...had no authority to address the issue...and he was the only person with the actual power to handle all land-related issues

²⁴ RFA, paras. 45-46.

²⁵ RFA, para. 47.

²⁶ RFA, para. 53. *See also* R. 41(5) Obj., para. 29 (citing RFA, para. 53).

²⁷ RFA, para. 54.

²⁸ RFA, para. 49. *See also* R. Obs., para. 38 (citing RFA, para. 49).

²⁹ RFA, para 50.

in this project” and, yet, Secretary You took no action and thereafter “he has refused to meet with Ansung for any matter.”³⁰

49. In June 2011, Mirage was unable to repay the loan arranged by the Committee, because, with only an 18-hole golf course, “Ansung was unable to produce sufficient returns from its investments in the JV and Mirage as to justify their continued existence...[or] contribute additional financing from Korea into its Subsidiaries, including Mirage, given the Sheyang-Xian government’s manifest failure to honor its aforementioned commitments and assurances.”³¹
50. Also in June 2011, Ansung employees reported that Committee officials visited the golf course to demand repayment of the debt by “unlawful means” such as “blockad[ing] the main gate of the golf course and even assault[ing] Ansung’s employees,” with requests for police protection going unheeded, “leaving Ansung’s officers and employees in perpetual danger.”³²
51. Without the planned full 27-hole golf course with luxury condominiums, and facing the competing illegal golf course at Sheyang Island Park and harassment by local officials, Ansung found itself unable to sell memberships to the golf course and hence “incapable of sustaining a profitable and stable golf business in Sheyang-Xian.”³³ Consequently, in October 2011, “Ansung had no alternative but to dispose of its entire assets of the golf business, including its shareholding in [Mirage], to a Chinese purchaser at a price significantly lower than the amount that Ansung had invested toward the project, causing serious financial losses and damage to Ansung.”³⁴

³⁰ *Ibid.*

³¹ RFA, para. 55.

³² RFA, para. 56.

³³ RFA, paras. 58 and 59.

³⁴ RFA, para. 60. *See also* R. 41(5) Obj., para. 27 (citing RFA, para. 12); R. Obs., para. 13.

52. As also pleaded in the introduction to the Request for Arbitration: “As a consequence of the foregoing, Ansung was forced to dispose of its entire investment in Sheyang-Xian in October 2011 in order to avoid further losses.”³⁵
53. The factual background in Claimant’s Request for Arbitration ends at October 2011. In Ansung’s letter of November 3, 2014 to the ICSID Secretary-General and in its First Observations, Ansung describes the sales transactions that it alleges took place in November and December 2011.
54. Ansung provides the following description of events in its November 3, 2014 letter:
- a) “On 2 November 2011, Claimant entered into a share transfer agreement with a Chinese purchaser to sell its shareholdings in the Subsidiaries. However, the agreement did not set a fixed price for the share transfer.”
 - b) “On 17 December 2011, the parties reached agreement on the final price for the transfer arrangement as well as the date on which the transfer would occur; and this was reduced to writing and reflected in an instrument called a ‘supplementary agreement.’”
 - c) “On 19 December 2011, pursuant to the supplementary agreement, Claimant transferred the shares of the Subsidiaries to the Chinese purchaser.”³⁶
55. In Claimant’s First Observations, the alleged November and December 2011 events were described as follows:
- a) “[O]n 2 November 2011, Ansung tentatively agreed to transfer the shares. However it was yet to sell the Project, because the share price for the sale was not yet settled.”

³⁵ RFA, para. 12.

³⁶ Letter dated November 3, 2014 from Bae, Kim & Lee LLC to the ICSID Secretary-General.

- b) “After further negotiations, in mid-December 2011, the parties arrived at the final price for the share transfer and decided the date on which the transfer would occur.”
- c) “On 17 December 2011, *considering that the additional land was not still provided by the local government*, Ansung finally agreed to transfer the shares at the agreed price.”³⁷

V. THE PARTIES’ MAIN POSITIONS AND REQUESTS FOR RELIEF

A. Summary of the Parties’ Positions

- 56. Pursuant to ICSID Arbitration Rule 41(5), Respondent objects that Ansung’s claims under the China-Korea BIT “manifestly lack legal merit and should be dismissed,” because Ansung instituted this ICSID arbitration more than three years after it first acquired knowledge that it had incurred loss or damage, rendering the claim time-barred under Article 9(7) of the China-Korea BIT.³⁸ The MFN Clause in the Treaty cannot save Ansung’s untimely claim.³⁹
- 57. Claimant advances that Respondent’s Rule 41(5) Objection itself “lacks any legal merit and should be denied,” because: “(i) [Respondent] fails to show that Ansung’s knowledge of loss or damage is manifestly incapable of satisfying the time requirement of Article 9(7) of the China-Korea BIT, and (ii) regardless of the tribunal’s determination on the (i) above, the China-Korea BIT’s MFN clause applies so as to allow Ansung to take advantage of more favorable treatment in third party BITs with respect to the time requirement.”⁴⁰ Ansung argues that if the facts it asserts are taken as true, its claim meets the three-year prescription period because it served its Notice of Intent two-and-a-half years after it could have known the losses incurred. Ansung contends that, at best,

³⁷ Cl. First Obs., para. 28 (emphasis in original).

³⁸ R. 41(5) Obj., paras. 1-6.

³⁹ R. Obs., para. 5.

⁴⁰ Cl. First Obs., paras. 2, 66.

China's allegations that its claims are time-barred demand further factual and legal scrutiny at a later stage and cannot be considered "manifestly" meritless.⁴¹

58. In outlining the Parties' respective positions in the sections below, the Tribunal does not express or imply any view regarding the merits of any arguments advanced by either Party.

B. Requests for Relief

59. Respondent requests an award in its favor: (a) dismissing with prejudice all claims made by Ansung in the Request for Arbitration; (b) ordering Ansung to pay China's legal fees incurred in connection with this arbitration; (c) ordering Ansung to pay the fees of the Centre and the Tribunal; and (d) ordering post-Award interest on all sums awarded at a commercially reasonable rate to be set by the Tribunal.⁴²
60. Respondent also requests that, in the event the Tribunal decides it must hear evidence before definitively resolving the application of Article 9(7) to these proceedings, the Tribunal order this question to be heard as a preliminary question pursuant to ICSID Arbitration Rule 41(4).⁴³
61. Claimant requests a decision: (a) denying Respondent's 41(5) Objection, if possible at the First Session; and (b) ordering Respondent to reimburse Claimant for all costs and expenses incurred by Claimant for the First and Second Observations on Respondent's 41(5) Objection, including but not limited to fees and expenses of the Tribunal, ICSID, legal counsel, and Claimant's own officers and employees.⁴⁴

⁴¹ Cl. Second Obs., para. 13.

⁴² R. Obs., paras. 74-75.

⁴³ R. Obs., para. 75.

⁴⁴ Cl. Second Obs., para. 77.

VI. THE LEGAL STANDARD FOR ICSID ARBITRATION RULE 41(5) AND (6)

A. Respondent's Position

62. Respondent recites that ICSID Arbitration Rule 41(5) provides for early dismissal of claims that are “manifestly without legal merit,” and the Tribunal must render an award under ICSID Arbitration Rule 41(6) if it finds either that the dispute is not within the Centre’s jurisdiction or that the claims are “manifestly without legal merit.”⁴⁵ Respondent relies on the Rule 41(5) analysis of the ICSID tribunal in *Trans-Global Petroleum v. Jordan* (“*Trans-Global*”), which subsequent tribunals have cited with approval:

[T]he ordinary meaning of the word [“manifestly”] requires the respondent to establish its objection clearly and obviously, with relative ease and despatch. The standard is thus set high. Given the nature of investment disputes generally, the Tribunal nonetheless recognizes that this exercise may not always be simple....The exercise may thus be complicated; but it should never be difficult.⁴⁶

63. Respondent, again citing to *Trans-Global*, posits that a Rule 41(5) decision would “assume the truth of the factual allegations in the request for arbitration unless a given factual obligation was manifestly ‘incredible, frivolous, vexatious or inaccurate or made in bad faith.’”⁴⁷ China asserts that Ansung erroneously suggests that a claim can survive a Rule 41(5) challenge “if a tribunal is of the opinion that...the facts in the claim are not patently frivolous or absurd.”⁴⁸ According to Respondent, the question under Rule 41(5) instead is “whether, assuming the truth of the credible allegations made, the claim fails as a matter of law.”⁴⁹

⁴⁵ R. 41(5) Obj., para. 7. See also R. 41(5) Obj., para. 11 (noting “...subsequent tribunals have repeatedly confirmed, any legal defect in the claim may be the subject of a Rule 41(5) application, whether concerning the tribunal’s jurisdiction or the merits.”).

⁴⁶ R. 41(5) Obj., para. 10 (citing RLA-009, *Trans-Global Petroleum, Inc. v. Hashemite Kingdom of Jordan*, ICSID Case No. ARB/07/25, para. 88 (Decision on the Respondent’s Objection Under Rule 41(5), May 12, 2008) (“*Trans-Global*”).

⁴⁷ R. 41(5) Obj., para. 12 (citing *Trans-Global*, para. 105).

⁴⁸ R. Obs., para. 18 (citing Cl. First Obs., para. 13).

⁴⁹ *Ibid.*

64. When considering Rule 41(5) applications, Respondent explains that “tribunals weigh the right granted to the respondent ‘to have a patently unmeritorious claim disposed of before unnecessary trouble and expense is incurred in defending it’ against the general requirements of due process.”⁵⁰
65. With respect to Claimant’s reliance on the Secretary-General’s registration of the Request, Respondent notes that ICSID Arbitration Rule 41(5) was proposed to complement the Secretary-General’s screening powers, so registration does not prejudge the Rule 41(5) question presented to the Tribunal.⁵¹ Unlike the short registration process, which considers only the claimant’s *ex parte* submissions, the Rule 41(5) procedure has a “full, adversary exploration of the relevant legal principles.”⁵² Respondent further notes that an article written by a member of the working group that prepared the Rule 41 amendments recognized that temporal objections were appropriate for resolution under Rule 41(5).⁵³

B. Claimant’s Position

66. Claimant, like Respondent, relies on the *Trans-Global* decision to interpret the scope of ICSID Arbitration Rule 41(5), but contends that the *Trans-Global* tribunal “held that the provision applied only to clear and obvious cases of ‘patently unmeritorious claims.’”⁵⁴ Ansung concurs with China’s reliance on that tribunal’s elucidation of the meaning of the adjective “manifestly,” by requiring the respondent to establish its objection “clearly and obviously, with relative ease and despatch.”⁵⁵ Claimant concludes that, to meet the necessary element of “manifestly,” “Respondent must pass a demanding and rigorous test by demonstrating that its objection has such clarity, certainty, and obviousness.”⁵⁶

⁵⁰ R. 41(5) Obj., para. 13 (citing RLA-012, *Global Trading Resource Corp. and Globex International, Inc. v. Ukraine*, ICSID Case No. ARB/09/11, para. 34 (Award, December 1, 2010) (“*Global Trading*”)).

⁵¹ R. Obs., para. 19.

⁵² *Ibid.*

⁵³ *Ibid.* (referencing RLA-007, A. Antonietti, *The 2006 Amendments to the ICSID Rules and Regulations and the Additional Facility Rules*, 21(2) ICSID Rev. 427, 439 (2006)).

⁵⁴ Cl. First Obs., para. 6 (citing *Trans-Global*, para. 92).

⁵⁵ *Ibid.* (citing *Trans-Global*, para. 88).

⁵⁶ Cl. First Obs., para. 8.

67. Claimant further argues that, “for the purpose of the 41(5) Objection, if a tribunal is of the opinion that (i) the facts in the claim are not patently frivolous or absurd, and (ii) the tribunal would not be able to decide the questions presented to it without an in-depth scrutiny of factual allegations, then it must resolve such a factual question in favour of the claimant and reject the 41(5) Objection.”⁵⁷
68. Claimant asserts that the factual background set out in its Notice of Intent and Request for Arbitration meets the temporal requirement of Article 9(7) of the China-Korea BIT at a *prima facie* level.⁵⁸ Furthermore, according to Ansung, a Rule 41(5) objection is not appropriate for contesting the existence of temporal jurisdiction, as further factual disclosure is required for a proper assessment of this objection.⁵⁹
69. Claimant also asserts that “[g]iven that the ICSID Secretary-General registered Ansung’s Request for Arbitration, this shows that from the Secretary-General’s perspective, Ansung’s claim is not ‘manifestly outside the jurisdiction [of the Centre].’”⁶⁰

C. **Tribunal’s Analysis**

70. The test for a preliminary objection under ICSID Arbitration Rule 41(5) is whether “a claim is manifestly without legal merit.” The Tribunal agrees with the Parties that the test of “manifestly” is well articulated by the *Trans-Global* tribunal, and so will require Respondent to establish its objection “clearly and obviously, with relative ease and despatch.”
71. In deciding the objection, the Tribunal accepts the facts as pleaded by Ansung. The Tribunal need not decide China’s argument that it must ignore facts that are “incredible, frivolous, vexatious or inaccurate or made in bad faith,” as it does not find that the facts pleaded by Ansung fall into these categories.

⁵⁷ Cl. First Obs., para. 13.

⁵⁸ Cl. Second Obs., para. 3.

⁵⁹ *Ibid.*

⁶⁰ Cl. First Obs., para. 69.

72. With regard to the import of the Secretary-General's registration of Ansung's Request for Arbitration, the Tribunal agrees with China that registration does not and cannot pre-judge an application under ICSID Arbitration Rule 41(5). Registration follows the Secretary-General's early screening process, at which point she bases her registration decision only "on the basis of the information contained in the request."⁶¹ If registration were to vouch for the manifest legal merit of a request for arbitration, Rule 41(5) would never lead to early resolution and would serve no purpose.
73. Where a respondent's Rule 41(5) objection is concerned with a limitation period, as China's is, a tribunal's decision on such an objection constitutes a decision as contemplated by Rule 41(6) regarding a lack of jurisdiction of the Centre and of its own competence as well as regarding manifest lack of legal merit due to a lack of temporal jurisdiction. As set out below, this is the situation here.

VII. ARTICLE 9(7) OF THE CHINA-KOREA BIT – LIMITATION PERIOD

74. To recall, Article 9(7) of the China-Korea BIT provides:

[A]n investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage.⁶²

75. Classically, the start date for such a temporal limitation period is known as the *dies a quo* and the end date as the *dies ad quem*.

A. Respondent's Position

1) *Dies a Quo*

76. Turning first to the *dies a quo* for the prescription period in the Treaty, Respondent emphasizes that Article 9(7) is precise in setting the *dies a quo* as "the date on which the investor first acquired, or should have first acquired, *knowledge that the investor had*

⁶¹ ICSID Convention, Art. 36(3).

⁶² R. 41(5) Obj., para. 1 (citing C-001, China-Korea BIT, Art. 9(7)).

*incurred loss or damage.*⁶³ Relying on prior decisions by NAFTA tribunals interpreting the substantially similar time limitation language in the NAFTA, China argues that the Treaty Article 9(7) language addresses “knowledge of the *fact* that there has been a loss, not knowledge of the *quantum* lost.”⁶⁴ Moreover, Respondent asserts, “a claimant may not rely only on loss from the last of a series of similar and related State actions alleged to constitute a breach.”⁶⁵

77. Accepting the facts set out in Claimant’s Request for Arbitration, Respondent asserts that Ansung “necessarily knew of the *fact* that it had incurred loss or damage on some date prior to the disposal of its investment in October 2011,” the date on which Ansung sold its entire investment in Sheyang-Xian “in order to avoid *further* losses.”⁶⁶ According to Respondent, the Tribunal need not decide an exact date because the *first* date of losses (being earlier losses) necessarily was prior to October 2011.⁶⁷
78. In Respondent’s Observations, China underscores that Ansung has attempted to change its story in its First Observations by concentrating on “a continuing omission” by the local government in late 2011, as opposed to allegations in the Request for Arbitration that the Committee began affirmatively breaching the Investment Agreement by withholding land in 2007, and engaged in “outright repudiation” in 2008 by forcing

⁶³ R. 41(5) Obj., para. 23 (citing C-001, China-Korea BIT, Art. 9(7) (emphasis added by Respondent)).

⁶⁴ R. 41(5) Obj., paras. 24-25 (emphasis in original). Article 1116(2) of the NAFTA provides: “An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.”

⁶⁵ R. 41(5) Obj., para. 25 (citing RLA-008, *Grand River Enterprises Six Nations, Ltd., et al. v. United States of America*, NAFTA/UNCITRAL, para. 81 (Decision on Jurisdiction, July 20, 2006) (“*Grand River)). Similarly, Respondent cites to the United States Article 1128 submission in *Eli Lilly. v. Canada*:*

An investor or enterprise *first* acquires knowledge of an alleged breach and loss at a particular moment in time; that is, under Articles 1116(2) and 1117(2), knowledge is acquired as of a particular “date.” Such knowledge cannot *first* be acquired at multiple points in time or on a recurring basis. ... Accordingly, once a claimant *first* acquires (or should have first acquired) knowledge of breach and loss, subsequent transgressions by the State Party arising from a continuing course of conduct do not renew the limitations period under Articles 1116(2) or Article 1117(2).

R. 41(5) Obj., para. 26 (citing RLA-020, *Eli Lilly & Co. v. Government of Canada*, NAFTA/UNCITRAL, para. 4 (Submission of the United States of America, March 18, 2016)).

⁶⁶ R. 41(5) Obj., para. 2 (citing RFA, paras. 12 and 60 (emphasis added by Respondent)). *See also* R. 41(5) Obj., paras. 27-30.

⁶⁷ R. 41(5) Obj., para. 31.

Ansung to pay a higher price for use of the 300 *mu*.⁶⁸ Respondent also asserts that, in Claimant’s First Observations, Ansung modified, without explanation, its story that it disposed of its investment in October 2011 by alleging that it began negotiations with an unnamed Chinese individual at an unspecified time and finally agreed to transfer its shares at the agreed price only on December 17, 2011.⁶⁹

79. China contests Ansung’s belated reliance on December 17, 2011 as the *dies a quo*. According to Respondent, although this may have been the date Ansung fully liquidated and realized its losses, it is not the date on which “Ansung first knew or should have known that its project incurred a loss.”⁷⁰ Citing to prior decisions including *Mondev International Ltd. v. United States*, China contends that Claimant’s assertions fail as a matter of law because the three-year period commences when a claimant knows “of the *fact* that some loss has occurred, not upon its full realization”.⁷¹
80. Respondent challenges Claimant’s “continuing omission” argument, first, for lack of support in Ansung’s own allegations and the applicable jurisprudence.⁷² The alleged breaches based on local government conduct between 2007 and 2010, for example the demand for an increased price for the 300 *mu*, were not ones with continuing character pursuant to the rules on State responsibility, as each breach was “complete even if it has continuing ongoing effects....”⁷³ Respondent contends that Claimant cannot convert these breaches into continuing breaches simply by alleging that it tried and failed to resolve the situation.⁷⁴

⁶⁸ R. Obs., paras. 9-12.

⁶⁹ R. Obs., para. 14.

⁷⁰ R. Obs., para. 3.

⁷¹ R. Obs., para. 35 (finding support in RLA-006, *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, para. 87 (Award, October 11, 2002); RLA-040, *Spence International Investments, LLC, Berkowitz, et al v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, para. 213 (Interim Award, October 25, 2016) (“Spence”)).

⁷² R. Obs., paras. 4, 38 *et seq.*

⁷³ R. Obs., paras. 4, 42 (citing RLA-035, *William Randolph Clayton et al and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-03, UNCITRAL, para. 268 (Award on Jurisdiction and Liability, March 17, 2015)).

⁷⁴ R. Obs., paras. 4, 43-44 (citing RLA-025, *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, para. 55 (Award, December 16, 2002) (“Feldman”)).

81. Second, China dismisses Ansung’s “continuing omission” justification that, as the Committee did not explicitly repudiate its prior assurances to provide the additional 1,500 *mu*, Ansung’s original plan for a 27-hole golf course remained viable up to the date, in mid-December 2011, that Ansung sold its phase one 18-hole golf course and clubhouse.⁷⁵ In addition to being incoherent, Respondent considers this justification to be a legal characterization of Ansung’s factual allegations that fails as a matter of law.⁷⁶ If viewed as an allegation of fact, however, China urges the Tribunal to disregard it as not credible.⁷⁷
82. From a legal perspective, Respondent asserts that tribunals have consistently rejected similar theories of “continuing breach” through a “continuing omission” for purposes of calculating a limitations period.⁷⁸ For example, as in *Corona v. Dominican Republic*, Claimant relies in this case on the local government’s absence of action for its “continuing omission” theory; however, as in *Corona v. Dominican Republic*, “that silence did not ‘produc[e] any separate effects on [the] investment other than those that were already produced by the initial decision[s]’ and acts.”⁷⁹
83. Moreover, even if considered “continuing acts,” China emphasizes that Ansung’s final transfer of shares on December 17, 2011 “would not change the fact that Ansung *first* knew or should have known of the fact of loss from the breaches prior to 4 November 2011” or before October 2011.⁸⁰
84. Respondent also criticizes Claimant’s reliance on *Pac Rim v. El Salvador*, because that case “did not even address application of a limitation period.”⁸¹ Nor can Ansung rely on *UPS v. Canada*, as that case addressed a textually different limitation clause that required

⁷⁵ R. Obs., para. 45.

⁷⁶ R. Obs., para. 47.

⁷⁷ *Ibid.* (citing *Trans-Global*, para. 105).

⁷⁸ R. Obs., para. 48 (citing e.g. *Spence*, para. 231; RLA-039, *Rusoro Mining Limited v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, para. 221 (Award, August 22, 2016)).

⁷⁹ R. Obs., paras. 48-50 (citing RLA-037, *Corona Materials LLC v. Dominican Republic*, ICSID Case No. ARB(AF)/14/3, paras. 146-147 (Award, May 31, 2016)).

⁸⁰ R. Obs., para. 4. *See also* R. Obs., para. 51.

⁸¹ R. Obs., para. 52 (citing *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, (Decision on Jurisdiction, June 1, 2012)).

knowledge of both breach and loss, and the tribunal’s approach has been “severely criticized and not followed by later tribunals.”⁸² Most recently, in *Spence v. Costa Rica*, the tribunal found:

While it may be that a continuing course of conduct constitutes a continuing breach, the Tribunal considers that such conduct cannot without more renew the limitation period as this would effectively denude the delimitation clause of its essential purpose, namely, to draw a line under the prosecution of historic claims. Such an approach would also encourage attempts at the endless parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period. This does not comport with the policy choice of the parties to the treaty.⁸³

85. Finally, Respondent argues that Claimant’s interpretation of Treaty Article 9(7) would render that Article without effect. If a State’s inaction could itself renew a time limitation period, or if final disposal of an investment were required for the limitation period to begin, the investor would fully control when the period would start, thereby “rendering it illusory” and undermining the legal stability served by limitation periods.⁸⁴

2) *Dies ad Quem*

86. Turning to the *dies ad quem* for the three-year limitation period, Respondent argues that the end date must be November 4, 2014, the date on which ICSID registered Claimant’s Request for Arbitration.⁸⁵ This means that, on China’s case, the *dies a quo* had to have been after November 4, 2011.
87. In support of its position, China recites that Article 9(7) of the China-Korea BIT refers to “the date on which the ‘investor...make[s] a claim pursuant to paragraph 3 of this Article,’⁸⁶ and paragraph 3 of Article 9 in turn addresses how the dispute shall be

⁸² R. Obs., para. 52 (citing the *Spence* tribunal’s critique of the award analysis in CLA-005, *United Parcel Service of America v. Canada*, UNCITRAL (Award on Merits, May 24, 2007) (“UPS”).)

⁸³ *Spence*, para. 208.

⁸⁴ R. Obs., para. 54.

⁸⁵ R. 41(5) Obj., paras. 3, 45 (citing Institution Rule 6(2)).

⁸⁶ R. 41(5) Obj., para. 32 (citing C-001, China-Korea BIT, Art. 9(7) (emphasis added by Respondent)).

submitted to arbitration. Therefore, according to China, the *dies ad quem* “is when an investor makes a claim in the sense of submitting the dispute to arbitration.”⁸⁷

88. In specific, China asserts that ICSID Institution Rule 6(2) precisely establishes when a dispute is submitted and the proceeding begins: “[a] proceeding under the Convention shall be deemed to have been instituted on the date of registration of the request.”⁸⁸ When an investor chooses ICSID arbitration, Institution Rule 6(2) “determines when an ‘investor...make[s] a claim pursuant to paragraph 3 of this Article [9],’” because “in the ICSID system there is no arbitration unless and until the Secretary-General registers the request.”⁸⁹ Applying Article 31 of the VCLT to interpret the plain terms of Treaty Article 9(3) and (7),⁹⁰ China submits that an “investor does not make an ICSID claim or submit a dispute to ICSID arbitration until that claim is registered by the Secretary-General.”⁹¹
89. Respondent contests Claimant’s position that the date of the original Notice of Intent constitutes “making a claim” within the meaning of Article 9(7) of the China-Korea BIT. China insists that the provision is clear that “a claim is made only when the dispute is submitted under the arbitration rules specified in Article 9(3).”⁹² China disagrees that the China-Korea BIT text can support Ansung’s efforts to draw a distinction between the “claim” reference in Article 9(7) and “the dispute” reference under Article 9(3), as Article 9(5) treats those terms as synonyms.⁹³ Nor does China find any linguistic or textual support for Claimant’s contention that there is a distinction between “making” and “submitting” a claim in either the English, Korean or Chinese versions.⁹⁴ Citing *Apotex Inc. v. United States* as an example, Respondent reiterates that prior tribunals interpreting “substantially identical” provisions “have held that ‘making a claim’ refers to the

⁸⁷ R. 41(5) Obj., para. 32 (citing C-001, China-Korea BIT, Art. 9(3)).

⁸⁸ R. 41(5) Obj., para. 3 (citing Institution Rule 6(2)). *See also* R. 41(5) Obj., para. 33.

⁸⁹ R. 41(5) Obj., paras. 35, 40.

⁹⁰ R. 41(5) Obj., paras. 42-44.

⁹¹ R. 41(5) Obj., para. 41.

⁹² R. Obs., para. 2.

⁹³ R. Obs., para. 24.

⁹⁴ R. Obs., para. 25.

definitive activation of an arbitration procedure,” which a notice of intent could not meet.⁹⁵

90. China also challenges Ansung’s argument that ICSID claimants would be inconvenienced if the plain terms of Article 9(7) were strictly applied, as prior tribunals have confirmed that a limitation clause is “a legitimate legal mechanism to limit the proliferation of historic claims” and “generations of NAFTA claimants have succeeded without difficulty in navigating” such provisions.⁹⁶
91. Finally, Respondent asserts that Claimant errs in suggesting that China’s position is that the Request’s transmission establishes the *dies ad quem*, and it reiterates its position that under Article 9(7) of the Treaty a claim is made in an ICSID arbitration when the proceedings are instituted, on the date of registration.⁹⁷

3) Conclusion

92. In sum, Respondent submits that Claimant “instituted this ICSID arbitration more than three years after the date on which it acquired knowledge that it had incurred loss or damage.”⁹⁸ Based on Ansung’s own pleadings, it first learned that it incurred loss or damage related to its Sheyang-Xian golf course project at some point before October 2011. This is more than three years before November 4, 2014, when ICSID registered Ansung’s case. Consequently, “[u]nder the plain terms of Article 9(7)...[Ansung’s] claim is barred by the text of the consent it relies upon to invoke the jurisdiction of this Tribunal,” and “[t]he lack of legal merit of its claims is manifest.”⁹⁹

⁹⁵ R. Obs., paras. 2, 26 (citing RLA-032, *Apotex Inc. v. Government of the United States of America*, NAFTA/UNCITRAL, para. 301 (Award on Jurisdiction and Admissibility, June 14, 2013) (“Apotex”)).

⁹⁶ R. Obs., para. 28 (citing *Spence*, para. 208).

⁹⁷ R. Obs., para. 30.

⁹⁸ R. 41(5) Obj., para. 4.

⁹⁹ *Ibid.*

B. Claimant's Position

1) *Dies a Quo*

93. To determine the proper start date for its claim, Ansung emphasizes that the China-Korea BIT provides a cause of action in Article 9(1) for loss or damage arising from the breach of the Treaty obligations,¹⁰⁰ and “the loss or damage set out in Article 9(7) is also understood to relate to those arising from the Respondent’s multiple breaches of the China-Korea BIT.”¹⁰¹ According to Ansung, it could ascertain its loss or damage under Article 9(7) “only *after* its expectation and plan for the 27-hole golf course was completely frustrated, owing primarily to the government’s continued inaction in providing the additional land for the second phase of the Project.”¹⁰²
94. Ansung alleges that it “obtained information assisting it in recognizing possible losses only around December 17, 2011...when the circumstances leading to the losses became unavoidable, thereby driving Ansung to sell the business to the Chinese purchaser.”¹⁰³ Therefore, the *dies a quo* for purposes of Treaty Article 9(7) must be December 17, 2011, as the date when Claimant “first acquired or should have first acquired knowledge” of loss or damage.¹⁰⁴ This position, says Claimant, is consistent with the tribunal’s view in *Pope & Talbot, Inc. v. Canada* that “actual damage, rather than predicted future damage” is required to trigger a prescription period.¹⁰⁵
95. Claimant contests Respondent’s argument that it knew that it had incurred loss triggering the limitation period by reason of local government action before October 2011.¹⁰⁶ Ansung’s loss instead was a consequence of government inaction concerning the second allotment of 1,500 *mu* of land, which inaction could not lead to a claimable loss while

¹⁰⁰ Cl. First Obs., para. 19.

¹⁰¹ *Ibid.*

¹⁰² Cl. First Obs., para. 30 (emphasis in original).

¹⁰³ Cl. First Obs., para. 31.

¹⁰⁴ Cl. First Obs., para. 32.

¹⁰⁵ Cl. First Obs., para. 31 (citing CLA-003, *Pope & Talbot, Inc. v. Government of Canada*, UNCITRAL, para. 12 (Award, February 24, 2000)).

¹⁰⁶ Cl. First Obs., para. 33.

Ansung continued to try to resolve the situation with the government.¹⁰⁷ Relying on *Pac Rim v. El Salvador* and *UPS v. Canada*, Claimant notes that continuing host State omissions have been held to be treaty breaches, and such continuing omissions push the temporal boundaries of the relevant limitation period.¹⁰⁸

96. In its Second Observations, Claimant asserts that “the key question to be examined pursuant to Article 9(7) of the China-Korea BIT is when Ansung actually or constructively acquired knowledge of the incurred losses resulting from the frustration of its legitimate expectation.”¹⁰⁹ The answer alleged is that “[b]efore Ansung transferred its shares in December 2011, Ansung could not know that its legitimate expectation [to develop a 27-hole golf course and condominiums] was frustrated and, therefrom, it incurred losses.”¹¹⁰ Claimant contests Respondent’s position that the local government’s failure to allot the second phase land must be characterized (for prescription purposes) as a discrete breach that occurred before December 2011.¹¹¹ According to Ansung, the government “failed to provide the second phase land for more than a year without any express repudiation and with even further assurance to give the land,” which “actually or constructively matured into a breach only in mid-December 2011.”¹¹²
97. Similarly, Claimant maintains that even if the Tribunal should find that the government’s separate acts between 2007 and 2010 were severable breaches falling before the three-year limitation period, the Tribunal would still have jurisdiction. This is because such earlier breaches could not affect Ansung’s claims based on the local government’s separate ongoing breach of its commitment to provide the second phase land.¹¹³
98. Alternatively, and relying on *UPS v. Canada*, Ansung argues that the local government’s continuing omission concerning the second phase land effectively renewed the three-year

¹⁰⁷ Cl. First Obs., para. 35.

¹⁰⁸ Cl. First Obs., paras. 36-37.

¹⁰⁹ Cl. Second Obs., para. 9.

¹¹⁰ Cl. Second Obs., Sec. 2.1.

¹¹¹ Cl. Second Obs., para. 10.

¹¹² Cl. Second Obs., para. 11.

¹¹³ Cl. Second Obs., paras. 12-14, 21.

period and “may render the *first damage* incurred from the renewed omission to fall within the prescription period of the China-Korea BIT.”¹¹⁴ Claimant challenges Respondent’s efforts to undermine the *UPS* case and thereby avoid the application of the continuing breach principle. Claimant also distinguishes the *Corona* case, where the host State took an affirmative measure and thereafter remained silent in the face of the claimant’s request that it reconsider the measure; in the present case, the government never acted and instead simply withheld the second parcel of land, making it a “continuing breach” of its promise.¹¹⁵

2) *Dies ad Quem*

99. According to Claimant, although Article 9(7) of the China-Korea BIT explicitly precludes an investor from making a claim if the three-year time period has expired, the Treaty does not define the meaning of the phrase “make a claim.”¹¹⁶ Claimant posits that “a claim is made when the notice of intent is submitted.”¹¹⁷
100. In support of its position, Ansung highlights Article 9(5) of the Treaty, which addresses how an investment dispute may be settled. Article 9(5) requires that a claimant investor provide a written notice of intent to the respondent State at least 90 days before its claim can be “submitted” to arbitration.¹¹⁸ As its Notice of Intent and Request for Arbitration are substantially similar and as, according to Ansung, a notice of intent clarifies the nature of the dispute and the investor’s intention to resolve it, it is unreasonable to calculate the limitation period from the date of the Request for Arbitration and reduce the period by 90 days.¹¹⁹ Moreover, Article 9(3) of the Treaty permits the respondent State to require the investor to go through the domestic administrative review procedure for four months before submission to international arbitration, which could reduce the limitation by a further four months.¹²⁰ Given that, according to Ansung, the submission

¹¹⁴ Cl. Second Obs., paras. 15-17, 20, 23 (emphasis in original).

¹¹⁵ Cl. Second Obs., paras. 18-19.

¹¹⁶ Cl. First Obs., para. 40.

¹¹⁷ Cl. First Obs., para. 41.

¹¹⁸ Cl. First Obs., para. 43.

¹¹⁹ Cl. First Obs., para. 46.

¹²⁰ Cl. First Obs., para. 47.

of a dispute to arbitration is only “a formalistic process, whereas making the claim is the more substantive step...the prescription period applies to the substantive step, i.e. submitting the notice of intent.”¹²¹ Finally, Ansung suggests that “a dispute is ‘a disagreement on a point of law or fact, a conflict of legal views or of interest’” and that the notice of intent and the subsequent acts can help crystallize a “dispute,” which until that point remains a “claim,” in order to support its view that “the prescription period applies only to the notice of intent.”¹²²

101. In its Second Observations, Claimant reiterates its position that the end date must be the date of its Notice of Intent, and adds that, in the alternative, this could be the date of the filing of the Request for Arbitration. Claimant alleges that Respondent “fails to identify any relevant authorities demonstrating that a registration date becomes the date when a claim was first made,” and, by contrast, “there are supporting legal authorities that treat the date of Notice of Intent or the filing date of the Request for Arbitration as the date for making a claim.”¹²³
102. Claimant reasserts that the China-Korea BIT distinguishes between a “claim” and a “dispute.”¹²⁴ For a claim to crystallize into a dispute, the investor must first give the Respondent a “notice of intent” which will become a dispute when the respondent State refuses the claim.¹²⁵ Ansung argues that it first “made a claim” seeking relief for its losses, for purposes of Article 9(3) of the Treaty, through its Notice of Intent to China on May 19, 2014.¹²⁶ Ansung rejects China’s argument that the terms “investment dispute” and “claim” are used synonymously and suggests that “while every dispute includes a claim, every claim does not mature into a dispute.”¹²⁷ Claimant opposes Respondent’s assertion that there is no distinction between “making” and “submitting” a claim, and disagrees with the use of the *Apotex* and *Feldman* decisions on grounds that these

¹²¹ Cl. First Obs., para. 50.

¹²² Cl. First Obs., para. 52 (citing CLA-006, *Case of the Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Objection to Jurisdiction (1924), PCIJ Rer. Series A, No. 2, p. 11).

¹²³ Cl. Second Obs., para. 4(2).

¹²⁴ Cl. Second Obs., para. 29.

¹²⁵ *Ibid.*

¹²⁶ Cl. Second Obs., para. 4(2).

¹²⁷ Cl. Second Obs., paras. 35-36.

decisions do not interpret the phrase “make a claim” objectively, but rather in the context of NAFTA provisions.¹²⁸ Ansung notes that the NAFTA uses “claims” consistently and does not refer to “disputes,” so the NAFTA jurisprudence does not provide a useful comparison.¹²⁹ Ansung further argues that the teleological approach put forward by Respondent “constitutes a failure to apply the rules of treaty interpretation in international law and reduces the protections” granted by the Treaty.¹³⁰

103. In the alternative, and citing *Vannessa Ventures v. Venezuela*, Claimant contends that the latest possible cut-off date is October 7, 2014 when it filed its Request for Arbitration.¹³¹ Although the Secretary-General has the power under Article 36(3) of the ICSID Convention to screen requests for arbitration before registration, Ansung argues it would be “absurd to suggest that the cut-off date within the meaning of the China-Korea BIT will change depending on the time taken by the ICSID Secretary-General to register the Request for Arbitration,” especially as the Secretary-General’s screening power “does not prejudice the tribunal’s power to examine its own competence.”¹³²

3) Conclusion

104. In sum, Claimant submits that, taking the facts it alleges as true, it meets the three-year limitation period in Article 9(7) of the China-Korea BIT. Ansung “came to know, or should have come to know, of its loss or damage around December 17, 2011” and it made a claim with its Notice of Intent on May 19, 2014, approximately two-and-a-half years later.¹³³ Alternatively, Claimant submits that it made a claim with the filing of its Request for Arbitration on October 7, 2014,¹³⁴ which also meets the three-year limitation period in Article 9(7) of the China-Korea BIT. Consequently, Ansung’s claim cannot be considered manifestly meritless on grounds that it is time-barred.

¹²⁸ Cl. Second Obs., para. 40.

¹²⁹ Cl. Second Obs., para. 41.

¹³⁰ Cl. Second Obs., para. 42.

¹³¹ Cl. Second Obs., p. 3 and paras. 44-45 (citing CLA-019, *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/6, p. 31 (Decision on Jurisdiction, August 22, 2008) (“*Vannessa Ventures*”); *Feldman*, para. 44).

¹³² Cl. Second Obs., para. 46.

¹³³ Cl. First Obs., para. 18.

¹³⁴ Cl. Second Obs., paras. 4(2) and 47.

C. Tribunal's Analysis

105. As the time limitation question before the Tribunal is one of treaty interpretation, the text of Article 9(7) of the China-Korea BIT bears repeating:

Notwithstanding the provisions of paragraph 3 of this Article, an investor may not make a claim pursuant to paragraph 3 of this Article if more than 3 years have elapsed from the date on which the investor first acquired, or should have first acquired, the knowledge that the investor had incurred loss or damage.

106. It also bears repeating that, under ICSID Arbitration Rule 41(5), China must establish that Ansung's claim is "manifestly without legal merit" on the basis of the facts as pleaded by Ansung.

1) *Dies a Quo*

107. Turning first to the start date for the three-year limitation period in Article 9(7), the record is clear that Claimant repeatedly pleaded facts setting the date at which it "first acquired...the knowledge...that [it] had incurred loss or damage" to be before October 2011. As set out in the Factual Background section above, which is based on the facts as pleaded by Claimant:

- a) Most important, in the Request for Arbitration (paragraph 12), Ansung pleaded that it "was forced to dispose of its entire investment in Sheyang Xian *in October 2011* in order *to avoid further losses*. Specifically, Ansung was forced to sell its shareholdings in the Subsidiaries to a Chinese purchaser at a price significantly lower than the amount that Ansung had invested toward the project" (emphasis added). This indicates Ansung had knowledge that it had incurred loss or damage *before October 2011*.
- b) In the Request for Arbitration (paragraph 55), Ansung pleaded that its subsidiary Mirage "was unable to meet the repayment date of *June 2011* for the [loan] arranged by the Committee" (emphasis added), and "Ansung was unable to produce sufficient returns from its investments in the [joint venture] and Mirage as to justify their continued existence." It was also in *June 2011* that Ansung

employees suffered harassment from Committee officials and the local government refused to provide police protection. This indicates Ansung had knowledge of loss or damage incurred by *June 2011*.

- c) In the Request for Arbitration (paragraph 60), Ansung pleaded that “*in October 2011*, Ansung had no alternative but to dispose of its entire assets of the golf business, including its shareholding in the Subsidiaries, to a Chinese purchaser at a price significantly lower than the amount that Ansung had invested toward the project, causing serious financial losses and damage to Ansung” (emphasis added). This indicates Ansung had knowledge of incurred loss or damage by *October 2011*.
 - d) Ansung pleaded several other facts indicating knowledge of incurred damage, at least to the prospects of its golf course project, *well before October 2011*. As early as 2007, it observed the development of a competing golf course at Sheyang Island Park, which went into operation in 2009.¹³⁵ In 2007 and 2008, Ansung was compelled to pay a higher price for the additional 300 *mu* of land for phase one than originally agreed, following what Ansung described as “the Committee’s *outright repudiation*” of the Investment Agreement (emphasis added).¹³⁶
108. After these multiple and clear pleadings, the Tribunal cannot accept Ansung’s attempts to characterize these pre-October 2011 dates in its Observations and at the Rule 41(5) Hearing as mere background information.
109. Nor can the Tribunal accept Ansung’s main argument that it incurred loss or damage for Article 9(7) purposes “only *after* its expectation and plan for the 27-hole golf course was completely frustrated, owing primarily to the government’s continued inaction in providing the additional land for the second phase of the Project”¹³⁷ (emphasis added), and when it sold its shares in the joint venture on December 17, 2011.

¹³⁵ RFA, paras. 36, 53-54; *See also* paras. 39-40, 46 above.

¹³⁶ RFA, paras. 44-46. *See also* paras. 43-44 above.

¹³⁷ Cl. First Obs., para. 30.

110. Ansung ignores the plain meaning of the words “first” and “loss or damage” in Article 9(7). The limitation period begins with an investor’s *first* knowledge of the *fact* that it has incurred loss or damage, not with the date on which it gains knowledge of the *quantum* of that loss or damage. Ansung’s actual sale of its shares on December 17, 2011 marked the date on which it could *finalize* or *liquidate* its damage, not the *first* date on which it had to know it was incurring damage.
111. As aptly stated by the ICSID tribunal in the Interim Award in *Spence v. Costa Rica*, “the limitation clause does not require full or precise knowledge of the loss or damage....such knowledge is triggered by the first appreciation that loss or damage will be (or has been) incurred. It neither requires nor permits a claimant to wait and see the full extent of the loss or damage that will or may result.”¹³⁸
112. The Tribunal acknowledges Claimant’s legal argument that a continuing omission by a host State, such as alleged here, is recognized as a breach, for example in *Pac Rim v. El Salvador*, and that damages for such a continuing breach may be measured from different times after the first incident of that omission. As noted by the *UPS* tribunal, a “continuing course of conduct might generate losses of a different dimension at different times.”¹³⁹
113. However, even assuming a continuing omission breach attributable to China, which the Tribunal must assume, and even assuming Ansung might wish to claim damages from a date later than the first knowledge of China’s continuing omission – for example, from November 2, 2011, when Ansung tentatively agreed to transfer its shares or even December 17, 2011, when Ansung’s commercial patience ran out – that could not change the date on which Ansung *first* knew it had incurred damage. And it is that *first* date that starts the three-year limitation period in Article 9(7). To allow Claimant to adjust that date of first knowledge by selecting the date from which it wants to claim damages for continuing breach would be, to borrow from the *Spence* decision, to allow an “endless

¹³⁸ *Spence*, para. 213.

¹³⁹ *UPS*, para. 30.

parsing up of a claim into ever finer sub-components of breach over time in an attempt to come within the limitation period.”¹⁴⁰

114. To conclude, based on the facts as pleaded by Claimant, Ansung “first acquired, or should have first acquired, the knowledge that [it] had incurred loss or damage” in connection with its ill-fated golf course project in Sheyang-Xian for purposes of Article 9(7) of the Treaty on a date *before October 2011*. The record does not provide an exact date, but it is reasonable to assume a date close to October, in late summer or early autumn 2011.

2) *Dies ad Quem*

115. Turning to the *dies ad quem* for the applicable three-year limitation period, the Tribunal finds that, on the basis of the plain language in Article 9(7) of the China-Korea BIT, the end date is the date on which an investor deposits its request for arbitration with ICSID.
116. The interpretive steps are not difficult. Article 9(7) instructs that an investor “may not make a claim pursuant to paragraph 3 of this Article” more than three years after the *dies a quo*. Paragraph 3 of Article 9, in turn, instructs that “the dispute shall be submitted, at the option of the investor, to [as relevant here] ICSID.” In coming to this conclusion, the Tribunal finds itself in agreement with the Decision on Jurisdiction in *Vannessa Ventures v. Venezuela*, where the ICSID tribunal had to determine when a dispute was submitted and found that the “relevant document regarding the interruption of the statute of limitation is therefore the Request for Arbitration.”¹⁴¹
117. In the Tribunal’s view, this combination of paragraphs 3 and 7 of Article 9 of the China-Korea BIT excludes the two alternative end dates championed by the Parties in their primary cases.
118. First, Claimant correctly points out that Article 9(5) of the Treaty requires an investor to take the preliminary step of giving the Contracting Party a written notice of intent.

¹⁴⁰ *Spence*, para. 208.

¹⁴¹ *Vannessa Ventures*, p. 31.

However, as a matter of plain text, the Article 9(5) notice of intent is not “submitted...to ICSID,” as required by Article 9(3).

119. Second, for similar reasons, the date on which ICSID registers the request for arbitration is, by definition, subsequent to the date the dispute is “submitted...to ICSID.” Moreover, the Tribunal agrees with Claimant that it would be unreasonable to subscribe to the Contracting Parties the intention that the end date of the Article 9(7) limitation period would be dependent upon the uncertain date of registration of a request for arbitration, which may depend upon a number of extraneous factors (no matter how efficient ICSID’s registration process has become).
120. In light of the Tribunal’s interpretation, it is not necessary to address the Parties’ arguments concerning interpretation of the potentially different meaning of the words “dispute” and “claim” in the ICSID Arbitration Rules.
121. Claimant deposited the Request for Arbitration with ICSID electronically on October 7, 2014 and physically on October 8, 2014. Either date is more than three years after late summer or early autumn 2011, or the beginning of October 2011.
122. Consequently, Ansung submitted its dispute to ICSID and made its claim for purposes of Article 9(3) and (7) of the Treaty after more than three years had elapsed from the date on which Ansung first acquired knowledge of loss or damage. The claim is time-barred and, as such, is manifestly without legal merit.

VIII. ARTICLE 3 OF THE CHINA-KOREA BIT – MFN TREATMENT

123. To recall, Article 3 of the China-Korea BIT provides:

3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as “most-favoured-nation treatment”) with respect to investments and business activities [defined in paragraph

1 as “the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments”], including the admission of investment.

....

5. Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.

A. Claimant’s Position

124. Should the Tribunal find that Ansung made its claim after the three-year limitation period, Claimant argues in the alternative, in its First and Second Observations, that the MFN Clause in Article 3(3) of the China-Korea BIT operates to save the claim from being time-barred.¹⁴²
125. First, after noting that MFN clauses operate to allow investors to import substantive rights from other treaties, Ansung argues that the principle of extinctive prescription is considered a substantive (rather than a procedural) right both in international law and in many civil law countries, including Korea and China.¹⁴³ Claimant then relies on a two-page table of 81 Chinese BITs to contend that most Chinese BITs do not have any prescription period.¹⁴⁴ Because the three-year limitation period in Article 9(7) of the China-Korea BIT “is less favorable to foreign investors than those investors protected by BITs which do not contain such a prescription period,” Ansung claims the protection of other Chinese treaties lacking prescription periods.¹⁴⁵
126. Second, even if the three-year period in Article 9(7) is considered to be procedural rather than substantive, Ansung contends that “[m]any tribunals and commentators are of the view that MFN clauses should be interpreted broadly” and be extended to the important

¹⁴² Cl. First Obs., paras. 56 *et seq.*

¹⁴³ Cl. First Obs., para. 60.

¹⁴⁴ Cl. First Obs., para. 62. *See* Appendix A of Cl. First Obs., List of China’s BITs.

¹⁴⁵ Cl. First Obs., para. 63.

procedural protection of arbitration provisions.¹⁴⁶ In its First Observations, Ansung refers to a “stream of jurisprudence”¹⁴⁷ supporting its MFN argument, to be developed at a later stage of the proceedings, which allegedly shows that China’s Rule 41(5) Objection does not meet the requisite legal threshold.¹⁴⁸ In its Second Observations, Ansung reiterates that such jurisprudence “will insulate” its claims from China’s jurisdictional defense, by supporting its use of Chinese treaties without limitations periods.¹⁴⁹

127. Third, contesting China’s treaty interpretation position, Ansung argues that the terms “treatment” and “investment activities” in Article 3(3) of the Treaty should be broadly interpreted to include dispute settlement procedures, because investor-State arbitration is critical to protect investment activities.¹⁵⁰ Moreover, Claimant submits that the geographical limitation “within the territory” found in the MFN Clause of the Treaty does not prevent application of the MFN Clause to the dispute settlement clause.¹⁵¹ Ansung puts forward case law to support its arguments.¹⁵² Ansung refers to *Siemens v. Argentina*, where the tribunal interpreted the phrase “activities related to investment,” included in an MFN clause, to be sufficiently wide to include settlement of disputes. Such an interpretation allowed the claimant in *Siemens* to access another treaty that did not condition international arbitration on waiting 18 months after initiation of the domestic judicial process.¹⁵³ Furthermore, Ansung relies on *AWG v. Argentina*, where the tribunal interpreted an MFN clause similar to Article 3(3) of the China-Korea BIT – covering an investor’s “management, maintenance, use, enjoyment or disposal of their investments” – to apply to dispute settlement and allow the claimant to avoid having to submit its dispute first to local courts.¹⁵⁴

¹⁴⁶ Cl. First Obs., para. 64.

¹⁴⁷ Cl. First Obs., para. 65.

¹⁴⁸ Cl. First Obs., para. 65.

¹⁴⁹ Cl. Second Obs., para. 5.

¹⁵⁰ Cl. Second Obs., paras. 51-61.

¹⁵¹ Cl. Second Obs., paras. 58-61.

¹⁵² Cl. Second Obs., paras. 51-61.

¹⁵³ CLA-013, *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, para. 32 (Decision on Jurisdiction, August 3, 2004).

¹⁵⁴ CLA-021, *AWG Group Ltd. & Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, para. 56 (Decision on Jurisdiction, August 3, 2006).

128. Ansung contests China's contextual argument that Article 3(5) of the Treaty, which provides MFN treatment with respect to "access to courts of justice and administrative tribunals and authorities", demonstrates that Article 3(3) is unrelated to dispute settlement. Ansung argues that Article 3(5) on its face "comprehensively covers all kinds of domestic judicial or administrative proceedings" and therefore not international dispute settlement.¹⁵⁵ Ansung further suggests that China's argument regarding references to its treaty practice fails, because, among other things, the treaties submitted by China are later than the China-Korea BIT, which "makes the Respondent's analysis...less convincing", and also refers to general treaty practice on MFN clauses.¹⁵⁶
129. In its Second Observations, Ansung emphasizes the importance of the alleged substantive nature of the prescription period, as tribunals are more likely to import substantive standards than procedural protections from third party treaties through the MFN clause.¹⁵⁷

B. Respondent's Position

130. In its Observations responding to Claimant's First Observations, Respondent contests Ansung's reliance on the MFN Clause in Article 3(3) of the China-Korea BIT to save its claim from being dismissed as time-barred under Article 9(7). China emphasizes that Article 3(3) does not apply either in general to investor-State dispute settlement provisions or in particular to China's temporal condition to consent to arbitration in Article 9(7).¹⁵⁸
131. First, China argues that Ansung's invocation of the MFN Clause in Article 3(3) fails as a matter of treaty interpretation.¹⁵⁹ The text of Article 3(3) limits MFN treatment to the host State's territory and covers only "investment and business activities," which phrase is defined in Article 3(1) to cover "the expansion, operation, management, maintenance,

¹⁵⁵ Cl. Second Obs., paras 62-69.

¹⁵⁶ Cl. Second Obs., paras. 67-69

¹⁵⁷ Cl. Second Obs., paras. 70-74.

¹⁵⁸ R. Obs., para. 5.

¹⁵⁹ R. Obs., para. 58.

use, enjoyment, and sale or other disposal of investments” – and does not include dispute settlement.¹⁶⁰ The Treaty context confirms that Article 3(3) does not cover dispute settlement. This is because Article 3(5) separately provides for MFN treatment for dispute resolution by access to courts and administrative tribunals, demonstrating that the Contracting States do not consider Article 3(3) to apply to dispute settlement.¹⁶¹

132. Respondent asserts that the Contracting States’ treaty practice further confirms that Article 3(3) does not apply to dispute settlement. The 2012 trilateral agreement on investment between China, Korea and Japan similarly limits MFN treatment to “investment activities” encompassing “management, conduct, operation, maintenance, use, enjoyment and sale or other disposition of investments,” and the States expressly state their understanding that this MFN treatment does not extend to dispute settlement.¹⁶² The 2015 comprehensive free trade agreement between China and Korea is to similar effect.¹⁶³
133. Second, Respondent argues that Claimant erred in equating Article 9(7) of the Treaty with the principle of extinctive prescription under international law. Article 9(7) explicitly conditions a Contracting State’s consent to arbitration under Article 9(3) “on the submission of a claim within a precisely delimited and unqualified time period,” which, under the plain Treaty terms, is “both an integral part of the investor-State dispute-resolution mechanism and a condition to China’s consent to arbitration.”¹⁶⁴ In comparison, extictive (or equitable) prescription arises under customary international law and “represents a form of the common-law notion of laches,” requiring an assessment of State negligence without a fixed time period. Article 9(7), says China, is “akin to a

¹⁶⁰ R. Obs., paras. 60-61.

¹⁶¹ R. Obs., para. 62.

¹⁶² R. Obs., paras. 63-64; RLA-029, Agreement among the Government of the People’s Republic of China, the Government of Japan and the Government of the Republic of Korea for the Promotion, Facilitation and Protection of Investment dated May 13, 2012, Art. 4(1).

¹⁶³ R. Obs., para. 65; RLA-036, Trade Agreement between the People’s Republic of China and the Government of the Republic of Korea dated June 1, 2015 (entered into force December 20, 2015).

¹⁶⁴ R. Obs., paras. 69-70 (citing *Spence*, para. 225; *Apotex*, para. 335; *Grand River*, paras. 27-29).

statute of limitation that fixes an unyielding, specific time limitation for bringing a claim and specifies the beginning and end date for the calculation.”¹⁶⁵

134. Third, China contends that Ansung errs in categorizing either equitable prescription or Article 9(7) as a substantive obligation. While in customary international law prescription is a question of admissibility rather than merits, “Article 9(7) is explicitly framed as a condition to consent to arbitration and therefore presents a question of jurisdiction.”¹⁶⁶
135. Finally, Respondent emphasizes that Claimant has failed to specify a treaty with more favorable treatment as a matter of time limitation, and so has failed to demonstrate more favorable treatment than Article 9(7) of the China-Korea BIT.¹⁶⁷

C. Tribunal’s Analysis

136. Ansung’s alternative defense to China’s Rule 41(5) Objection is that, because China has entered into other bilateral investment treaties with third States that do not prescribe a temporal limitation for an investor initiating an arbitration claim against the host State, Ansung is entitled to invoke the MFN Clause in Article 3(3) of the China-Korea BIT to disregard the three-year limitation period in Article 9(7) of the Treaty.
137. The Tribunal accepts that the ambit of an MFN clause is dependent on its wording. Article 3(3) of the China-Korea BIT relevantly provides:

Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investor of the other Contracting Party treatment no less favorable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as “most-favoured-nation treatment”) with respect to investments and business activities [defined in paragraph 1 as “the expansion, operation, management, maintenance, use, enjoyment, and sale or

¹⁶⁵ R. Obs., para. 71.

¹⁶⁶ R. Obs., para. 72.

¹⁶⁷ R. Obs., para. 73.

other disposal of investments”], including the admission of investments.

138. A plain reading of this Article does not extend to MFN treatment for a State’s consent to arbitrate with investors and, in particular, not to the temporal limitation period for investor-State arbitration in Article 9(7) of the China-Korea BIT. The Tribunal considers that Article 9(7) pertains to the Contracting State’s consent to arbitration, and so it is irrelevant whether under municipal law prescription is a matter of substance or procedure. The import of Article 9(7) of the China-Korea BIT is a matter of international law, as correctly pointed out by Respondent and as is reflected in the International Law Commission’s Articles on State Responsibility.¹⁶⁸
139. The Tribunal’s conclusion in relation to the MFN Clause in Article 3(3) of the China-Korea BIT also becomes clear by reference to Article 3(5) of the Treaty. This Article offers specific MFN protection in relation to an investor’s “access to courts of justice and administrative tribunals and authorities.” In marked contrast to those domestic avenues, such express reference to international dispute resolution is conspicuously absent in the MFN Clause in Article 3(3).
140. As the Tribunal finds that the wording of the MFN Clause in Article 3(3) of the Treaty is clear, it is not necessary to give further consideration to additional arguments or previous arbitral decisions on the interpretation of other MFN clauses or treaty practice. The plain reading of Article 3(3) and its interpretation leave no doubt that China has established its Rule 41(5) Objection with regard to the MFN Clause “clearly and obviously, with relative ease and despatch,” contrary to Claimant’s allegation.
141. For these reasons the Tribunal does not consider that Article 3(3) of the China-Korea BIT assists Claimant in preventing its claim from being manifestly time-barred under Article 9(7) of the Treaty.

* * * * *

¹⁶⁸ Hearing Tr. 135:21-136:4.

142. To conclude, the Tribunal has carefully considered Respondent's Rule 41(5) Objection, the Observations from both Parties, and the presentations from counsel at the Rule 41(5) Hearing. The breadth and depth of the Parties' submissions has enabled the Tribunal to provide its oral ruling after deliberating at the end of the First Session and Rule 41(5) Hearing. In specific, to borrow language from the *Trans-Global* tribunal, the Tribunal was able to determine that China established its Rule 41(5) Objection "clearly and obviously, with relative ease and despatch" and its determination proved not to be "difficult."
143. Accepting the facts as pleaded by Claimant to be true, the Tribunal finds Ansung's claim to be time-barred under Article 9(7) of the China-Korea BIT and not protected by operation of the MFN Clause in Article 3(3) of the Treaty. The Tribunal finds the claim hence to be manifestly without legal merit under ICSID Arbitration Rule 41(5).
144. In light of the reasoning above, Respondent's alternative request that the Tribunal hear the question of the application of Article 9(7) of the China-Korea BIT as a preliminary question pursuant to ICSID Arbitration Rule 41(4) is moot.

IX. COSTS

145. Article 61(2) of the ICSID Convention provides:

In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

146. This provision gives the Tribunal discretion to allocate all costs of the arbitration, including attorney's fees and other costs, between the Parties as it deems appropriate.

A. Claimant's Position

147. In its Statement of Costs of January 17, 2017, Claimant seeks the following costs: (i) costs of ICSID arbitration, including the lodging fee, amounting to US\$ 175,000; (ii) wire transfer fee for the lodging fee, amounting to KRW 54,340; and (iii) professional fees and disbursements of Bae, Kim & Lee LLC, amounting to KRW 433,772,145.¹⁶⁹
148. In support of its costs request, Claimant asserts that, “although there is no set principle for allocation of costs in ICSID arbitrations, the Tribunal in one well-cited award [*Romak v. Uzbekistan*] was compelled to conclude after reviewing prior jurisprudence that there is a ‘general practice in investment treaty arbitration disfavoring the shifting of arbitration costs against the losing party’ and that ‘a general trend has developed that arbitration costs should be equally apportioned between the Parties, irrespective of the outcome of the dispute.’”¹⁷⁰
149. Claimant asks the Tribunal to follow this “general trend” and exercise its discretion under Article 61(2) of the ICSID Convention to order each Party to bear its own costs and divide the ICSID costs (including the fees and expenses of the Tribunal) equally. Ansung offers three reasons for this allocation, in the circumstances of this case: first, Ansung, which is a small investor, has suffered substantial loss as a consequence of China’s actions, and “pursued the instant claim in good faith and on sound substantive ground;” second, Ansung presented its case “in the most procedurally efficient and economical manner;” and, third, the Rule 41(5) Objection issues were novel issues of law.¹⁷¹ As to the third reason, Claimant emphasizes that “the Tribunal was called on to rule on the novel legal questions of (i) whether MFN applies to limitations provisions in a BIT, and (ii) how to interpret ‘knowledge that the investor had incurred loss or damage’ under Article 9(7) of the BIT.”¹⁷²

¹⁶⁹ Cl. Statement of Costs, para. 6.

¹⁷⁰ Cl. Statement of Costs, para. 8 (citing CLA-026, *Romak S.A. v Republic of Uzbekistan*, PCA Case No. AA280, para. 251 (Award, November 26, 2009)).

¹⁷¹ Cl. Statement of Costs, paras. 10 and 17.

¹⁷² Cl. Statement of Costs, para. 25 (emphasis in original).

150. In Claimant’s Response, Ansung reiterates the novelty of these legal arguments and emphasizes that “the applicability of a MFN clause to limitation periods has never been tested by an investment treaty tribunal previously.”¹⁷³
151. Ansung rejects China’s argument that the upholding of a Rule 41(5) objection automatically requires an ICSID tribunal to award all costs to the respondent. In support, Ansung cites *Global Trading Resource v. Ukraine*, in which the tribunal “gave much weight to the parties’ conduct in apportioning costs and did not give any consideration to the review threshold under Rule 41(5).”¹⁷⁴
152. Claimant also challenges the level of Respondent’s legal costs, which are almost double Ansung’s costs. This disparity is unreasonable, Ansung contends, because China filed only two briefs totaling 47 pages, participated in a one-day hearing, and did not have to prepare a comprehensive submission equivalent to Claimant’s Request for Arbitration.¹⁷⁵ Ansung objects to Respondent’s “attempts [at] justifying its excessive costs by arguing that it needed to prepare a defense to Ansung’s allegedly shifting arguments and conflicting factual assertions.”¹⁷⁶ Ansung points out that China did not raise this “shifting arguments” contention until November 2016, while most of its legal costs were incurred before September 2016 and one-third of the sums claimed by the Zhong Lun law firm had been paid by July 2015.¹⁷⁷
153. Finally, Ansung requests the Tribunal to disregard China’s “unsolicited” and “fresh” request for post-Award interest. Ansung alleges that this request falls outside the scope of the Statements of Costs and outside the Tribunal’s instructions allowing Respondent to file observations on Claimant’s Statement of Costs, which did not address interest.¹⁷⁸

¹⁷³ Cl. Response, para. 8.

¹⁷⁴ Cl. Response, para. 17 (citing RLA-012, *Global Trading*, para. 59).

¹⁷⁵ Cl. Response, para. 9.

¹⁷⁶ Cl. Response, para. 10.

¹⁷⁷ Cl. Response, paras. 11-12.

¹⁷⁸ Cl. Response, para. 13.

B. Respondent's Position

154. In its Statement of Costs of January 17, 2017, Respondent seeks the following costs: (i) costs of ICSID arbitration, amounting to US\$ 149,985.00; (ii) disbursements relating to Chinese Government representatives' attendance at the Rule 41(5) Hearing in Singapore, amounting to US\$ 6,471; (iii) Dentons' invoiced legal fees and disbursements, amounting to EUR 356,590.80; and (iv) Zhong Lun's invoiced total legal fees, amounting to CNY 3,330,900.33 with fees capped at CNY 1,850,000.00 (including disbursements of CNY 200,000).¹⁷⁹
155. In Respondent's Observations on Costs, China contests Ansung's depiction of the general approach to allocation of costs being "pay-your-own-way," citing the words of the ICSID tribunal in *Arif v. Moldova* that "a 'more modern strand is for the costs to be awarded on the basis of the relative success of the parties in the arbitration.'"¹⁸⁰ Ansung argues that the "costs follow the event" principle is "particularly adapted to cases where the losing party's arguments are rejected for fundamental lack of merit"¹⁸¹ and "particularly suited to the context of a successful Rule 41(5) objection."¹⁸² China relies on the *RSM v. Grenada* award, in which the tribunal "had no difficulty applying the 'costs follow the event' principle and ordered the unsuccessful claimant to bear the entirety of the arbitration costs in a case where the claims were rejected for manifest lack of legal merit following a successful Rule 41(5) objection."¹⁸³
156. Respondent objects to Claimant's arguments in favor of cost-sharing. First, even if Ansung is a small investor and made a good faith mistake in assessing its case, there is no basis for the Tribunal to presume that Ansung's substantive claims would have proven meritorious.¹⁸⁴ Second, Claimant "cannot claim being efficient" by bringing a claim that

¹⁷⁹ R. Statement of Costs, pp. 2-3.

¹⁸⁰ R. Observations on Costs, para. 3 (citing RLA-045, *Franck Charles Arif v. Republic of Moldova*, ICSID Case No. ARB/11/23, para. 630 (Award, April 8, 2013)).

¹⁸¹ R. Observations on Costs, para. 5.

¹⁸² R. Observations on Costs, para. 6.

¹⁸³ *Ibid.* (referencing RLA-013, *RSM Production Company v. Grenada*, ICSID Case No. ARB/10/6, para. 8.3.4 (Award, December 10, 2010)).

¹⁸⁴ R. Observations on Costs, paras. 11-14.

was dismissed for a manifest lack of legal merit.¹⁸⁵ Third, the issues presented were not novel, as “[n]umerous investor-State tribunals have rejected claimants’ claims on the basis of similar temporal objections to the application of a treaty” and China’s objections were based “on the clear wording of Article 9(7) of the China-Korea BIT which the Tribunal had no difficulty applying in this case.”¹⁸⁶

157. Finally, China emphasizes that its costs were “reasonable and proportionate to the total amount of work that was needed to prepare a defense against Ansung’s shifting arguments and conflicting factual assertions.”¹⁸⁷ Further, Respondent achieved an early dismissal of the case “through an expedited procedure introduced specifically to address frivolous claims filed against the ICSID Contracting States.”¹⁸⁸

C. **Tribunal’s Analysis**

158. The Tribunal’s decision in favor of Respondent’s Rule 41(5) Objection constitutes a decision as contemplated by Arbitration Rule 41(6) regarding a lack of jurisdiction of the Centre and of its own competence as well as regarding manifest lack of legal merit due to a lack of temporal jurisdiction.
159. The Tribunal need not venture into the discussion about whether there is a general trend in ICSID practice favoring the “costs follow the event” approach or “pay-your-own-way” approach to allocation of costs. The Tribunal is satisfied that, under the circumstances in this case, Respondent is entitled to its reasonable costs. The Tribunal’s determination that Ansung’s claim manifestly lacks legal merit as time-barred necessarily means that the claim should not have been brought, and China should not bear the reasonable costs for successfully defending the claim at the Rule 41(5) stage.
160. Even accepting the novelty of Ansung’s arguments concerning the applicability of MFN treatment to limitations provisions in BITs in general and the proper interpretation of

¹⁸⁵ R. Observations on Costs, para. 15.

¹⁸⁶ R. Observations on Costs, para. 16.

¹⁸⁷ R. Observations on Costs, para. 8.

¹⁸⁸ R. Observations on Costs, para. 9.

Article 9(7) of the China-Korea BIT (“knowledge that the investor had incurred loss or damage”), novelty is not necessarily a test of even *prima facie* validity.

161. Even further accepting that Ansung is a small investor in an unfortunate position, proceeding in good faith against China, these points are irrelevant to the allocation of costs following acceptance of the Rule 41(5) Objection. Nor is efficiency in an Arbitration Rule 41(5) objection procedure necessarily a factor relevant to costs allocation, as an Arbitration Rule 41(5) objection procedure is by definition designed to promote efficiency.
162. This is not to say that costs could and should never be apportioned between the parties following a successful Rule 41(5) objection. In this regard, the Tribunal notes Claimant’s reliance on *Global Trading Resource v. Ukraine*, in which the tribunal granted Ukraine’s Rule 41(5) objection but chose not to allocate costs between the parties. However, as pointed out by Claimant itself, the Award dates to 2010, and the tribunal opined that “given the newness of the Rule 41(5) procedure and given the reasonable nature of the arguments concisely presented to it by both parties, the appropriate outcome is for the costs of the procedure to lie where they fall.”¹⁸⁹ In comparison, the Rule 41(5) procedure is no longer new and the Tribunal has found in this case that Claimant’s limitations arguments were not reasonable.
163. This leaves the question of the reasonableness of the amount of costs claimed by Respondent. Having considered the circumstances and the entire record carefully, the Tribunal determines to apportion only 75 percent of Respondent’s costs to Claimant. This is not because China claimed substantially higher costs than Ansung claimed, as percentage comparisons ignore issues such as market rates and individual fee arrangements. Rather, the Tribunal considers that the legal costs sought by China, even noting the fee cap for the Zhong Lun law firm, are disproportionate to the extent of the Rule 41(5) Objection submissions and one-day hearing.

¹⁸⁹ *Global Trading*, para. 59.

164. Turning to post-Award interest, Ansung is incorrect in suggesting that China made a “fresh” request for post-Award interest in its Observations on Claimant’s Submissions on Costs. The record reflects that China requested post-Award interest, at a commercially reasonable rate to be set by the Tribunal, in its Rule 41(5) Objection, in its Observations and in its Statement of Costs.¹⁹⁰ The Tribunal determines to award post-Award interest, on the terms set out below.
165. To conclude, the Tribunal decides to assess all of the direct costs of the proceeding and 75 percent of Respondent’s legal fees and expenses against Claimant.
166. The direct costs of the proceeding include: (i) the fees and expenses of each Member of the Tribunal; (ii) payments made by ICSID for other direct expenses, such as those related to the conduct of hearings (*e.g.*, court reporting, Maxwell Chambers’ charges, courier services, and estimated charges related to the dispatch of this Award); and (iii) ICSID’s administrative fees.
167. These costs amount to (in US\$):

Arbitrators’ fees and expenses:

| | |
|-----------------------------------|-------------------------------|
| Professor Lucy Reed | US\$ 29,987.20 |
| Dr. Michael Pryles | US\$ 29,444.84 |
| Professor Albert Jan van den Berg | US\$ 33,589.05 |
| Other direct expenses (estimated) | US\$ 14,500.00 |
| ICSID’s administrative fees | US\$ 32,000.00 |
| Total | <u>US\$ 139,521.09</u> |

168. The above costs have been paid out of the advances made to ICSID by the Parties in equal parts. Once the case account balance is final, the ICSID Secretariat will provide the Parties with a detailed financial statement, and the remaining balance will be reimbursed to the Parties in proportion to the advances they made.

¹⁹⁰ Rule 41(5) Objection, para. 50; R. Observations, paras. 74-75; R. Statement of Costs, p. 2.

169. Accordingly, the Tribunal orders Claimant to pay Respondent US\$ 69,760.55 for the expended portion of Respondent's advances to ICSID and US\$ 4853.25 plus EUR 267,443.10 plus CNY 1,387,500 to cover 75 percent of Respondent's legal fees and expenses, plus interest at the rate of three-month LIBOR plus two percent, compounded quarterly, such interest to run from the 90th day after the date of dispatch of this Award on any unpaid portion of the amounts due under this Award until the date of payment.

X. DECISION

For the reasons set forth above, the Tribunal decides as follows:

- (1) Dismisses with prejudice all claims made by Claimant, Ansung Housing Co., Ltd., in its Request for Arbitration, pursuant to ICSID Arbitration Rule 41(5).
- (2) Awards Respondent, the People's Republic of China, its share of the direct costs of the proceeding in the amount of US\$ 69,760.55, plus 75 percent of its legal fees and expenses in the amount of US\$ 4853.25 plus EUR 267,443.10 plus CNY 1,387,500, plus interest at the rate of three-month LIBOR plus two percent, compounded quarterly, such interest to run from the 90th day after the date of dispatch of this Award on any unpaid portion of the amounts due under this Award until the date of payment.

[signed]

Dr. Michael Pryles
Arbitrator

Date: March 7, 2017

[signed]

Prof. Albert Jan van den Berg
Arbitrator

Date: March 3, 2017

[signed]

Prof. Lucy Reed
President of the Tribunal

Date: March 9, 2017