INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

[redacted] **MIN**

Claimant

and

REPUBLIC OF KOREA

Respondent

ICSID Case No. ARB/20/26

DECISION ON THE RESPONDENT'S PRELIMINARY OBJECTION PURSUANT TO RULE 41(5) OF THE ICSID ARBITRATION RULES

Members of the Tribunal
Mr. Ian Glick QC, President
Mr. Stephen L. Drymer, Arbitrator
Professor Donald M. McRae, Arbitrator

Secretary of the Tribunal
Ms. Geraldine R. Fischer

Date of dispatch to the Parties: 18 June 2021

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TABLE OF SELECTED ABBREVIATIONS

Arbitration Rules	ICSID Rules of Procedure for Arbitration Proceedings 2006
Cut-off Date	16 July 2017
ICSID Convention	Convention on the Settlement of Investment Disputes Between States and Nationals of Other States dated 18 March 1965
ICSID or the Centre	International Centre for Settlement of Investment Disputes
"Rule 41(5) Objection" or "Application"	The Respondent's Preliminary Objection pursuant to Rule 41(5) of the ICSID Arbitration Rules
Rule 41(5) Hearing	Hearing on the Respondent's Rule 41(5) Objection held by videoconference on 26 May 2021
Treaty	Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, which entered into force on 1 December 2007

I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("**ICSID**" or the "**Centre**") on the basis of the Agreement between the Government of the People's Republic of China and the Government of the Republic of Korea on the Promotion and Protection of Investments, which entered into force on 1 December 2007 (the "**BIT**" or "**Treaty**") and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "**ICSID Convention**").

2. The claimant is Mr. [redacted] Min ("**Mr. Min**" or the "**Claimant**"), a national of the People's Republic of China. The respondent is the Republic of Korea ("**Korea**" or the "**Respondent**"). The Claimant and the Respondent are collectively referred to as the "**Parties**." The Parties' representatives and their addresses are listed above on page (i).

3. This dispute relates to Mr. Min's claim that his rights under the Treaty and international law, including his rights under BIT Article 2(2) to fair and equitable treatment, have been violated and that he has been denied justice; and that, contrary to BIT Article 4(1), his investment in Korea, namely his shareholding in a Korean company, has been expropriated.

4. This Decision sets out the Tribunal's reasoned decision on the "Respondent's Preliminary Objection pursuant to Rule 41(5) of the ICSID Arbitration Rules" (the **"Rule 41(5) Objection**" or "**Application**").

II. THE OBJECTION

5. ICSID Arbitration Rule 41(5) provides as follows.

> *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. The Respondent's Objection is that certain claims raised by Mr. Min are time-barred pursuant to Article 9(7) of the Treaty and that, accordingly, these claims manifestly lack legal merit and should be dismissed pursuant to Rule 41(5) quoted above.

7. As appears below, it is not in dispute between the Parties that the Respondent filed its Rule 41(5) Objection within 30 days after the constitution of the Tribunal and before its first session.

III. PROCEDURAL HISTORY

8. On 16 July 2020, the Claimant submitted its Request for Arbitration, together with Exhibits C-001 to C-024 and Legal Authority CL-001 (the "**Request**"), which was registered by the Secretary-General of ICSID on 3 August 2020, in accordance with Article 36(3) of the ICSID Convention.

9. On 20 October 2020, Mr. Stephen L. Drymer, a national of Canada, accepted his appointment by Claimant as arbitrator. On 19 November 2020, Professor Donald M. McRae, a national of Canada and New Zealand, accepted his appointment by Respondent as arbitrator. On 29 January 2021, in accordance with the method of appointment of the President agreed upon by the Parties, Mr. Ian Glick QC, a national of the United Kingdom, accepted his appointment as President of the Tribunal. On 1 February 2021, the Secretary-General informed the Parties that the Tribunal was constituted.

10. On 5 February 2021, the Respondent filed its Rule 41(5) Objection accompanied by Legal Authorities RL-001 to RL-013.

11. Further to the Tribunal's 11 February 2021 briefing schedule for Respondent's Rule 41(5) Objection, the Parties filed the following written submissions:

- On 8 March 2021, the Claimant filed its First Observations on Respondent's Preliminary Objection pursuant to Rule 41(5) of the ICSID Arbitration Rules, accompanied by Legal Authorities CL-002 to CL-019 ("**Claimant's First Observations**").

- On 5 April 2021, the Respondent filed its Observations on the Preliminary Objection pursuant to Rule 41(5) of the ICSID Arbitration Rules, accompanied by Legal Authorities RL-014 to RL-019 ("**Respondent's Observations**").

- On 3 May 2021, the Claimant filed its Second Observations on Respondent's Preliminary Objection pursuant to Rule 41(5) of the ICSID Arbitration Rules,

accompanied by Legal Authorities CL-020 to CL-025 ("**Claimant's Second Observations**").

12. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a first session and Hearing on the Respondent's Rule 41(5) Objection (the "**Rule 41(5) Hearing**") by videoconference on 26 May 2021. The following persons were present at the first session and Rule 41(5) Hearing:

Tribunal:

Mr. Ian Glick QC	President
Mr. Stephen L. Drymer	Arbitrator
Professor Donald M. McRae	Arbitrator

ICSID Secretariat:

Ms. Geraldine R. Fischer	Secretary of the Tribunal

For the Claimant:

Counsel	
Mr. Wade Coriell	King & Spalding
Mr. Aloysius Llamzon	King & Spalding
Ms. Xiaomao Min	King & Spalding
Mr. Joel Ng	King & Spalding
Mr. Ning Fei	Hui Zhong Law Firm
Ms. Xueyu Yang	Hui Zhong Law Firm

For the Respondent:

Counsel	
Mr. Matthew Hodgson	Allen & Overy
Ms. Jae Hee Suh	Allen & Overy
Mr. Fares Nowak	Allen & Overy
Mr. Daniel Hrčka	Allen & Overy
Mr. Yun Jae Baek	Yulchon LLC
Ms. Jeonghye Sophie Ahn	Yulchon LLC
Mr. Jae Hyong Woo	Yulchon LLC
Mr. Min Kyu Lee	Yulchon LLC
Ms. Young Geon Claire Kim	Yulchon LLC

Party Representatives	
Mr. Changwan Han	International Dispute Settlement Division, Ministry of Justice
Ms. Hyeon Song Lee	International Dispute Settlement Division, Ministry of Justice
Mr. Hyungjoo Lee	International Dispute Settlement Division, Ministry of Justice
Ms. Soo Min Yang	International Dispute Settlement Division, Ministry of Justice
Ms. Ajoo Kim	International Dispute Settlement Division, Ministry of Justice

Court Reporter:

Ms. Margie Dauster	Worldwide Reporting

Zoom Technical Support:

Mr. Adam Kirn Hennessey	The World Bank Group

13. On 1 June 2021, the Tribunal issued Procedural Order No. 1, which sets out the procedural rules that govern this arbitration.

14. The first session and Rule 41(5) Hearing transcript and recordings were distributed to the Members of the Tribunal and the Parties, and the Parties submitted their agreed transcript corrections on 3 June 2021.

IV. THE TREATY

15. As already mentioned, Mr. Min alleges that Korea has breached Articles 2(2) and 4(1) of the Treaty; and Korea alleges that certain of his claims are time-barred by Article 9(7).

16. Article 2(2) of the Treaty provides as follows:

> *Each Contracting Party shall accord to investments in its territory of investors of the other Contracting Party fair and equitable treatment and full and constant protection and security.*

17. Article 4(1) of the Treaty provides as follows:

Neither Contracting Party shall expropriate, nationalize or take other similar measures, directly or indirectly, (hereinafter referred to as "expropriation") against the investments of the investors of the other Contracting Party in its territory, unless the following conditions are met:

(a) for the public interests;

(b) in accordance with domestic law and international standard of due process of law;

(c) without discrimination;

(d) against compensation in accordance with paragraph 2.

18. Article 9 of the Treaty provides, so far as material, as follows.

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;

...

[e]*ach Contracting Party hereby gives its consent for submission by the investor concerned of the investment dispute for settlement by binding international arbitration.*

...

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.

V. FACTUAL BACKGROUND

19. For purposes of the Rule 41(5) Objection, the Tribunal summarises the factual background of the dispute alleged in the Claimant's Request. This summary does not reflect any finding of fact by the Tribunal.

(a) In 2007, Mr. Min established a company incorporated in Korea called Pi Investment Co. Ltd ("**Pi Korea**"). Mr. Min was originally its sole shareholder and, although there was a period when there were other investors, from 2010 until January 2015 Mr. Min was again its sole shareholder.[1]

(b) In 2008, Pi Korea became the ultimate owner of a valuable building in central Beijing.[2]

(c) To finance this acquisition, Pi Korea borrowed KRW380 billion in two loans, one from Korea Life Insurance Co., Ltd and one from Kookmin Bank.[3] These loans were later, in 2009 and 2010, assigned to Woori Bank, which was then, and at all material times remained, a Korean state-owned and controlled institution.[4]

(d) In 2010, a criminal investigation into Mr. Min began in Korea which culminated, in December of that year, in the Prosecutor's Office charging him with embezzlement, bribery, making false accusations against Woori Bank, and breach of fiduciary duty.[5]

(e) In June 2011, the loans were extended on terms that allowed Woori Bank to accelerate them "*at its own discretion without notice*". The Woori Bank then took steps to enforce its security, including removing Mr. Min as a director of Pi Korea and establishing a trust over the shares of that company (the "**Pi Korea Shares**").[6]

(f) In July 2013, Mr. Min began proceedings in the Seoul Central District Court against Woori Bank seeking a declaration that he was the shareholder of Pi Korea.[7]

(g) In December 2013, Woori Bank entered into a Sale and Purchase Agreement (the "**Woori-Manner SPA**") to sell all the Pi Korea Shares, and the loans, to Manner International Trading Ltd ("**Manner**"), a BVI-incorporated company, (the

[1] Request, paras. 2, 16 and 17.

[2] Request, paras. 2, 18 and 21.

[3] Request, paras. 2 and 19.

[4] Request, paras. 2 and 19.

[5] Request, para. 50.

[6] Request, paras. 24-28.

[7] Request, paras. 5 and 31.

"**Manner Transfer**"), and the shares were transferred to Manner in two tranches in March 2014 and January 2015.[8] This transfer caused Mr. Min to lose his entire equity interest in Pi Korea.[9]

(h) In March 2015, Mr. Min learned of the Woori-Manner SPA and the Manner Transfer, and disclosure of the former's full terms then became an issue in the proceedings, as did its validity and the value of the Pi Korea Shares.[10]

(i) On 19 November 2015, the Seoul Central District Court found for Woori Bank, holding that the Woori-Manner SPA was valid, and refusing to reinstate him as the sole shareholder of Pi Korea.[11]

(j) On 10 October 2016, the Seoul High Court convicted Mr. Min of embezzlement and other offences and sentenced him to a 6-year prison term.[12]

(k) On 23 December 2016, the Seoul High Court upheld the judgment of the Seoul Central District Court.[13]

(l) On 22 March 2017, the Korean Supreme Court dismissed Mr. Min's appeal against his conviction, and Mr. Min remains in prison to date.[14]

(m) On 18 July 2017, the Korean Supreme Court also upheld the judgment of the Seoul Central District Court.[15]

20. Paragraph 6 of the Request defines the proceedings before the District Court, the High Court and the Supreme Court collectively as the "**Korean Civil Proceedings**". These, the Claimant alleges, "*were fraught with procedural flaws and irregularities*" which "*seriously undermined Mr Min's right to a fair trial.*"[16]

21. Paragraph 7 of the Request alleges as follows.

> *The Korean courts' mishandling of the Korean Civil Proceedings was part of a wider scheme against Mr Min, facilitated by the Korean Government and designed to deprive him of his investment*

[8] Request, paras. 4 and 28.

[9] Request, paras. 4 and 17.

[10] Request, paras. 29 and 32-44.

[11] Request, paras. 44-45.

[12] Request, para. 51.

[13] Request, para. 46.

[14] Request, para. 51.

[15] Request, para. 46.

[16] Request, paras. 6 and 47.

*in Korea through unlawful criminal investigation and enforcement measures, as well as illegitimate civil judgments. In addition to Woori Bank's wrongful enforcement of the Pi Korea Security and the Korean Civil Proceedings, the Korean government also subjected Mr Min to inappropriate criminal investigation, discriminatory treatment and unjust criminal proceedings, all of which deprived Mr Min of his right to due process and freedom of movement, including his wrongful conviction and incarceration to date (collectively the "**Korean Criminal Proceedings**"). In so doing, the Korean government deprived Mr Min of the opportunity to manage his businesses, including the Pi group of companies.*

22. In its Application, the Respondent uses the definition "**Woori Bank Enforcement**". This is not a defined term in the Request but the Tribunal understands it to refer to the Woori Bank's enforcement of the security over the Pi Korean Shares, and its execution of the Manner Transfer.[17]

VI. THE CLAIM

23. At Part V of the Request, the Claimant sets out what he alleges to have been the Respondent's violations of the Treaty. In particular, the Claimant alleges the following.

> **A. Korea Failed to Treat Mr Min's Investment Fairly and Equitably**
>
> *61. Article 2(2) of the Treaty requires that Korea accord "fair and equitable treatment" to Mr Min's investment.*
>
> *62. Korea breached its obligation to provide fair and equitable treatment to Mr Min's investment, including the obligation not to deny justice to Mr Min, through the following measures (separately and/or taken together as a composite act), which are discriminatory, unjust, unfair and lacking due process:*
>
> - *The Korean courts' improper handling of the Korean Civil Proceedings, including but not limited to:*
>   - *The Korean courts' grossly unfair and unjust decision not to order disclosure of the Woori-Manner SPA, a crucial piece of evidence in the Korean Civil Proceedings which denied Mr Min access to key documents necessary to present his case;*

[17] See the Respondent's Objection, para. 5(a), and the Request, paras. 65, 66 and 72.

- *The Seoul Central District Court's failure to forward Mr Min's appeal on the Disclosure Issue in a timely manner, which deprived Mr Min of his opportunity to appeal on the disclosure issue and to deploy the Woori-Manner SPA in fulfilling his burden of proof at trial;*
- *The Korean courts' wrongful acceptance that the November 2014 Amendment to the Woori-Manner SPA provided by Woori Bank was valid despite legitimate concerns as to its authenticity, jeopardizing Mr Min's right to due process and a fair trial;*
- *The Korean courts' wrongful acceptance of the Pi Korea Shares' zero valuation submitted by Woori Bank at face value, despite the fact that the valuation clearly represented a gross undervalue of the Pi Korea Shares. Further the Korean courts' decision to reject Mr Min's request for further information from KPMG was unjust and unreasonable; and*
- *The Korean courts' wrongful acceptance of the validity of the Manner Transfer and/or the Woori-Manner SPA, despite all of the above irregularities.*

• *The Korean courts and other State organs' improper handling of the Korean Criminal Proceedings, including but not limited to:*

- *The Prosecutor's Office's discriminatory prosecution of Mr Min;*
- *Mr Min's wrongful conviction and incarceration;*
- *The Prosecutor's Office's use of unlawful surveillance against Mr Min; and*
- *The Ministry of Justice's rejection of the Korean court's request that Mr Min be permitted to leave Korea, despite Mr Min's good track record of cooperating with the Korean authorities and his genuine need to travel for business.*

63. *Each of the acts set out above individually and collectively constitute a violation by Korea of Article 2(2) of the Treaty.*

B. Korea Expropriated Mr Min's Investment

64. *Article 4(1) of the Treaty prohibits Korea from directly or indirectly expropriating or taking any similar measures against qualifying investments unless all of the conditions set out in Article 4(2) are satisfied, i.e., the expropriation is*

(i) for the public interest; (ii) in accordance with domestic and international standards of due process; (iii) without discrimination; and (iv) with compensation.

65. *Korea unlawfully expropriated Mr Min's investment in violation of Article 4(1) as its following acts (separately and/or taken together as a composite act) (i) had the effect of expropriating Mr Min's entire investment in Korea; and (ii) were not carried out for the public interests, in accordance with international standards of due process and/or with compensation:*

- *Woori Bank's wrongful enforcement of the Pi Korea Security and execution of the Manner Transfer; and*
- *The Korean courts' unlawful handling of the Korean Civil Proceedings.*

24. At Part VII of the Request, the Claimant sets out his request for relief as follows:

(a) A declaration that the Korean Civil Proceedings and the Korean Criminal Proceedings violated Mr Min's rights the Treaty and international law, including Mr Min's right to fair and equitable treatment and also amounted to a denial of justice;

(b) A declaration that Korea expropriated Mr Min's investment in Korea through Woori Bank's wrongful enforcement of the Pi Korea Security and the Korean Civil Proceedings;

(c) An award of damages amounting to Mr Min's financial loss as a result of the deprivation of his shareholdings in Pi Korea to be quantified at a later stage;

(d) A declaration that Mr Min's indictment, conviction and incarceration as a result of the Korean Criminal Proceedings violated the Treaty and international law;

(e) An order that Mr Min be released from prison immediately;

(f) An award of moral damages to be quantified at a later stage; and

(g) Such other relief as may be just and equitable.

VII. THE PARTIES' POSITIONS

25. The Tribunal has carefully reviewed the Parties' written and oral submissions on the Respondent's Rule 41(5) Objection, and this section provides an overview of the Parties' positions in summary form. It is not intended to be exhaustive.

26. In brief, the Respondent submits that Mr. Min's claims based on the Woori Bank Enforcement and the Korean Criminal Proceedings are "*manifestly without legal merit*" as they are time-barred under BIT Article 9(7). The Claimant disputes his claims are time-barred, and he further argues that Rule 41(5) is an improper remedy in the present case.

A. THE RULE 41(5) STANDARD

27. Rule 41(5) of the Arbitration Rules has been set out above.

28. The Parties are agreed on the following principles related to the applicable standard for Rule 41(5):

    (a) Korea's Rule 41(5) Objection was timely.

    (b) The applicable test is "*manifestly without legal merit*", and, in accordance with the decision in ***Trans-Global***,[18] a respondent is required "*to establish its objection clearly and obviously, with relative ease and despatch.*" The Respondent does not dispute that the *Trans-Global* test is a high bar.[19]

    (c) Rule 41(5) relates to "*a legal impediment to a claim*", not a factual one, so the Tribunal should generally accept the facts as pleaded by the claimant in determining a Rule 41(5) objection, unless it considers that the factual allegations are "*incredible, frivolous, vexatious or inaccurate or made in bad faith.*"[20]

29. As further described below, with respect to the applicable standard, the Parties, however, disagree on: (i) the role of a Rule 41(5) objection in the context of a time-bar objection; and (ii) whether a tribunal should consider "*efficiency*" in making its determination of a Rule 41(5) Objection.

(1) The Respondent's position

30. The Respondent asserts that Rule 41(5) concerns "*a legal impediment to a claim*", "*which can go to jurisdiction or the merits of the dispute.*"[21] Furthermore, a time-bar jurisdictional

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[18] RL-05, *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) of the ICSID Arbitration Rules, 12 May 2008 ("***Trans-Global***").

[19] Respondent's Observations, para. 27.

[20] Claimant's First Observations, para. 15.

[21] Rule 41(5) Objection, para. 13 (citing RL-012, *Almasryia for Operating & Maintaining Touristic Construction Co. LLC v. State of Kuwait*, ICSID Case No. ARB/18/2, para. 31 (Award on the Respondent's Application under Rule 41(5) of the ICSID Arbitration Rules, 1 November 2019) ("***Almasryia***")).

objection "*is squarely 'a legal impediment to a claim*'", and, in fact, the ***Ansung*** tribunal upheld a Rule 41(5) objection based on the same BIT's time-bar provision.[22]

31. In response to the Claimant's arguments that Respondent's Rule 41(5) objection improperly requires the Tribunal to decide a number of critical and complex factual issues, the Respondent emphasises that, for purposes of this Rule 41(5) Objection, the Tribunal need only decide the legal question of interpreting and applying BIT Article 9(7) based on the Claimant's "*presumed*" pleaded facts.[23] The Respondent is not asking the Tribunal to make any factual inquiry at this stage.[24]

32. In particular, the Respondent says, at paragraph 36 of its Observations:

> *Hence, the Claimant's assertion that 'the Tribunal must examine whether and to what extent the Respondent's acts complained of by Mr Min that comprise the Woori Bank Enforcement, the Korean Civil Proceedings and the Korean Criminal Proceedings were interconnected or had the common aim of depriving the Claimant of his investment in Korea' is plainly incorrect. The Tribunal does not need to do so. It only needs to interpret Article 9(7) and apply it to the pleaded facts i.e. assuming, for the purpose of this Rule 41(5) Objection, that there was such a connection between the actions. This is a question of law, not fact.*

33. Contrary to the Claimant's assertion that *ratione temporis* objections generally require a fact-intensive analysis at the merits stage, the Respondent points out that whether a time-bar objection can be decided at a preliminary stage depends on the case. Moreover, the Claimant's cited cases concerned different treaty provisions with different formulated claims and objections, which diverge from those in the present case.[25] Furthermore, the Respondent highlights that the ***Ansung*** tribunal determined a Rule 41(5) objection based on the same Treaty provision "*even in the face of the claimant's* [Ansung's] *'continuing breach' argument (which closely mirrored the Claimant's* [Mr. Min's] *continuing breach argument in these proceedings).*"[26]

34. The Respondent similarly dismisses the Claimant's efficiency argument as being irrelevant to the determination of a Rule 41(5) objection and notes that tribunals have granted Rule

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[22] Rule 41(5) Objection, para. 14 (citing RL-011, *Ansung Housing Co., Ltd. v. People's Republic of China*, ICSID Case No. ARB/14/25 (Award, 9 March 2017) ("***Ansung***")).

[23] Respondent's Observations, paras. 30, 35 (citing RL-05, *Trans-Global* and RL-014, *Emmis International Holding, B.V. and others v. Hungary*, ICSID Case No. ARB/12/2 (Decision on Respondent's Objection under ICSID Arbitration Rule 41(5), 11 March 2013 ("***Emmis***")), 63(b).

[24] Hearing Tr., p. 25.

[25] Respondent's Observations, para. 37 (citing *e.g.* Claimant's First Observations, para. 29).

[26] Respondent's Observations, para. 38.

41(5) objections that resulted in only partial dismissal of claims, without addressing efficiency.[27] In any event, the Respondent points out that by definition there would be efficiency gains if some claims are dismissed.[28]

(2) The Claimant's position

35. According to the Claimant, the Rule 41(5) standard is "*extremely high*", and a Rule 41(5) application must fail if "*the Claimant has at least a 'tenable arguable case'.*"[29] Moreover, the Claimant submits that the Tribunal must dismiss a Rule 41(5) objection "*if the application requires the Tribunal to prejudge disputed factual issues.*"[30] The Claimant asserts that a time-bar objection in the context of a composite or continuing breach is a question for the merits as it requires an analysis of the facts underlying the claims within the Treaty framework. Accordingly, the Claimant argues that the Rule 41(5) procedure is not a proper forum for resolving a time-bar dispute in the context of a composite act.[31]

36. In Claimant's view, accepting Mr. Min's pleaded facts includes assuming his allegation that the acts are interconnected and constitute a composite act.[32] The Claimant contends that to uphold the Respondent's preliminary objection would require the Tribunal to reject Mr. Min's composite act allegations, which is not permitted by Rule 41(5).[33] Additionally, the Claimant observes that certain questions implicated by Respondent's Rule 41(5) Objection, such as causation, cannot be answered on a preliminary basis and are for the merits.[34]

37. The Claimant observes that the Respondent's Rule 41(5) Objection, based on the BIT Article 9(7) time-bar provision, only seeks partial dismissal of Mr. Min's claims, which would not result in any meaningful time and cost savings nor fulfil the *raison d'etre* of Rule 41(5).[35]

B. THE TIME-BAR: BIT ARTICLE 9(7)

38. Article 9(7) of the Treaty has been set out above.

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[27] Respondent's Observations, paras. 41-43 (citing, *e.g.* RL-014, *Emmis*, paras. 44, 84-85). Hearing Tr., pp. 43-44.

[28] Respondent's Observations, para. 44.

[29] Claimant's First Observations, para. 17; Claimant's Second Observation, para. 22(b).

[30] Claimant's First Observations, para. 19.

[31] Claimant's First Observations, Section II(B); Claimant's Second Observations, para. 35.

[32] Claimant's Second Observations, para. 2(a).

[33] Claimant's Second Observations, para. 22(c).

[34] Hearing Tr., p. 70.

[35] Claimant's Second Observations, para. 2(c).

39. It is not in dispute that the Tribunal must first interpret the BIT Article 9(7) time-bar "*in good faith in accordance with the ordinary meaning of the words in their context and in light of the Treaty's object and purpose pursuant to Article 31 of the Vienna Convention.*"[36]

40. With respect to the interpretation of BIT Article 9(7), the Parties agree that:

(a) The "Cut-off Date" for the application of BIT Article 9(7) is 16 July 2017 (*i.e.* three years before the Claimant filed its Request with ICSID)

(b) The BIT Article 9(7) limitation start date "*should be the date on which an investor 'first acquired, or should have first acquired, knowledge that he had incurred loss or damage'.*"[37] The Parties also agree that "*knowledge*" can be either **actual** knowledge or **constructive** knowledge (i.e., what a prudent claimant should have known or must reasonably be deemed to have known by exercise of reasonable care or diligence).[38]

41. The Parties disagree on (i) what is sufficient to constitute "*knowledge*" for the limitation start date; and (ii) the effect of the limitation period in the context of a continuing breach and of a composite breach.

(1) The Respondent's position

42. According to the Respondent, the relevant knowledge that triggers the three-year limitation period is "***first*** *knowledge of the* ***existence*** *(and not the full extent) of the relevant loss or damage*"[39] (not the requisite knowledge of "*breach*" as argued by the Claimant[40]). The Respondent discounts Claimant's cited cases on the time-bar provision as they are based on treaties whose text differs from BIT Article 9(7), which is triggered only by "*knowledge of 'loss or damage'*" without any reference to a "*breach.*"[41] Moreover, the Respondent asserts that the ***Ansung*** tribunal is the only tribunal that considered the same clause, and the Claimant has not challenged the ***Ansung*** tribunal's reasoning.[42]

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[36] Respondent's Observations, para. 47 (citing Claimant's First Observations, para. 37). *See also* Rule 41(5) Objection, paras. 18-19.

[37] Claimant's First Observations, para. 38. Claimant's Second Observations, para. 33. Respondent's Observations, para. 51 (citing Claimant's First Observations, paras. 38-39). *See also* Rule 41(5) Objection, paras. 19 and 19(b) (citing RL-010, *Aaron C. Berkowitz, Brett E. Berkowitz and Trevor B. Berkowitz (formerly Spence International Investments and others) v. Republic of Costa Rica*, ICSID Case No. UNCT/13/2, para. 213 (Interim Award, 25 October 2016) ("***Spence***"). Hearing Tr., pp. 26-28.

[38] Respondent's Observations, para. 51 (citing Claimant's First Observations, paras. 38-39).

[39] Respondent's Observations, para. 51 (emphasis in original) (citing Claimant's First Observations, paras. 38-39).

[40] Respondent's Observations, para. 49.

[41] Respondent's Observations, para. 48.

[42] Respondent's Observations, para. 48.

43. The Respondent says that "*a composite act claim must necessarily be an alternative to an individual act of breach*", and they are "*mutually exclusive*."[43] The Respondent asserts that the same principles regarding relevant knowledge apply to a composite act claim. The Respondent observes that BIT Article 9(7) does not distinguish between composite and individual acts, which the Respondent contends undercuts the Claimant's argument that the limitation period is not tolled until the composite act constituting the breach crystalises.[44]

44. In the Respondent's view, the Tribunal does not have jurisdiction to award loss or damage of which the Claimant first became aware, or should have first become aware, on or before the Cut-Off Date even when the Claimant relies on a composite act (as opposed to an individual act) made up of a series of acts and omissions ending after the Cut-off Date.[45] In other words, according to the Respondent, "*the Tribunal can still consider* [a] *composite act claim*[, but] *it cannot* [...] *award damages which have been first appreciated by an investor more than three years before it starts its claim.*"[46]

45. The Respondent submits that, analytically, the Claimant is claiming in respect of three different types of loss: loss of his shareholding, loss resulting from Korean courts' failure to remedy the loss of his shareholding, and loss resulting from his incarceration. Claims of the first and the third types are time-barred.[47]

(2) The Claimant's position

46. With respect to the start date of the limitation period, citing to *Mobil v. Canada*, in order to have "*knowledge*", the Claimant submits that there must be "*a reasonable degree of certainty as to the existence of the loss or damage in question.*"[48]

47. So far as a continuing breach is concerned, the limitation period renews each day the breach continues;[49] "*in the case of a composite breach the relevant limitation period does not even start to run until 'the time at which the last action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act'.*"[50] The time bar "*applies to the composite act as a whole, rather than to the individual events that comprise*

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[43] Hearing Tr., p. 30.

[44] Hearing Tr., pp. 48-49.

[45] Respondent's Observations, para. 54. *See also* Hearing Tr., pp. 38-39.

[46] Hearing Tr., p. 39.

[47] Hearing Tr., pp. 123-124.

[48] Claimant's First Observations, paras. 42-45 (emphasis removed). Claimant's Second Observations, para. 2(b). Hearing Tr., p. 97.

[49] Claimant's First Observations, paras. 70-71, citing CL-011, *United Parcel Service of America Inc. v. Government of Canada*, ICSID Case No. UNCT/02/1 (Award, 24 May 2007) ("***UPS***").

[50] Claimant's Second Observations, para. 55(b) (citing Commentary on ILC Articles (CL-010), Article 15, ¶ 8).

the composite act."[51] The Claimant further explains that "*as long as the composite act includes key measures taken after the relevant cut-off date (as it does here), the claims arising out of that composite act are not time-barred.*"[52]

48. The Claimant strongly opposes the Respondent's arguments that the limitation period starts when an investor became aware of "*loss or damage*" from an individual component of a composite act, even if such act takes place before the Treaty breach crystalises.[53] According to the Claimant, this theory "*essentially amount*[s] *to a contention that Article 9(7) disallows claims based on composite acts*", and Respondent's interpretation is problematic for several reasons.[54] For example, the Claimant asserts that "loss or damage" is necessarily the result of an alleged breach, and "*it cannot precede the existence of a breach.*"[55] Similarly, the Claimant observes that the Respondent's approach runs contrary to other cases, such as ***Rusoro***,[56] that have decided a time-bar shall apply to "*the totality of acts* [...] ***as a unity***."[57] The Claimant also submits that Mr. Min's "*awareness of certain circumstance of a claim before the Cut-Off Date does not make that claim time-barred.*"[58]

C. APPLICATION TO THE FACTS

(1) The Respondent's position

49. The Respondent argues that Mr. Min's claims based on the Woori Bank Enforcement and the Korean Criminal Proceedings are time-barred under BIT Article 9(7), and, therefore, "[t]*hese claims are thus 'manifestly without legal merit' and should be dismissed in accordance with Rule 41(5) of the ICSID Rules.*"[59]

50. The Respondent underscores that even taking the facts as pleaded in the Request at face value, "*it is manifest that Mr Min first acquired, or should have first acquired, knowledge of the fact that he had incurred or will incur loss or damage in connection with the Woori*

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[51] Claimant's Second Observations, para. 2(a).

[52] Claimant's Second Observations, para. 5(a). *See also* Hearing Tr., pp. 102-103; Claimant's Second Observations, para. 46; CD-1, p. 31.

[53] Claimant's Second Observations, para. 5(a).

[54] Claimant's Second Observations, paras. 36-40.

[55] Claimant's Second Observations, para. 38 (also citing RL-010, *Spence*, para. 211).

[56] CL-014, *Rusoro Mining Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5 (Award, 22 August 2016).

[57] Claimant's Second Observations, para. 40 (emphasis in original).

[58] Claimant's Hearing Slides 33-34; Claimant's Second Observations, paras. 44-45 (citing CL-024 (*Naturgy Energy Group, S.A. (formerly Gas Natural SDG, S.A.), Naturgy Electricidad Colombia (formerly Gas Natural Fenosa Electricidad Colombia S.L.) v. Republic of Colombia*, ICSID Case No. UNCT/18/1 (Award, 12 March 2021)) and CL-025 (*Astrida Benita Carrizosa v. Republic of Colombia*, ICSID Case No. ARB/18/5 (Award, 19 April 2021)).

[59] Rule 41(5) Objection, para. 6.

Bank Enforcement and the Korean Criminal Proceedings before the Cut Off Date."[60] Consequently, "*it is clear and obvious that any claims for loss or damage resulting from the Woori Bank Enforcement and the Korean Criminal Proceedings (regardless of whether they are based on an individual act or a composite act) are time-barred under Article 9(7) of the China-Korea BIT and therefore outside the Tribunal's jurisdiction.*"[61] Consequently, these claims should be dismissed pursuant to ICSID Rule 41(5) as being manifestly without legal merit.[62]

a. Woori Bank Enforcement

51. With respect to the Woori Bank Enforcement, the Respondent highlights that Mr. Min claims damages for his "*financial loss as a result of the deprivation of his shareholding in Pi Korea*," and a declaration that Korea violated the FET BIT provision and International Law.[63] Mr. Min's pleadings show that he "*first knew, or at the very least, should have first known 'by exercise of reasonable care or diligence' that he incurred loss or damage as a result of the Woori Bank Enforcement*"[64] by July 2013 (with the start of the Korean Civil Proceedings) or, at the very latest, early 2015 (when Woori Bank disclosed to Mr. Min that the Pi Korea shares had been transferred to Manner International Trading Limited (the "Manner Transfer")).[65]

52. The Respondent disputes the Claimant's unsupported assertion that the existence of a composite act and the application of a time-bar are inherently fact-sensitive questions that can only be resolved at the merits phase. The Respondent explains that such a question depends on the treaty text and the wording of the provision and the Claimant's pleaded case, and, on these bases, the three cases cited by the Claimant are distinguishable and "*of no avail*".[66] In this particular case, even taking the Claimant's facts as true, including the composite act, the "*Claimant first knew or should have first known of 'loss or damage' resulting from the Woori Bank Enforcement before the Cut-Off Date*", and thus, like *Ansung*, the time-bar "*objection is apt for determination pursuant to the Rule 41(5) procedure, prior to the consideration of the merits*[.]"[67]

53. Similarly, the Respondent disputes the Claimant's assertion that Mr. Min only acquired the requisite knowledge that he had incurred loss or damage as a result of the Woori Bank

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[60] Rule 41(5) Objection, para. 23. *See also* Respondent's Observations, para. 54.

[61] Respondent's Observations, para. 91.

[62] Respondent's Observations, para. 92.

[63] Respondent's Observations, para. 58.

[64] Respondent's Observations, para. 60 (citing RL-010, *Spence*, para. 209).

[65] Respondent's Observations, para. 60. *See also* Rule 41(5) Objection, paras. 28 -33. Hearing Tr., p. 35.

[66] Respondent's Observations, para. 64.

[67] Respondent's Observations, para. 63(c).

Enforcement with the Korean Supreme Court judgement of 18 July 2017.[68] Citing to ***Apotex***, the Respondent submits that the Woori Bank Enforcement loss, which culminated with the Manner Transfer, is "*clearly analytically distinct*" from the loss from the Civil Proceedings.[69] Only the first loss, which took place either in July 2013 or early 2015, is the subject of the Rule 41(5) Objection.[70] According to the Respondent, the Claimant's reliance on ***Mobil v. Canada***,[71] does not assist as, in the Claimant's words, Woori Bank started taking steps to enforce the security in 2011, compelling him to commence the Korean Civil Proceedings in July 2013, and he lost his entire shareholding with the Manner Transfer, which was disclosed to him in "*early 2015*."[72] The Respondent emphasises that the ***Apotex*** decision is directly relevant as it addressed a similar argument and found that "*a discrete government or administrative measure* [...] *is not tolled by litigation, or court decision relating to the measure*."[73]

b. Korean Criminal Proceedings

54. Regarding the Korean Criminal Proceedings, the Respondent notes that "[i]*t is* [...] *clear and obvious from Mr Min's pleaded facts that the latest possible date on which Mr Min could possibly be said to have first acquired, or on which he should have first acquired, knowledge of the loss or damage in connection with the Korean Criminal Proceedings for the purpose of Article 9(7) of the Treaty is the date of the Supreme Court decision* [...], *i.e.,* ***22 March 2017***", which confirmed Mr. Min's conviction.[74]

55. In its Observations, the Respondent contends that even taking the Claimant's alleged facts as true, the Claimant would have "*first acquired the actual or constructive knowledge of 'loss or damage' resulting from the Korean Criminal Proceedings before the Cut-Off Date, and that provides a sufficient basis for the Tribunal to uphold Korea's Rule 41(5) Objection.*"[75]

56. In the Respondent's submission, the Claimant's continuing breach argument is also untenable as it is undisputed that the proceedings ended with the Korean Supreme Court's final judgement dated 22 March 2017, and Mr. Min's continued incarceration is an "*effect*"

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[68] Respondent's Observations, para. 62(b).

[69] Respondent's Observations, para. 72 (citing RL-008, *Apotex Inc. v. Government of the United States of America*, UNCITRAL, para. 334 (Award on Jurisdiction and Admissibility, 14 June 2013) ("***Apotex***")).

[70] Respondent's Observations, para. 72.

[71] CL-018, *Mobil Investments Canada, Inc v. Canada*, ICSID Case No. ARB/15/6 (Decision on Jurisdiction and Admissibility, 13 July 2018).

[72] Respondent's Observations, para. 74.

[73] Respondent's Observations, para. 68 (citing RL-008, *Apotex*, para. 328).

[74] Rule 41(5) Objection, para. 39 (emphasis in the original). *See also* Respondent's Observations, paras. 76-78.

[75] Respondent's Observations, paras. 76 *et seq.*

of an allegedly perfected breach (as opposed to another "*breach*").[76] The Respondent also points out that the ***Ansung*** tribunal "*rejected a similar argument of continuing breach and said that* [a continuing breach] *does not, of course, change when a claimant first knew or should have known that it suffered loss or damage.*"[77] The Respondent is further critical of the Claimant's reliance on the ***UPS*** decision for the "*continuing breach*" theory as the decision has not been followed, and it was critiqued by other tribunals.[78]

(2) The Claimant's position

57. The Claimant emphasises that the Respondent mischaracterises his claims, which, as set out in the Request, consist of both stand-alone claims and composite claims.[79] The Claimant highlights that the Respondent's Rule 41(5) objection ignores the Claimant's central argument that the three categories of acts were part of a composite breach, or a continuing breach (for the Korean Criminal Proceedings).[80] The Rule 41(5) standard requires that the Tribunal make its determination based on Claimant's facts, including its allegation that there is a composite act. Accordingly, the Article 9(7) three-year time-bar applies to the composite act as a whole, so the composite acts which include the Woori Bank Enforcement and the Korean Criminal Proceedings are not time-barred.[81]

58. Additionally, and alternatively, the Claimant submits that whether these acts constitute composite or continuing acts is a question for the merits, and, for a Rule 41(5) Objection, Mr. Min only needs only to show he has a "*tenable arguable case*" that he acquired the requisite "*knowledge* [that] *he had incurred loss or damage*" on or after the Cut-Off date, which he has met.[82]

59. The Claimant further notes that the Respondent's Rule 41(5) objection is not the proper remedy in the present case as at least one of Mr. Min's "*indisputably surviving claim's factual matrix requires a close examination of the facts on which other, allegedly time-barred claims are based.*"[83] Consequently, the Claimant submits that this would not result in any meaningful time or cost savings nor fulfil the *raison d'etre* of Rule 41(5).

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[76] Respondent's Observations, para. 84.

[77] Hearing Tr., p. 63.

[78] Respondent's Observations, paras. 84-88. Hearing Tr., p. 64.

[79] Claimant's Second Observations, paras. 6, 10.

[80] Claimant's Second Observations, para. 2(a) and (b).

[81] Claimant's Second Observations, para. 2(a).

[82] Claimant's Second Observations, para. 2(b).

[83] Claimant's Second Observations, para. 2.

a. Woori Bank Enforcement

60. The Claimant argues that Mr. Min's expropriation and composite FET and denial of justice claims related to the Woori Bank Enforcement are not manifestly time-barred. During the Rule 41(5) Hearing, the Claimant submitted that the Woori Bank Enforcement claim is not a stand-alone claim.[84] The Woori Bank Enforcement, the Korean Civil Proceeding and the Korean Criminal Proceedings are interconnected and form part of the composite act that culminated in the expropriation of his investment.[85] According to the Claimant, the composite expropriation claim did not crystalise until the Korean Supreme Court's decision of 18 July 2017, and in January 2015, when the share transfer occurred, "*the expropriation as claimed by Mr. Min, had not occurred*" as he was diligently seeking the court's intervention, so he "*could not have filed a BIT expropriation case at that point (the case would have been premature).*"[86]

61. The Claimant explains, "[a]*pplying* [the **Mobil**] *standard, 'there was no reasonable degree of certainty on the part of Mr Min that he would sustain loss or damage as a result of the Woori Bank Enforcement until the Korean Courts finally disposed of his challenge to its validity'.*"[87] Moreover, the Claimant distinguishes the **Apotex** case on the ground that it did not involve a composite act claim.[88]

62. Furthermore, the Claimant asserts that no efficiencies would be gained by dismissing these claims given the interconnectedness of the Woori Bank Enforcement and the Korean Civil and Criminal Proceedings.[89]

b. Korean Criminal Proceedings

63. According to the Claimant, the FET and denial of justice claims arising out the Korean Criminal Proceedings are not manifestly time-barred. First, the Korean Criminal Proceedings form part of the composite FET claim, together with the Woori Bank Enforcement and the Korean Civil Proceedings.[90] The Claimant submits that Mr. Min only acquired knowledge of "*loss or damage*" arising from the FET breach on 18 July 2017 when the Korean Supreme Court issued its decision.[91] The Claimant argues that until that time "*the Korean State could have itself corrected its actions, and the loss or damage*

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[84] Hearing Tr., pp. 78-80, and 83.

[85] Claimant's Second Observations, para. 47(a).

[86] Claimant's Hearing Slides, p. 43.

[87] Claimant's Second Observations, paras. 48 and 56. Hearing Tr., pp. 80-81 and 112-113. Claimant's Hearing Slides, p. 45.

[88] Claimant's Second Observations, para. 55.

[89] Claimant's Second Observations, paras. 48 and 50.

[90] Claimant's Second Observations, para. 57.

[91] Claimant's Hearing Slides, p. 45.

would not have occurred."[92] Similarly, Mr. Min has a composite denial of justice claim based on the Korean Civil Proceedings and Criminal Proceedings, and Mr. Min also submits that Mr. Min only acquired knowledge of the reasonable certainty of "*loss or damage*" arising from the denial of justice breach on 18 July 2017 when the Korean Supreme Court issued its decision.[93]

64. Secondly, the Claimant argues that the Korean Criminal Proceedings are a continuing breach of the BIT and international law, and each new act, including Mr. Min's incarceration, constitutes a new breach, which renews the BIT Art. 9(7) limitation period.[94] The Claimant further submits that the Tribunal may only determine whether a series of acts constitutes a continuing breach at the merits stage. The Claimant asserts that he has at least a tenable case that the Korean Criminal Proceedings constitute a continuing breach in light of his wrongful incarceration, which happened after the Korean Supreme Court Judgement of 22 March 2017 and continues to date.[95]

65. In addition, should the Tribunal dismiss these claims, the Claimant asserts that there would no efficiencies gained as the Tribunal would still have to examine the underlying facts.[96]

D. COSTS

66. The Respondent submits that the Tribunal has the discretion to allocate costs under ICSID Convention Article 61(2). As the two claims are manifestly without legal merit, the Respondent argues that Mr. Min should pay Korea's costs incurred in connection with the Rule 41(5) Objection, including Korea's legal fees and expenses and Korea's share of the Tribunal's and ICSID's fees and expenses, plus interest.[97]

67. The Claimant similarly requests that the Tribunal order that the Respondent reimburse all of the Claimant's costs incurred in connection with the Respondent's Preliminary Objection, including fees and expenses of the arbitrators and legal counsel.[98]

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[92] Claimant's Hearing Slides, p. 45.

[93] Claimant's Hearing Slides, p. 46.

[94] Claimant's Second Observations, para. 57.

[95] Claimant's Second Observations, para. 59.

[96] Claimant's Second Observations, para. 57.

[97] Rule 41(5) Objection, paras. 45 and 46(b). Respondent's Observations, para. 93(c).

[98] Claimant's Second Observations, para. 63(b).

E. THE PARTIES' REQUEST FOR RELIEF

(1) The Respondent's request for relief

68. The Respondent requests the Tribunal to:

> *(a) dismiss with prejudice each of:*
>
> > *(i) the Claimant's claim that the Woori Bank Enforcement individually/separately amounted to an expropriation;*
> >
> > *(ii) the Claimant's claim that the Korean Criminal Proceedings individually/separately amounted to a breach of the FET standard and a denial of justice;*
> >
> > *(iii) the Claimant's claim that the Woori Bank Enforcement and the Korean Civil Proceedings collectively/taken together as a composite act amounted to an expropriation, to the extent that the Claimant claims loss or damage resulting from the Woori Bank Enforcement; and*
> >
> > *(iv) the Claimant's claim that the Korean Criminal Proceedings and the Korean Civil Proceedings collectively/taken together as a composite act amounted to a breach of the FET standard and a denial of justice, to the extent that the Claimant claims loss or damage resulting from the Korean Criminal Proceedings;*
>
> *(b) declare that each of the Claimant's claims outlined in subparagraph (a) above is outside the scope of the Tribunal's jurisdiction;*
>
> *(c) order the Claimant to pay the entirety of Korea's costs incurred in connection with the Rule 41(5) Objection (including Korea's legal fees and expenses and Korea's share of the Tribunal's and ICSID's fees and expenses), plus interest thereon; and*
>
> *(d) order such further or other relief as the Tribunal may deem just and proper.*[99]

[99] Respondent's Observations, para. 93.

(2) The Claimant's request for relief

69. The Claimant requests that the Tribunal grant the following relief:

> *(a) A declaration rejecting the Respondent's Preliminary Objection in its entirety;*
>
> *(b) An order that the Respondent reimburse all of the Claimant's costs incurred in connection with the Respondent's Preliminary Objection, including fees and expenses of the arbitrators and legal counsel; and*
>
> *(c) Such other relief as may be just and equitable.*[100]

VIII. THE TRIBUNAL'S ANALYSIS

A. INTRODUCTION

70. In deference to the industry of counsel, the Tribunal has summarised at some length the varied and interesting arguments they have advanced. However, the Respondent's Objection is to "*certain claims*" raised by Mr. Min, and not to all of them.[101] This means that, whatever the Tribunal decides, this dispute will continue, and some at least of Mr. Min's claims will go forward for determination. That makes it most important that the Tribunal should not, even if only by a side wind, pre-judge, or appear to pre-judge, any of the factual or legal issues that are going to arise at a later stage.

71. In the present case, the Objection goes to the Tribunal's jurisdiction. The effect of Article 9(7) is that the Respondent has not agreed to be answerable for claims 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 of damage. That said, it is not in dispute that conduct occurring before that date may still be relevant for the purposes of assessing both liability and damages.[102]

72. Rule 41(5) requires a claim to be "*manifestly without legal merit*" before it can be shut out. As held in ***Trans-Global***, the Respondent must "*establish its objection clearly and obviously, with relative ease and despatch.*"

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[100] Claimant's Second Observations, para. 63.

[101] Rule 41(5) Objection, para. 3.

[102] Hearing Tr., p. 38; and see RL-010, *Spence*, paras. 212 and 218.

73. Even though the word "*efficiency*" is not mentioned in the rule, one obvious purpose of Rule 41(5) is to allow claims that are plainly legally bad to be disposed of quickly, and at an early stage; and it is difficult to see how it could be described as efficient to allow a claim that is manifestly without legal merit to go forward, even if it is based on facts which are also relied in relation to other, more meritorious, claims.

74. It is not suggested that the Claimant's factual allegations are "*incredible, frivolous, vexatious or inaccurate or made in bad faith*". Accordingly, the Respondent's application falls to be decided on the basis of a close examination of the Claimant's case, as pleaded in his Request.

75. Moreover, that examination must be made in the context of the Respondent's acceptance, albeit only for the purposes of deciding the Rule 41(5) Objection, that the Woori Bank Enforcement, the Korean Civil Proceedings, and the Korean Criminal Proceedings are inter connected as alleged by the Claimant in his Request.[103]

76. For these reasons, this is a dispute in which the Tribunal not only can, but should, decide the Objection quite shortly and, as Rule 41(5) provides, do so without prejudice to the Respondent's right "*to file an objection pursuant to* [Rule 41] *(1) or to object, in the course of the proceeding, that a claim lacks legal merit*".

B. THE CLAIMS PLEADED

77. In the Tribunal's judgment, on a fair reading, paragraphs 61 to 66 of the Request assert the following claims:

A. That Korea failed to accord Mr. Min fair and equitable treatment through the Korean courts' improper handling of the Korean Civil Proceedings ("*separately*").

B. That the Korean courts failed to accord him fair and equitable treatment through the Korean courts and other state organs' improper handling of the Korean Criminal Proceedings ("*separately*").

C. That Korea failed to accord him fair and equitable treatment through the Korean courts' improper handling of the Korean Civil Proceedings and the Korean courts and other State organs' improper handling of the Korean Criminal Proceedings ("*taken together as a composite act*").[104]

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[103] Respondent's Observations, para. 36 quoted above; Hearing Tr., p. 25.

[104] It could be argued that, read literally, the language of paragraph 63 of the Request means that Mr. Min is making a separate claim in respect of each of the assertions listed under the phrase "*including but not limited to*" in each of

D. That Korea unlawfully expropriated Mr. Min's investment as a result of Woori Bank's wrongful enforcement of the Pi Korea Security and execution of the Manner Transfer ("*separately*").

E. That Korea unlawfully expropriated his investment as a result of the Korean courts' unlawfully handling of the Korean Civil Proceedings ("*separately*").

F. That Korea unlawfully expropriated his investment as a result of Woori Bank's wrongful enforcement of the Pi Korea Security and execution of the Manner Transfer and the Korean courts' unlawful handling of the Korean Civil Proceedings ("*taken together as a composite act*").

78. The division between looking at the acts complained of "*separately*" at A, B, D and E, and "*taken together as a composite act*" at C and F follows from the "*and/or*" formulation of the claims in paragraphs 62 and 65 of the Request.

79. The Claimant has, to some extent, attempted to reformulate his claims at paragraph 6 of his Second Observations and slide 7 and 8 used for the oral submissions. His currently pleaded case, however, is that in the Request. It is that to which the Respondent has objected, and it is that which the Tribunal must examine.

C. THE OBJECTION

80. The Respondent's Objection, as ultimately developed at the hearing, relates to the entirety of claims B and D, and as regards claims C and F, to any loss or damage which Mr. Min incurred, and of which he knew or should have known, before the Cut-off Date.

81. As already mentioned, it is not in dispute that, for the purposes of Article 9(7) of the Treaty, the Cut-off Date is 16 July 2017: that is, after the decision of the Korean Supreme Court dismissing Mr. Min's appeal against his conviction in the Korean Criminal Proceedings, but before it upheld the judgment of the Seoul District Court in the Korean Civil Proceedings. It is also after Woori Bank had successfully enforced its security over the Pi Korea Shares and executed the Manner Transfer.

82. Mr. Min, of course, knew of the decisions of the Korean Supreme Court in each case when, or very shortly after, they were promulgated; and he knew that Woori Bank had enforced its security not later than March 2015, when he learned of the Woori-Manner SPA and the Manner Transfer.

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the two bullet points set out in paragraph 62. However, it is clear from the submissions made on his behalf that the Claimant does not put his case on this atomised basis, and this is not how the Tribunal has understood it.

D. CLAIM D: THE WOORI BANK ENFORCEMENT

83. As already mentioned above, the Claimant disclaims any intention to make a claim based on the Woori Bank Enforcement in and of itself.[105] However, in the Tribunal's judgment, the Request, fairly read, contains such a claim. That being so, the Respondent is entitled to object to it, and the Tribunal ought to rule on that objection.

84. This claim, put "*separately*" as it is in paragraph 65 of the Request, is manifestly without legal merit on the basis of the facts pleaded by the Claimant himself. The process of enforcement carried out by Woori Bank finally came to an end in January 2015, when the second tranche of Pi Korea Shares was transferred to Manner; and Mr. Min acquired the knowledge that he had lost his shares in the company this way not later than March of that year, long before the Cut-off Date. It is like the claim "*based exclusively*" on the FDA Decision in ***Apotex***.[106]

85. Accordingly, the Woori Bank Enforcement cannot found a stand-alone claim as it is barred by Article 9(7) of the Treaty.

E. CLAIM B: THE KOREAN CRIMINAL PROCEEDINGS

86. This claim alleges a continuing breach stretching from the initiation of the criminal investigation of Mr. Min in 2010 to the present day, when he remains imprisoned in Korea.[107]

87. In the Tribunal's judgment, whether for the purposes of the Treaty the conduct complained of can properly be characterised as a continuing breach is a matter to be determined on the merits, not on a Rule 41(5) Objection.

88. The application of time limits to what are alleged to be continuing breaches has led to conflicting views from different tribunals: see for example: ***UPS*** paragraphs 24 to 30, and ***Spence*** at paragraphs 212 and 218 and ***Ansung*** paragraphs 112 to 114.

89. Although Mr. Min's conviction was finally confirmed, and his imprisonment began, before the Cut-off Date, it is at least arguable that any loss or damage he may have incurred since that date is not time-barred. Such post Cut-off Date loss or damage may arguably have been caused by fresh breaches, rather than being the effect of an earlier breach which caused pre Cut-off Date loss or damage about which he knew, or ought to have known, before that date.

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[105] Hearing Tr., pp. 78, 79, 86 and 125.

[106] See RL-008, *Apotex*, paras. 315-324.

[107] Hearing Tr., pp. 71-72.

90. Accordingly, Claim B as a whole cannot be said to be manifestly without legal merit.

F. CLAIMS C AND F: THE COMPOSITE CLAIMS

91. Claims C and F are pleaded as composite acts which it is said in each case breached the Treaty. Such a breach consists of "*a series of acts or omissions defined in aggregate as wrongful*".[108]

92. Where a series of acts or omissions is properly so characterised, it is arguable that there is no breach until the series is complete. It is also arguable that the time when the investor first acquired, or should have first acquired, knowledge that he has incurred loss or damage cannot arise until the breach itself has occurred. For without an alleged breach there cannot be a dispute, or a claim, at all.[109]

93. For the purpose of determining the Rule 41(5) Objection, the Respondent accepts that, as pleaded, the Woori Bank Enforcement, the Korean Criminal Proceedings, and the Korean Civil Proceedings are interconnected. That being so, in the Tribunal's judgment, it must be open to the Claimant to plead claims C and F as it has. As pleaded, in each case the composite act was not complete until the final decision of the Korean Supreme Court in the Korean Civil Proceedings on 18 July 2017, two days after the Cut-off Date.

94. The Respondent relies on the decision in ***Apotex***. However, in that case the respondent and the tribunal rejected any suggestion that the (out of time) FDA Decision could be linked to the subsequent (within time) Federal Court Decisions. In the present case, by contrast, for the purposes of this Objection the interconnection between the facts alleged constitute composite acts is accepted. Moreover, there appears to have been no equivalent in ***Apotex*** to the allegation in paragraph 7 of the Request[110] in this case.

95. Once it is accepted that a claim based on an alleged composite act is *prima facie* timeous and thus not barred as a whole by Article 9(7), the Tribunal does not think it appropriate to go on to parse that claim and examine whether parts of the loss or damage alleged to be attributable to the breach are irrecoverable because they were incurred, and known to the investor, before the Cut-off Date. If the claim as a whole is not manifestly without legal merit, the question of what loss is recoverable, if liability is established, should here be left for the hearing on the merits.

96. Accordingly, neither claim C nor claim F can be said to be manifestly without legal merit.

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[108] See CL-010, Articles on Responsibility of States for Internationally Wrongful Acts, Article 15.

[109] See Article 9(1) of the Treaty, quoted above.

[110] See para. 21 above.

IX. COSTS

97. In the Tribunal's judgment, the appropriate order to make at this stage is to reserve the costs of this Rule 41(5) Objection.

X. DECISION

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

(1) Claim B, that the Korean courts failed to accord the Claimant fair and equitable treatment through the Korean courts and other State organs' improper handling of the Korean Criminal Proceedings, is not as a whole manifestly without legal merit;

(2) Claim C, that Korea failed to accord the Claimant fair and equitable treatment through the Korean courts' improper handling of the Korean Civil Proceedings and the Korean courts and other State organs' improper handling of the Korean Criminal Proceedings, taken together as a composite act, is not manifestly without legal merit;

(3) Claim D, that Korea unlawfully expropriated Mr. Min's investment as a result of Woori Bank's wrongful enforcement of the Pi Korea Security and execution of the Manner Transfer, and based exclusively thereon, is manifestly without legal merit;

(4) Claim F, that Korea unlawfully expropriated the Claimant's investment as a result of Woori Bank's wrongful enforcement of the Pi Korea Security and execution of the Manner Transfer and the Korean courts' unlawful handling of the Korean Civil Proceedings, taken together as a composite act, is not manifestly without legal merit; and

(5) The costs of and incidental to this Rule 41(5) Objection are reserved.

Mr. Stephen L. Drymer
Arbitrator

Date: 18 June 2021

Professor Donald M. McRae
Arbitrator

Date: 18 June 2021

Mr. Ian Glick QC
President of the Tribunal

Date: 18 June 2021