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CERTIFICATE

FENGZHEN MIN

v.

REPUBLIC OF KOREA

(ICSID CASE NO. ARB/20/26)

I hereby certify that the attached document is a true copy of the Tribunal's Award, dated 30 May 2024.

Gonzalo Flores
Acting Secretary-General

Washington, D.C., 30 May 2024

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

In the arbitration proceeding between

FENGZHEN MIN

Claimant

and

REPUBLIC OF KOREA

Respondent

ICSID Case No. ARB/20/26

AWARD

Members of the Tribunal
Mr. Ian Glick KC, President
Mr. Stephen Drymer, Arbitrator
Prof. Donald M. McRae, Arbitrator

Secretary of the Tribunal
Ms. Geraldine R. Fischer

Date of dispatch to the Parties: 30 May 2024

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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") 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"), which entered into force for the People's Republic of China on 6 February 1993 and the Republic of Korea on 23 March 1967.

2. The Treaty was made in the Korean, Chinese and English languages. All texts are authentic but, in the case of divergent interpretation, the English text prevails.[1]

3. The claimant is Mr. Fengzhen Min ("Claimant"), a natural person having Chinese nationality.

4. The respondent is the Republic of Korea ("Korea" or the "Respondent").

5. The Claimant and the Respondent are collectively referred to as the "Parties." The Parties' representatives and their addresses are listed above on page (i).

6. This dispute concerns allegations by the Claimant that the Respondent, through a Korean State-owned bank and as a result of unfair and unjust legal processes involving, amongst others, the national police and the judiciary, has illegally expropriated the shares he formerly held in a Korean company which, indirectly, owns valuable commercial property in China and has further subjected him and his investment to treatment in breach of various protections afforded by the BIT. The Respondent denies that the shares are protected by the Treaty, that it is responsible for the conduct of the bank, or that it or the bank behaved in any way wrongly.

[1] Exhibit C-001.

II. PROCEDURAL HISTORY

7. On 16 July 2020, ICSID received a request for arbitration dated 16 July 2020, from Mr. Fengzhen Min against the Republic of Korea (the "**Request**"), together with Exhibits C-001 through C-024 and Legal Authority CL-001.

8. On 3 August 2020, the Secretary-General of ICSID (the "**Secretary-General**") registered the Request in accordance with Article 36(3) of the ICSID Convention and notified the Parties of the registration. In the Notice of Registration, 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.

9. The Parties agreed to constitute the Tribunal in accordance with Article 37(2)(a) of the ICSID Convention as follows: the Tribunal would consist of three arbitrators, one to be appointed by each Party and the third, presiding arbitrator to be appointed by agreement of the Parties.

10. The Tribunal is composed of Mr. Ian Glick KC, a national of the United Kingdom of Great Britain and Northern Ireland, President, appointed by agreement of the Parties; Mr. Stephen L. Drymer, a national of Canada, appointed by the Claimant; and Prof. Donald M. McRae, a national of Canada and New Zealand, appointed by the Respondent.

11. On 1 February 2021, the Secretary-General, in accordance with Rule 6(1) of the ICSID Rules of Procedure for Arbitration Proceedings (the "Arbitration Rules"), 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. Ms. Geraldine Fischer, ICSID Senior Legal Counsel, was later designated to serve as Secretary of the Tribunal.

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

13. 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 Arbitration Rules, accompanied by Legal Authorities CL-002 to CL-019.

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

• On 3 May 2021, the Claimant filed its Second Observations on Respondent's Preliminary Objection pursuant to Rule 41(5) of the Arbitration Rules, accompanied by Legal Authorities CL-020 to CL-025.

14. In accordance with Arbitration Rules 13(1) and 41(5), on 26 May 2021, the Tribunal held a first session and a hearing on Respondent' preliminary objections by video conference.

15. Following the first session, on 1 June 2021, the Tribunal issued **Procedural Order No. 1** recording the agreement of the Parties on procedural matters. Procedural Order No. 1 provides, *inter alia*, that the applicable Arbitration Rules would be those in effect from 10 April 2006, the procedural language would be English, and the place of proceeding would be Washington, D.C., but the Tribunal could hold the hearing in Singapore, Seoul or any other any other place it considers appropriate (after consultation with the parties) or if the parties so agreed.

16. On 18 June 2021, the Tribunal issued its **Decision on the Respondent's Preliminary Objections pursuant to ICSID Arbitration Rule 41(5)**, dismissing certain claims as being "manifestly without legal merit" as they were time-barred by BIT Article 9(7).

17. On 19 July 2021, the Claimant submitted an Application for Limited Pre-Memorial Document Production, together with Exhibits C-025 through C-036 and Legal Authorities CL-026 through CL-039.

18. On 2 August 2021, the Respondent submitted a response to the Claimant's Application of 19 July 2021, together with Exhibits R-001 through R-003 and Legal authorities RL-020 through RL-033.

19. On 9 August 2021, the Tribunal issued **Procedural Order No. 2**, adopting the procedural timetable jointly proposed by the Parties.

20. On 16 August 2021, the Claimant submitted a reply to the Respondent's response of 2 August 2021, together with Legal Authorities CL-040 through CL-054.

21. On 30 August 2021, the Respondent submitted a rejoinder to the Claimant's reply of 16 August 2021, together with Legal Authorities RL-034 through RL-045.

22. On 3 September 2021, the Tribunal issued **Procedural Order No. 3**, concerning the Claimant's Application for Limited Pre-Memorial Document Production.

23. On 7 November 2021, the Claimant requested an extension of time to file his Memorial and supporting Witness Statements, which the Tribunal granted on 17 November 2021. In addition, the Claimant filed Exhibits C-037 through C-040 and Legal Authorities CL-055 through CL-057.

24. On 24 December 2021, the Tribunal issued **Procedural Order No. 4**, adopting the procedural timetable jointly proposed by the Parties.

25. On 9 May 2022, the Claimant filed a **Memorial**, together with the following supporting documents:

- Witness Statement of Mr. Fengzhen Min;
- Witness Statement of Mr. [redacted];
- Witness Statement of Ms. [redacted];
- Expert Legal Report of Professor [redacted] and Exhibits KK-001 through KK-024;
- Expert Legal Report of Professor [redacted] and Exhibits PW-001 through PW-043;

- Expert Report of Messrs. [redacted] and [redacted] KC and Exhibits BRG-001 through BRG-097 and Appendices F through L;

- Exhibit C-041 through C-189; and

- Legal Authorities CL-058 through CL-162.

26. On 23 May 2022, and in accordance with the timetable established in Procedural Order No. 4, the Respondent notified the Tribunal that it intended to make a request for bifurcation of preliminary objections.

27. On 21 June 2022, the Respondent filed a request to address the objections to jurisdiction as a preliminary question, together with Exhibits R-004 through R-016 and Legal Authorities RL-049 through RL-089. On 18 July 2022, the Claimant filed observations on the request to address the objections to jurisdiction as a preliminary question, together with Legal Authorities CL-163 through CL-205. Further to the Tribunal's directions, on 25 July 2022, the Respondent filed a response to the Claimant's observations together with Legal Authorities RL-090 and RL-091, and the Claimant filed a response to the Respondent's observations on 29 July 2022, together with Legal Authorities CL-206 and CL-207.

28. On 9 August 2022, the Tribunal issued **Procedural Order No. 5**, denying the Respondent's request to address the objections to jurisdiction as a preliminary question.

29. On 5 December 2022, the Tribunal issued **Procedural Order No. 6**, adopting the procedural timetable jointly proposed by the Parties.

30. On 31 January 2023, the Respondent filed a **Counter-Memorial**, together with Appendix 1 and the following supporting documents:

- Witness Statement of Mr. [redacted];

- Expert Report of Professor [redacted] and Exhibits HJC-001 to HJC-045;

- Expert Report of Messrs. [redacted] and [redacted] of FTI Consulting and Ms. [redacted] of Shanghai Baisen Real Estate Appraisal Co. Ltd. and accompanying Exhibits FTI-001 to FTI-027 and SB-001 to SB-010;
- Exhibits R-017 to R-075 and a Hyperlinked Cumulative Index of Exhibits; and
- Legal Authorities RL-092 to RL-212.

31. On 3 April 2023, and following exchanges between the Parties, each party filed a request for the Tribunal to decide on production of documents. With his Reply to Respondent's Objections to Document Production, the Claimant filed Legal Authorities CL-208 through CL-213.

32. On 10 April 2023, the Tribunal issued **Procedural Order No. 7**, concerning production of documents.

33. On 26 June 2023, the Claimant filed a **Reply Memorial**, together with the following supporting documents:

- Second Witness Statement of Mr. Fengzhen Min;
- Second Expert Legal Report of Professor [redacted] and Exhibit KK-025;
- Second Expert Legal Report of Professor [redacted] and Exhibits PW-044 through PW-049;
- Second Expert Report of Messrs. [redacted] and [redacted] KC and Exhibits BRG-098 through BRG-104 and Appendices D through H;
- Exhibits C-190 through C-247; and
- Legal Authorities CL-214 through CL-260.

34. On the same date, the Claimant requested that the Tribunal: (1) draw adverse inferences for the Respondent's alleged failure to comply with the Tribunal's document production orders; and (2) order that the documents produced in this arbitration be kept confidential.

Further to the Tribunal's directions, on 7 July 2023, the Respondent responded to the applications; on 14 July 2023 the Claimant replied; and on 26 July 2023, the Respondent submitted its rejoinder with RL-217. On 31 July 2023, the Tribunal issued **Procedural Order No. 8**, concerning the Adverse Inference Application and the Confidentiality Order Application.

35. On 31 July 2023, the Claimant submitted his Application for Further Disclosure in Respect of Professor [redacted] (the "Disclosure Application").

36. On 3 August 2023, further to the Tribunal's direction, the Respondent replied to the Disclosure Application arguing the Claimant "failed to properly explain the nature and basis of his complaints against Professor [redacted]", and his vague case made it "impossible for Korea to respond meaningfully." Therefore, Korea requested the Tribunal "to order the Claimant to make any Potential Application, should he still wish to do so, and allow Korea to respond [.]"

37. On the same date, the Tribunal ordered the Claimant to file any application it wished to make in relation to any alleged conflict of interest of the Respondent's expert on Korean law, Professor [redacted], by 10 August 2023. The Tribunal directed the Respondent to file its response within one week upon receipt of such application, if one was made.

38. On 10 August 2023, the Claimant submitted his Application for Further Disclosure in Respect of Professor [redacted] (the "**Further Disclosure Application**"). On 17 August 2023, further to the Tribunal's directions, the Respondent filed its response to the Further Disclosure Application, to which the Claimant replied on 22 August 2023.

39. On the same date, the Tribunal issued **Procedural Order No. 9**, concerning the Claimant's Application for Further Disclosure in Respect of Prof. [redacted].

40. On 28 August 2023, having failed to agree on a mutually acceptable confidentiality regime for documents produced by the Parties and pursuant to Procedural Order No. 8, the Parties provided their respective confidentiality proposals, together with accompanying submissions to the Tribunal.

41. On 1 September 2023, the Tribunal issued **Procedural Order No. 10**, concerning the Claimant's Application for a Confidentiality Order.

42. On 25 September 2023, the Respondent filed a **Rejoinder**, together with the following supporting documents:

- Second Witness Statement of Mr. [redacted];
- Second Expert Report of Professor [redacted] and accompanying Exhibits HJC-046 through HJC-052;
- Second Expert Report of Messrs. [redacted] and [redacted] of FTI Consulting and Ms [redacted] of Shanghai Baisen Real Estate Appraisal Co. Ltd. and accompanying Exhibits FTI-029 through FTI-042;
- Exhibits R-077 through R-124; and
- Legal Authorities RL-222 through RL-252.

43. On 9 October 2023, the Respondent filed the Expert Report's Exhibit FTI-028.

44. On 10 October 2023, the President held a pre-hearing organizational meeting with the parties by video conference, and, on 19 October 2023, the Tribunal issued **Procedural Order No. 11**, concerning hearing organization.

45. A hearing on jurisdiction and the merits was held at Maxwell Chambers in Singapore from 13 to 18 and 20 November 2023 (the "**Hearing**"). The following persons were present at the Hearing:

Tribunal:

Mr. Ian Glick KC	President
Mr. Stephen Drymer	Arbitrator
Prof. Donald M. McRae	Arbitrator

ICSID Secretariat:

Ms. Geraldine R. Fischer	Secretary of the Tribunal

For the Claimant:

Mr. Wade Coriell	King & Spalding
Ms. Elizabeth Silbert	King & Spalding
Mr. Aloysius Llamzon	King & Spalding
Ms. Xiaomao Min	King & Spalding
Mr. Joel Ng	King & Spalding
Mr. Benjamin Teo	King & Spalding
Mr. Ning Fei	Hui Zhong Law Firm
Ms. Xueyu Yang	Hui Zhong Law Firm
Mr. Shutao Zhang	Hui Zhong Law Firm
Mr. Zijian Wang	Hui Zhong Law Firm
Mr. Beomsu Kim	Baker McKenzie & KL Partners Joint Venture Law Firm
Ms. Woo Ji Kim	Baker McKenzie & KL Partners Joint Venture Law Firm
Mr. Jong-Gil Kim	DongIn Law Group

Party Representative

Mr. Fengzhen Min	Beijing Zhongtian Hongye Real Estate Consulting Co., Ltd

For the Respondent:

Mr. Matthew Hodgson	Allen & Overy
Ms. Jae Hee Suh	Allen & Overy
Mr. Fares Nowak	Allen & Overy
Mr. Curtis Fung	Allen & Overy
Mr. Noel Low	Allen & Overy
Mr. Yun Jae Baek	Yulchon LLC
Ms. Jeonghye Sophie Ahn	Yulchon LLC
Mr. Jae Hyong Woo	Yulchon LLC
Mr. Jun Kyu Jeon	Yulchon LLC
Mr. Joohyun Park	Yulchon LLC

Party Representatives

Ms. Jiun Kim	International Dispute Settlement Division, Ministry of Justice
Mr. Junyeul Yang	International Dispute Settlement Division, Ministry of Justice
Ms. Heejo Moon	International Dispute Settlement Division, Ministry of Justice
Mr. Soyoung Park	International Dispute Settlement Division, Ministry of Justice
Mr. Jung Hoon Kim	International Dispute Settlement Division, Ministry of Justice
Mr. Yunseong Kang	International Legal Advisory Division, Ministry of Justice

Court Reporter:
Epiq Global

Interpreters:
Ms. Jeong Yeon (Joanne) Kim
Ms. Hye-Yeon Park (Kathy)
Ms. Sunhee Sohn
Mr. Andrew Dawrant
Ms. Lacy Lan
Mr. Zhou Liang

46. During the Hearing, the following persons were examined:

On behalf of the Claimant:[2]

Mr. Fengzhen Min	Beijing Zhongtian Hongye Real Estate Consulting Co., Ltd
Mr. [redacted]	Barun Law Firm
Ms. [redacted]	Barun Law Firm
Professor [redacted]	Korea University Law School
Mr. [redacted]	Berkeley Research Group (UK) Limited
Mr. [redacted]	Berkeley Research Group (UK) Limited

On behalf of the Respondent:

Mr. [redacted]	Kim & Chang
Professor [redacted]	Sungkyunkwan University
Mr. [redacted]	FTI
Mr. [redacted]	FTI
Ms. [redacted]	Shanghai Baisen

47. The Parties filed post-hearing briefs on 8 January 2024, which resulted in correspondence between the Parties and the Tribunal on 18, 19, 23, 24 and 25 January 2024.

48. The Parties filed their submissions on costs on 19 February 2024 and their reply submissions on costs on 26 February 2024, together with supporting documents.

49. The proceeding was closed on 9 May 2024.

[2] Professor [redacted] was present for part of the hearing, but she did not give oral evidence.

III. FACTUAL BACKGROUND

50. The claim in this arbitration arises out of a very long and complex series of events involving many transactions and much litigation, both civil and criminal. In essence, however, the dispute involves a project by the Claimant, a Chinese national, and a Mr. [redacted] ("**Mr.** [redacted]"), a Korean national, to buy and develop a large building in Beijing using monies borrowed from Korean financial institutions. To this end, as described in more detail below, the Claimant formed a Korean company, Pi Investment Korea Co., Ltd ("**Pi Korea**") which, through a chain of other companies, was to, and ultimately did, buy and own the building.[3] The necessary funds were borrowed from two Korean financial institutions by way of loans ("the **Korean Loans**" or "**Loans**") arranged by Woori Bank, a bank whose acts the Claimant says are attributable to the Korean State;[4] and the Loans were subsequently assigned by those two institutions to Woori Bank itself. [5]

51. On incorporation, the Claimant owned all 5,000 issued shares in Pi Korea ("**the Pi Korea Shares**").[6] Subsequently, however, according to the Claimant:

> "*Mr.* [redacted] *and his agent, Mr.* [redacted]*,*[7] *became shareholders in Pi Korea for a short period, but I repurchased their shares in 2009 and early 2010 respectively. By March 17, 2010, I was once again the sole shareholder of Pi Korea. I remained the sole shareholder of Pi Korea prior to the loss of my entire equity in the company in July 2017 as a result of Korea's acts and omissions.*"[8]

[3] Claimant's Memorial, para. 4.

[4] Claimant's Memorial, paras. 66-70.

[5] Claimant's Memorial, para. 68.

[6] Claimant's Memorial, para. 55 (citing C-055; First Witness Statement of Fengzhen Min ("Min 1"), para. 29).

[7] His name is more usually transliterated as "[redacted]": see Exhibit R-017.

[8] Min 1, para. 41. The Claimant sold 1500 shares to Mr. [redacted] and 2000 shares to Mr. [redacted] See Transcript, Day 2, page 75.

52. After the Claimant had repurchased Mr. [redacted]'s shares, but before he had repurchased those sold to Mr. [redacted], on 22 January 2010 the Claimant and Mr. [redacted] executed an agreement pledging all the Pi Korea Shares to secure the loans.[9]

53. The Claimant lost the Pi Korea Shares because, starting in 2011, Woori Bank began the process of enforcing its security including, during 2014 and 2015, selling (or purporting to sell) the Pi Korea Shares to a company incorporated in the British Virgin Islands called Manner International Trading Limited ("**Manner**").[10]

54. The Claimant has fought Woori Bank's attempts at enforcement every step of the way in litigation taking place in Korea, Barbados and China.[11] However, although the Claimant complains about various prior steps taken by Woori Bank, his claim in the arbitration focuses on the civil proceedings he brought against Woori Bank between July 2013 and 2017 ("**the Korean Civil Proceedings**") in which he tried, and failed, to assert his ownership of the Pi Korea Shares, and the criminal proceedings brought against him by Korea between December 2010 and December 2017 ("**the Korean Criminal Proceedings**") in which he was convicted of (amongst other things) bribery and embezzlement and sentenced to 6 years' imprisonment.[12]

55. In brief, the Claimant commenced the Korean Civil Proceedings on 26 July 2013.[13] On 19 November 2015, the Claimant's claim substantially failed when the Seoul Central District Court upheld the validity of Woori Bank's transfer of the Pi Korea Shares to Manner.[14] On 23 December 2016, the Seoul High Court dismissed the Claimant's appeal,[15] and on 18 July 2017, his further appeal to the Supreme Court of Korea was dismissed.[16]

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[9] Respondent's Counter-Memorial, para. 121; Min 1, para. 34; Witness Statement of [redacted] ("[redacted] 1"), para 14; Exhibit C-002.

[10] Claimant's Memorial, para. 111.

[11] Claimant's Memorial, paras. 95-98.

[12] Claimant's Memorial, para. 228.

[13] Exhibit C-119.

[14] Exhibit C-017.

[15] Exhibit C-019.

[16] Exhibit C-020.

56. His principal complaint in relation to the Korean Civil Proceedings is that the Korean courts wrongly refused his repeated applications for Woori Bank to produce the whole of the final version of the Sale and Purchase Agreement[17] between Woori Bank and Manner; and his case is that, had it been produced, he would have succeeded in his claim against the bank and been restored as owner of the Pi Korea Shares which, by operation of Korean law, would have been free of the pledge referred to above.[18]

57. So far as the Korean Criminal Proceedings are concerned, the Claimant complains he was repeatedly, lengthily and improperly interrogated by the Korean National Police Agency between July and December 2010, and that on 17 December 2010 he was indicted for bribery and embezzlement.[19] As appears more fully below, on 8 February 2013, the Claimant was convicted of promising to pay bribes to a Mr. [redacted], an official of Woori Bank, for arranging the Korean Loans and of embezzlement.[20] Mr. [redacted] was also convicted for colluding in the promise to pay bribes.[21] The Claimant appealed to the High Court which, on 10 October 2016, reversed the conviction for bribery insofar as it related to bribes paid in China, but not for those in Korea; it also upheld, with modifications, the conviction for embezzlement, and confirmed Mr. [redacted]'s conviction.[22] On 22 March 2017, the Supreme Court of Korea dismissed both the Claimant's and Mr. [redacted]'s appeals.[23]

58. The Claimant's complaints in connection with the Korean Criminal Proceedings relate to the allegedly unfair and unjust conduct both of the investigation and of his trial, and to travel bans imposed on him during the course of the process. [24]

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[17] Exhibit R-074.

[18] See, Claimant's Post Hearing Brief, paras. 82 and 86. The Claimant, however, accepts that he would still be liable for the Korean Loans under his personal guarantee.

[19] Claimant's Memorial, paras. 176, 179, 201.

[20] Claimant's Memorial, para. 188; Respondent's Counter-Memorial, paras. 234 and 245.

[21] Exhibits C-150, C-241, R-008 and R-036. A convenient summary of the Claimant's various convictions on this and on other occasions, and the result of his appeals against them, appears at page 21 of the Respondent's Opening Statement.

[22] Exhibits C-242, R-011 and R-063.

[23] Exhibits C-158, C-243 and R-013.

[24] Claimant's Memorial, paras. 175-228.

IV. THE PARTIES' CLAIMS AND REQUESTS FOR RELIEF

59. In his Reply, the Claimant requests the following relief from the Tribunal:

> *(a) A declaration that Korea breached its obligation to provide fair and equitable treatment to Mr. Min's investment, including the obligation to provide a fair hearing to Mr. Min and not to deny him justice, through its improper handling of the Korean Civil Proceedings;*
>
> *(b) A declaration that Korea unlawfully expropriated Mr. Min's investment through the Korean Civil Proceedings;*
>
> *(c) A declaration that Korea breached its obligation to provide fair and equitable treatment, including the obligation to provide a fair trial to Mr. Min and not to deny him justice, through the Korean courts' improper handling of the Korean Civil Proceedings and the Korean Criminal Proceedings, resulting in Mr. Min's wrongful incarceration;*
>
> *(d) A declaration that Korea breached its obligation to provide fair and equitable treatment to Mr. Min's investment through Woori Bank's wrongful enforcement of the Pi Korea Security and execution of the Manner Transfer, Woori Bank's fabrication of a non-existent arbitration agreement and the illegitimate arbitration it filed with the KCAB and HKIAC, the Korean courts' failure to provide an adequate remedy through the Korean Civil Proceedings to rectify Woori Bank's wrongdoing, and the unfair and arbitrary treatment of Mr. Min and his investment by the Korean State organs throughout the Korean Criminal Proceedings;*
>
> *(e) A declaration that Korea unlawfully expropriated Mr. Min's investment through the Woori Bank Enforcement and the Korean Civil Proceedings;*
>
> *(f) An order that Korea exert all efforts within the limits of Korean law, including causing its Ministry of Justice and other competent Korean*

authorities to file and/or cooperate in any action in Korean courts and/or before other competent Korean authorities, to recognize and restore Mr. Min's status as the sole shareholder of Pi Korea (including but not limited to, by doing everything in its power under Korean law to give effect to a finding by the Tribunal that Woori Bank's sale of Pi Korea Shares to Manner was invalid);

(g) As an alternative to the relief requested in sub-paragraph (f), an award of damages in the sum of USD 116.9 million;

(h) An award of moral damages in the amount the Tribunal determines to be appropriate after considering all the circumstances of this case;

(i) An award of pre-award compound interest at a rate of 5% on the award sum from the valuation date of December 31, 2014 to the date of the award;

(j) An award of post-award compound interest at a rate of 5% until the date of Korea's final satisfaction of the award;

(k) An order that Korea reimburse to Mr. Min all fees and expenses incurred by Mr. Min in prosecuting this arbitration, including Mr. Min's counsel fees, expert fees, the costs of the Tribunal and ICSID;

(l) A declaration that the Tribunal's award is immediately enforceable; and

(l) Such other relief as may be just and equitable.[25]

60. In its Rejoinder, the Respondent requests the following relief:

(a) declare that the Tribunal lacks jurisdiction in respect of the Claimant's claims and/or that the Claimant's claims are inadmissible;

[25] Claimant's Reply, para. 657.

(b) in the alternative to the relief at paragraph [ ](a) above, dismiss with prejudice each of the Claimant's claims for lack of merit;

(c) in the alternative to the relief at paragraph [ ](a) and paragraph [ ](b) above, declare that even if Korea violated the Treaty, the Claimant is not entitled to any relief;

(d) order the Claimant to pay the entirety of Korea's costs incurred in connection with these arbitration proceedings (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

(e) order such further or other relief as the Tribunal may deem just and proper.[26]

V. JURISDICTION - OBJECTIONS

61. The Respondent raises six jurisdictional objections:

(a) *The Pi Korea Shares were not "used as investment" by the Claimant "in accordance with the applicable laws and regulations" of Korea as host State at the time of investment, as required by Article 1(1) of the Treaty (the **Legality Objection**).*

(b) *The Claimant is barred by the clean hands doctrine from pursuing his claims against Korea (the **Clean Hands Objection**).*

(c) *The Claimant did not have a qualifying "investment" within the meaning of Article 1(1) of the Treaty and Article 25 of the ICSID Convention (the **Article 25 Objection**).*

[26] Respondent's Rejoinder, para. 574.

(d) *The Pi Korea Shares were not "used as investment" by the Claimant "within the territory of" Korea as host State, as required by Article 1(1) of the Treaty (the **Territoriality Objection**).*

(e) *The Claimant is not an "investor" under Article 1(2) of the Treaty (the **Ratione Personae Objection**).*

(f) *The Claimant's claims are time-barred due to the three-year limitation period in Article 9(7) of the Treaty (the **Time-Bar Objection**).*[27]

62. All six objections are disputed by the Claimant.[28]

VI. JURISDICTION-LEGALITY OBJECTION

A. INTRODUCTION

63. Article 1 of the Treaty provides, so far as material, as follows.

> *"For the purposes of this Agreement,*
>
> *1. The term "investments" means every kind of asset, used as investment by investors of one Contracting Party within the territory of the other Contracting Party, in accordance with the applicable laws and regulations of that other Contracting Party at the time of investment and shall include, in particular, though not exclusively:*
>
> *...*

[27] Respondent's Counter-Memorial, para. 294.
[28] Claimant's Reply, paras. 260- 371.

(b) shares, stocks, bonds and debentures or any other forms of participation in a company, business enterprise or joint venture."[29]

64. It is not in dispute that the Pi Korea Shares are shares, or that they constitute the entire issued share capital of Pi Korea. The Respondent, however, says that they do not constitute "investments" within the meaning of the Treaty because they were not "used" by the Claimant "in accordance with the applicable laws and regulations of" the Republic of Korea.[30]

65. In particular, the Respondent contends that the Claimant breached the "Act on the Aggravated Punishment, etc., of Specific Economic Crimes, 2009" ("**the Economic Crimes Act**"). This provides so far as material as follows.

"Article 5 (Crime of Acceptance of Property)

(1) If any officer or employee of a financial institution accepts, demands or promises any money or other benefit, in connection with his duties, he shall be punished by imprisonment for not more than five years, or a suspension of qualification for not more than ten years.

...

Article 6 (Crime of Giving of Property, etc.)

(1) Any person who promises, gives or expresses his intention to give, the money or other profits as prescribed in Article 5, shall be punished by imprisonment for not more than five years, or by a fine not exceeding thirty million won.

[29] Exhibit C-001.

[30] See, for example, Respondent's Post-Hearing Brief, para. 29. Respondent's Rejoinder, para. 19(c).

…"[31]

There is also provision for longer sentences in aggravated cases where the size of the bribe is large.

66. The Claimant says that the Respondent is wrong both as a matter of law and of fact.

67. In order to consider the Legality Objection, it is first necessary to record the facts admitted or agreed by the Claimant, or proved to the satisfaction of the Tribunal by the evidence it read or heard, surrounding the establishment of Pi Korea in 2007, and concerning the police investigation into this during 2010 and the Korean Criminal Litigation between 2010 and 2017.

B. THE ESTABLISHMENT OF PI KOREA

68. In February 2006, Mr. [redacted], then the Head of the Real Estate Finance Team of the Trust Business Department of Woori Bank,[32] introduced the Claimant to Mr. [redacted],[33] a Korean real estate entrepreneur. The Claimant (and his wife) subsequently agreed with Mr. [redacted] to establish a foreign investment entity in China to develop real estate projects in Beijing with financing from Korea.[34]

69. In December 2006, the Claimant and Mr. [redacted] incorporated Pi Investment China Co., Ltd ("**Pi China**"), a foreign investment company in China (held, indirectly, 40 per cent by the Claimant and 60 per cent by Mr. [redacted]).[35] However, as a result of regulatory changes that had recently occurred, this company was not allowed to acquire real estate projects in China.[36] For that purpose, a foreign investor would need to obtain control of an existing

[31] Exhibit RL-088.

[32] Claimant's *Dramatis Personae*, Item 31.

[33] Min 1, para. 19; Second Witness Statement of Fengzhen Min ("Min 2"), para. 9.

[34] Min 1, paras. 20 and 21.

[35] Claimant's Memorial, para. 45; Respondent's Counter-Memorial, para. 66; Min 1, para. 22; Exhibit C-46.

[36] Min 1, paras. 21 and 23.

Chinese entity which already (prior to July 2006) owned property, by means of equity transfers outside China.[37]

70. Also, in or about December 2006, the Claimant purchased five AIG life insurance policies sold to him by Mr. [redacted]'s wife. Of this the Claimant says:

> *"As to the life insurance policies, it had nothing to do with the Loans or loan approval process. In December 2006, we had not even identified any property as a target for investment. Mr.* [redacted] *had never asked me to buy insurance from his wife. I regularly bought life insurance policies for myself, my family members and employees. The insurance company Mrs.* [redacted] *worked for, AIG, happened to have the insurance I needed. …"*[38]

71. Returning to the plan to develop real estate, the Claimant and Mr. [redacted] identified, amongst other possibilities, Grand Central Plaza in Beijing (the "**Building**") as a potential target. This was a partially completed building being developed by Beijing Zhongdi Real Estate Development Co., Ltd ("**Zhongdi**") and, as the Claimant puts it, "Mr. [redacted] and I decided to acquire the Building with financing from Korean banks."[39] That was a decision which cannot have been taken later than the beginning of August 2007, by when Pi China was already negotiating with the owner of Zhongdi.[40]

72. On enquiry, it turned out that the Building was actually owned by a different company, Beijing Zhongtian Hongye Real Estate Consulting Co., Ltd ("**Beijing Zhongtian**"), which itself was owned through a Barbadian company called Mountain Breeze (Barbados) SLR ("**Mountain Breeze**") by JP Morgan and Shui On Group.[41]

73. In September 2007, Pi China entered into a term sheet with Zhongdi which envisaged that Pi China "would acquire the Building by acquiring all the quotas [i.e. the shares] of

[37] Min 1, para. 23; Min 2, para. 9.
[38] Min 2, para. 27.
[39] Min 1, paras. 23 and 24; Min 2, para. 9.
[40] See Exhibit C-047.
[41] Min 1, paras. 25 and 27.

Mountain Breeze through an affiliate established by its Korean shareholder (or affiliated persons) in Hong Kong or elsewhere outside of China". [42] The term sheet also envisaged that the total consideration for the transaction would be RMB2.858 billion (approximately USD380 million).[43]

74. The following month, Pi China and others entered into a term sheet in respect of the proposed acquisition of all the quotas of Mountain Breeze for RMB2.2 billion (approximately USD292.7 million) which formed part of the USD380 million mentioned above.[44]

75. Meanwhile, as the Claimant puts it,

> *"…Mr.* [redacted] *and I decided that we would obtain loans from Korean banks through Woori Bank to fund the acquisition of the Building. In order to secure that financing, at the request of Woori Bank, I set up Pi Korea in Korea on October 30, 2007. I was the sole shareholder of Pi Korea with 5,000 shares…".*[45]

76. Between the decision to "obtain loans from Korean banks through Woori Bank" and the incorporation of Pi Korea on 30 October 2007, in or about September 2007, there was a meeting in Seoul between the Claimant, Mr. [redacted] and Mr. [redacted].[46] As appears below, this meeting figured in the police investigation, which forms one of the matters about which the Claimant complains in this arbitration, and he now disputes the truth of what he is recorded as telling the police happened at that meeting.[47] However, he does accept the meeting took place and that at that meeting Mr. [redacted] offered 30 per cent of the shares in the proposed Korean company to Mr. [redacted].

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[42] Claimant's Memorial, para. 51; Respondent's Counter-Memorial, para. 70; Min 1, para. 26.

[43] Min 1, para. 26 and Exhibit C-048.

[44] Min 1, para. 28 and Exhibit C-054.

[45] Min 1, para. 29; Exhibit C-055.

[46] Respondent's Counter-Memorial para. 85.

[47] Min 1, para. 87.

> *"PRESIDENT: Mr. Min, you said a moment ago that it was said by Mr. [redacted]. What was said by Mr. [redacted]?*
>
> *A. Mr. [redacted], yes. Mr. [redacted] was giving his share to Mr. [redacted]. I was listening to the conversation at the time, 30 per cent of the share. Mr. [redacted] was saying 30 per cent of his share."*[48]

In his Second Witness Statement, the Claimant says:

> *"With respect to the 30% shares in Pi Korea, it was Mr. [redacted] who offered Mr. [redacted] part of his equity interest in Pi Korea. It was not a plan hatched by Mr. [redacted] and me together as the Respondent claims."*[49]

77. On 20 November 2007, Pi Korea established New Pi (Hong Kong) Investment Co., Ltd. ("**New Pi**") in Hong Kong for the purpose of acquiring the quotas in Mountain Breeze.[50]

78. Meanwhile, at the end of October or in early November 2007, Woori Bank's Real Estate Working Committee considered and unanimously rejected supporting the Building project[51] but, on 29 November 2007 it reversed its decision, approved the project, and presented it to the Bank's Real Estate Investment Committee.[52] Mr. [redacted] was not present at the first meeting, but he chaired the second.[53] The Real Estate Investment Committee approved the project on 30 November 2007.[54] There were seven members present at the meeting of the Investment Committee, one of whom was Mr. [redacted], who acted as its secretary.[55]

79. In December 2007, the Claimant and Mr. [redacted] together with Pi Korea and Woori Bank entered into an agreement to secure the title to the Building and all the equity interest in

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[48] Transcript, Day 2, page 64.
[49] Min 2, para. 27.
[50] Min 1, para. 30. Exhibit C-056.
[51] Respondent's Counter-Memorial, para. 87; Claimant's Reply, para. 65
[52] Exhibit C-208.
[53] Respondent's Counter-Memorial, paras. 87 and 90; Claimant's Reply, para. 65. Exhibit C-208.
[54] Exhibit C-207.
[55] Exhibit C-207.

Beijing Zhongtian, whilst Woori Bank agreed to select the Korean lenders and arrange the loan financing. Following this, Woori Bank chose Korea Life Assurance Co., Ltd. ("**Korea Life**") and Kookmin Bank as the lenders in the total amount of KRW380 billion. On 20 December 2007, Pi Korea entered into a two year loan agreement[56] with Korea Life for KRW150 billion, and the following month Pi Korea entered into a one year loan agreement[57] with Kookmin Bank for KRW230 billion (the Korean Loans), all of which Pi Korea subsequently drew down.[58] Woori Bank acted as the facility agent and agreed to take over the loans should Pi Korea fail to repay them when they fell due. Both loans were guaranteed by the Claimant and Mr. [redacted]. In February 2008, using funds from the Korean Loans, New Pi acquired all the quotas of Mountain Breeze for approximately USD380 million as well as financing certain other payments in connection (or purportedly in connection) with the Building.[59]

80. The end result was that Pi Korea owned New Pi; New Pi owned Mountain Breeze; Mountain Breeze owned Beijing Zhongtian; and Beijing Zhongtian owned (or was supposed to own) the Building.[60] We say "supposed to own" because there followed a prolonged title dispute with Zhongdi which did not end until 2015.[61]

81. Pausing there, the Tribunal also records that, on 27 December 2007, a week after the loan agreement with Korea Life Assurance was made, the Claimant transferred 1500 shares in Pi Korea, representing 30 per cent of the Company's share capital, to Mr. [redacted][62] and 2000 shares, representing 40 per cent of the Company's share capital, to Mr. [redacted].[63]

82. Turning now to what became one of the subjects of the bribery charges against the Claimant, according to him:

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[56] Exhibit C-005.
[57] Exhibit C-006.
[58] Min 1, paras. 32 and 33.
[59] Min 1, para. 38.
[60] Min 1, para. 40.
[61] Min 1, paras. 42-45.
[62] Exhibit R-017.
[63] Respondent's Counter-Memorial, para. 73(b).

"On or around March 4, 2008, I received a call from Mr. [redacted] *(head of the Trust Business Department of Woori Bank), insisting that I sign the [Project Management] Agreement between Pi Korea and Mr.* [redacted]*'s company. He told me that after Mr.* [redacted] *left Woori Bank, his company would provide project management services to Pi Korea pursuant to the PM Agreement, including those related to the sale/lease and re-financing of the Building, which would be beneficial to the Building. ... On or around March 4, 2008, Mr.* [redacted] *called me too, saying that Woori Bank needed a PM Agreement for the sale of the Building. He asked me to follow Woori Bank's requirements and open a bank account with Woori Bank to make payments under the PM Agreement ... I also received a call from Mr.* [redacted] *around the same time, suggesting execution of the PM Agreement.*

...

On March 27, 2008, I signed the PM Agreement on Pi Korea's behalf with Mr. [redacted]*'s company, Wealth Care C&D ("Wealth Care"). My understanding at that time was that Mr.* [redacted] *had ceased to be an employee of Woori Bank on March 5, 2008 as he had found another job through a head-hunter. ...*

From March to August 2008, Pi Korea made monthly payments of the PM Service Fees to Wealth Care in accordance with the PM Agreement in a total sum of KRW2.86 billion (approximately USD2.62 million). During the same period of time, Mr. [redacted] *introduced some potential investors to me, including Arch International Group, who were interested in exploring the possibility to re-finance the Building."*[64]

83. The Project Management Agreement[65] contemplated Wealth Care performing various services for Pi Korea, but provided for Pi Korea to pay a "Basic Service Fee" of KRW5.6

[64] Min 2, para. 29.
[65] Exhibit C-229.

billion (in effect) whether any services were performed or not;[66] [redacted].[67] As recorded by the Claimant, Mr. [redacted] was in fact paid KRW2.86 billion.[68]

84. As already mentioned, the Korean Loans were assigned to Woori Bank at the end of 2009 and the start of 2010,[69] the Claimant and Mr. [redacted] executed a pledge over the Pi Korea Shares in January 2010,[70] and (after extending the Korean Loans several times)[71] the bank commenced the process of enforcing its security in the summer of 2011.[72]

C. THE INVESTIGATION

85. On 22 July 2010, the Claimant was questioned by the Special Investigations Division of the Korean National Police Agency ("**SID**") for approximately 10 hours from 10.10 to 20.40 with breaks for lunch and dinner.[73] Three areas of the investigation are relevant to this arbitration: the purchase of insurance policies from Mrs. [redacted], the promise of 30 per cent of the Pi Korea Shares to Mr. [redacted], and the Project Management Agreement.[74]

86. The record of the interrogation includes the following passages.

> *"Q: You have been asked to subscribe to AIG Insurance from [redacted], right?*
>
> *A: Around mid-December of 2006, [redacted] asked me to be subscribed to insurance as his wife is employed by an insurance company, so I said yes; then, a few days later, [Mr.*

[66] Exhibit C-229.

[67] Exhibit C-229.

[68] Min 2, para. 29.

[69] Min 1, para. 34.

[70] Exhibit C-002.

[71] Exhibits C-065, C-066, C-069, C-067, C-070, C-068, C-071, C-011, and C-012. The Respondent says that the final two extensions (entered into in June 2011) never took effect.

[72] Min 1, para. 59.

[73] Exhibit R-020.

[74] Exhibit R-020.

[redacted]*'s wife] came to the office ... and told me that she needs to get many insurance customers to be promoted and receive about KRW300 million in bonus per year, so, on 20 December 2006, I subscribed to guarantee-type insurance allowing me to retrieve the principal upon its maturity by paying KRW1,420,800 per month under my name, to which I am still paying; on 23 April 2008, I subscribed to two insurance policies under the name of my wife ..., one priced at KRW520,400 per month and another at KRW500,000; and on 23 December 2008, I subscribed to two insurance policies to which KRW1 million is paid per month under the name of Ajin Development Co., Ltd.*

...

Q: Why did [redacted] *ask you to subscribe to the insurance recruited by his wife ..., and why did you grant his request?*

A: At the time, [redacted] *was doing loan work related to the [Building], so when he asked me to subscribe to insurance via his wife, I couldn't say no. I had no choice but to grant his request because it might influence the loan. ...*

...

Q: Weren't you paying consideration to [redacted] *by the means of allowing his wife ... to receive the bonus by subscribing to the insurance for her in the process of* [redacted] *handling the loan?*

A: Yes, you are right that I subscribed to the insurance in return for [redacted] *moving the loan forward.*

Q: *You have entered into a [Project Management] agreement for the nominal purpose of paying KRW5.6 billion to* [redacted].

A: *Yes, I have.*

...

Q: *Under Article 3, Subparagraph 4 of the PM Agreement, the agreement has been executed that "Party B shall perform the duties by dispatching one (1) employee to China during the Service Period of this Project"; did Wealth Care C&D, in fact, dispatch its employee?*

A: *There was no dispatch of personnel. In the case of local PM duties in China, because Beijing Zhongtian, a company acquired by Pi Korea, is doing the overall management work like lease, management and sales, a separate PM company is not necessary.*

Q: *But the Agreement was executed under the terms that one employee would be dispatched and stay there.*

A: [redacted] *included the phrase on his whim. There's no work to do by coming to China. It was a document created merely for formality.*

...

Q: *You said that, before commencing the [Building] project, you agreed with* [redacted] *and [Mr.]* [redacted] *to share the profits.*

A: *Around May 2007,*[75] *at the Dongwon Tuna place ..., I, [Mr.]* [redacted] *and* [redacted] *met. There, when we asked* [redacted] *to get loans as we were working on a project to acquire the [Building] in Beijing, China,* [redacted] *asked us what we were going to do for him if handles the financial loans, so we agreed to proceed with the [Building] project by allocating the shares whereby [Mr.]* [redacted] *would give 20% of the 80% share he held to* [redacted] *and I would hold 20% as is. But I said that my share is small and thus will cause difficulties in doing the work publicly, and I asked him to give me a 40% share,* [redacted] *also said that the share of 20% is small because making a loan takes a lot of efforts and the loan is most important; in response, as I agreed to give 10% of the 40% I asserted, [Mr.]* [redacted] *consented. At that time, it seemed that* [redacted] *was very happy to have 30% of the share. Surely he is happy because he got the share.*

Q: *How did the comment about giving* [redacted] *a share come out?*

A: *Saying that* [redacted] *would get things going if he has a share, which would allow us to obtain the loan, [Mr.]* [redacted] *told me that he would give 20% of his share. Consequently,* [redacted] *was recruited as a participant in the [Building] Project by [Mr.]* [redacted].

Q: *Was 30% of the project profits given to* [redacted] *on the condition that he would arrange the loans?*

A: *What [Mr.]* [redacted] *said was that we must give* [redacted] *a share because he wouldn't get things going, and* [redacted]

[75] In a subsequent interview the Claimant corrected this to September 2007: see Exhibit R-021 at page 15.

[redacted] *was given the 30% share, he said that he will proactively work so that the loan can be approved.*

...

Q: *Has* [redacted] *ever demanded to execute the funds out of the loan amount?*

A: *Around mid-March of 2008,* [redacted] *went through a lot of trouble to get the loan approved and, as he established a business and is working on it, he doesn't even have the funds for operations, so he asked to give KRW5.6 billion, which is 1.5% of the loan amount of KRW380 billion.*

...

Q: *Wasn't* [redacted] *'s demand for KRW5.6 billion – corresponding to 1.5% of the loan amount of KRW380 billion – equal to asking for the payment in return for arranging the loan?*

A: *Yes, you're right. He demanded payment in return for the loan by negotiating with ...* [redacted]*. Because money cannot just be spent, so he fabricated the document as if we were doing a PM Agreement. In short,* [redacted] *wanted to get the payment in return for the loan, as well as the 30% share later. He is a greedy man.*

...

Q: *Why are you saying that* [redacted] *would also take the KRW5.6 billion when he also has the 30% share?*

A: *As the risk arose to the China project and if the share disappears, he would get nothing – so he set aside KRW5.6*

billion in advance. If things go well afterward, he must have had the greed to get the 30% share as well."[76]

87. The record was signed by the Claimant. [77]

88. On 26 July 2010, the Claimant was again questioned by the SID, this time from 10.10 until 22.45 with breaks for lunch and dinner.[78] The record of the interrogation included the following.

> *"Q: Around the end of September 2007, in what context did you meet with [Mr. [redacted]] and [redacted] at the Dongwon Tuna restaurant ...?*
>
> *A: When I came to Seoul for a little while, I got a call from [Mr. [redacted]] and he said that because [redacted] is not properly proceeding with the loan that we should give him a share in order for him to proceed with the loan, which is why we met.*
>
> *...*
>
> *Q: How did you agree to divide the shares?*
>
> *A: We decided to divide the shares [Mr. [redacted]] 40%, me 30%, and [redacted] 30%.*
>
> *...*
>
> *Q: When did you exactly hear that the loan would be issued?*
>
> *A: Around 20 October 2007, [Mr. [redacted]] said that the loan would be issued. Of course, because [Mr. [redacted]] heard from [redacted] that the loan would be possible, he called*

[76] Exhibit R-020.
[77] Exhibit R-020.
[78] Exhibit R-021.

me to say that since the loan would be issued an SPC company would need to be formed. So, [Mr. [redacted]] said that since he owned a corporation, that corporation should be used as the SPC company. I, however, said that if an existing corporation is used, the equity relationship is already fixed, and when I suggested to establish a new company, [Mr. [redacted]] agreed to doing so. ...

Q: When did you establish the corporation?

A: It was established on 30 October 2007.

...

Q: How much was the capital?

A: KRW50 million, where the total number of issued shares was 5,000 shares at KRW10,000 per share.

Q: How did you distribute the shares?

A: 2,000 shares, 40% for [Mr. [redacted]]; 1,500 shares, 30% for myself; 1,500 shares 30% for [Mr. [redacted]].

...

Q: Are you saying that you held the 5,000 shares and then transferred the shares to [Mr.] [redacted] and [Mr.] [redacted]?

A: I do not know [Mr.] [redacted]. When Korea Life Insurance signed for the loan of KRW150 billion on 20 December 2007, [Mr.] [redacted] told me to become a co-representative [director] because [redacted] had to manage the funds; [Mr.] [redacted] told me to register [Mr.] [redacted] with 40% (2,000 shares) and [Mr.] [redacted] with 30% (1,500 shares) as the shareholders.

So, because I was surprised to hear I was to register [Mr.] [redacted], who I do not even know, as a shareholder, I asked why give shares to a person I do not even know. [Mr.] [redacted] told me that the shares [owned by Mr.] [redacted] was for [redacted], [strongly] insisting me to [transfer the shares to Mr. [redacted]].

Q: *Did [redacted] clearly state that the 30% of the shares that are [owned by Mr.] [redacted] are the shares for [redacted]?*

A: *Yes. When Korea Life Insurance was signing on the loan, [Mr.] [redacted] wanted to speak to me outside and [strongly] asserted that the 30% of the shares for [Mr.] [redacted] are for [redacted] and that I should transfer the shares to [Mr.] [redacted].*

Q. *Mr. [redacted] essentially lent his name to [redacted].*

A: *[Mr. [redacted] lent his name to] [redacted]. At that time [redacted] could not hold the shares using his name because he was a bank employee. [redacted] might not have known who [redacted] was because [Mr.] [redacted] is the one who brought [Mr.] [redacted]'s name in.*

Q: *What is the reason to use [Mr. [redacted]'s] name for [redacted]'s share?*

A: *He could not hold the shares under his name because he was a Woori Bank employee and that would have put him under the issue of bribery. He used [borrowed name of Mr. [redacted]'s] to deviously disguise his ownership in the shares.*

...

Q: *What did [redacted] say to you while asking you to subscribe to insurance through his wife ... on 20 December 2006?*

A: *I subscribed to the insurance on 20 December 2006, so one day before that day, [redacted] called me and said that his wife is employed by an insurance company and needs to have many insurance subscription results to be promoted and get more annual salary, asking me to be subscribe to the insurance, telling me that his wife will come to the office, so I told him that, if so, let her come to the office. At the time, because it was in the middle of proceeding with the [Building] Project in China, I thought that if I lose favour with [redacted], it might later become difficult to obtain loans or the process might be lengthened; so when [Mrs. [redacted]] came to the office and told me that I should get the highest one as I am the president, so I subscribed to the insurance policy with the highest premium.*

Q: *You subscribed to an insurance policy, non-dividend permanent standard with 15-year payment period, to which you pay KRW1,420,800 per month.*

A: *When I wrote the insurance subscription application, I heard the words, so I knew the insurance policy, but now I don't remember. Anyways, I subscribed to the most expensive insurance because it was a period where I had to gain favour with [redacted] for the [Building] loan at the time.*

Q: *Would you be willing to subscribe to such high-premium insurance even if [redacted] is not handling PF loans as the team head of the Real Estate Financing Team of the Trust Business Board of Woori Bank?*

A: No. If [redacted] is not the team head in the Real Estate Financing Team and a general citizen, there will be no event where I subscribe to the insurance. And it was even that I subscribed to the most expensive insurance."[79]

89. On this occasion the record was signed by the Claimant and by his lawyer, Mr. [redacted] (or [redacted]), who had been present throughout.[80]

90. On 11 August 2010, the SID again questioned the Claimant, this time from 10.00 until 23.00.[81] The record of this interview contains similar questions and answers to those recorded at the previous meetings and was signed by the Claimant and his lawyer, on this occasion Mr. [redacted].

91. At the hearing of this arbitration, the Claimant was cross-examined extensively about his interviews with the SID, in particular the second interview at which his lawyer was present. His evidence can be summarised as follows.

(a) Though he was not subjected to, or threatened with, violence by the police, the interrogations were extremely long and gruelling, and his chief concern was to go home as soon as possible.[82]

(b) He simply assented to leading questions from the SID whom he described as "misguiding" or "misleading" him. There was no way he could not do what the police required.[83]

(c) His lawyer was not allowed to say anything, and neither he nor his lawyer had any real opportunity to correct the record.[84]

[79] Exhibit R-021.
[80] Transcript, Day 2, pages 41, 44, 45 and 67.
[81] Exhibit R-022.
[82] For example, Transcript, Day 2, pages 42 and 51.
[83] For example, Transcript, Day 2, pages 39, 41, 50, 52, 66 and 68.
[84] For example, Transcript, Day 2, pages 39, 41, 42 and 68.

(d) Even though the record might be accurate as to what he had said during the interviews, what he had said was not true, and indeed he had lied to the SID so as to tell them what they wanted. Though he also suggested at times that the record, or parts of it, did not accurately reflect what he had said.[85] He acted in this way in accordance with what he understood to be his right under Korean law to have the record of these interviews excluded from any criminal proceedings, as noted at subparagraph (l) below.

(e) He bought insurance policies from Mrs. [redacted] because she was selling the type of insurance that he needed.[86]

(f) It was Mr. [redacted], not the Claimant, who offered Mr. [redacted] 30 per cent of the shares in Pi Korea during a conversation between the two of them to which the Claimant was listening but not really paying attention; and this was not done because they needed Mr. [redacted]'s help to obtain the loans.[87]

(g) 2000 shares in Pi Korea were transferred to Mr. [redacted] and 1500 to Mr. [redacted], but this was at the request of Woori Bank.[88]

(h) The Claimant did tell the SID that the shares transferred to Mr. [redacted] were held by him for Mr. [redacted], but this was not true and was said under pressure from the police.[89]

(i) As to the Project Management Agreement, the Claimant insisted it was Woori Bank that drew it up and asked for it to be executed, though he accepted that the only letter from Pi Korea to Woori Bank about the agreement did not mention either Mr. [redacted] or Wealth Care.[90]

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[85] See, for example, Transcript, Day 2, pages 40, 41, 48, 50, 52, 53, 62, 69, 70 and 79.

[86] Transcript, Day 2, pages 49 and 55. See also Min 2, para. 27.

[87] Transcript, Day 2, pages 58, 59, 60, 63 and 64. See also Min 2, para. 27.

[88] Transcript, Day 2, pages 75 and 76.

[89] Transcript, Day 2, pages 78 to 80.

[90] Exhibit C-0214; Transcript, Day 2, pages 82, 83 and 88. See also Min 2, para. 29.

(j) The Claimant also accepted that no employee of Wealth Care had ever been despatched to China, that no actual refinancing had taken place (though Wealth Care had introduced the Claimant to another potential financial intermediary in October 2009),[91] and that the payment of KRW5.6 billion was not conditional on a successful refinancing of the project.[92]

(k) The Claimant agreed that, in the interview of 22 July 2010, he is recorded as saying that Mr. [redacted] fabricated the Project Management Agreement so that he could receive a payment, but he denied the agreement was a sham, saying his answers were what were demanded by the police.[93]

(l) He subsequently exercised his right under Korean law to have the record of these interviews excluded from the criminal proceedings.[94]

92. The Claimant complained that he had been subject to "no less than 49 interrogations by the SID"[95] however, only 17 such sessions appear to have been documented, though it may be that the Claimant was required to attend the SID on other occasions, for example to provide documents.[96]

D. THE KOREAN CRIMINAL LITIGATION

93. On 8 February 2013, at the Seoul Central District Court, the Claimant was convicted, jointly with Mr. [redacted], of the following crime.

> *"Defendants established [Pi Korea], a developer established to acquire and resell [the Building] in around September 2007 and took office as the joint representative director. In around December 2007, the Defendants, while asking [Mr. [redacted]], the head of the real estate*

[91] ArchBank PPP Project Management & Financing Corporation: see Exhibit C-228.

[92] Transcript, Day 2, pages 85 and 86.

[93] Transcript, Day 2, pages 91 to 95.

[94] For example, Transcript, Day 2, pages 40 and 41; and see Korean Criminal Procedural Act, Article 312 (Exhibit RL-133).

[95] See, for example, Min 2, para. 44.

[96] See Transcript, Day 3, page 4.

finance team at Woori Bank's trust business group, to arrange PF loans in relation to the resale of [the Building], proposed to provide 30% shares in [Pi Korea] and additional money in exchange for taking out the loan. Thereafter, under the arrangement of [Mr. [redacted]], Defendants took out a loan of KRW150 billion from [Korea Life Assurance Co., Ltd.] on 20 December 2007 and a loan KRW230 billion from Kookmin Bank on or around 30 January 2008, and also, received a payment guarantee from Woori Bank with respect to each of the above loan obligations.

In order to pay [Mr. [redacted]] for arranging the above PF loans, Defendants promised to give [Mr. [redacted]] KRW5.6 billion as the consideration for arranging the above loans in the form of executing a PM (Project Management) Agreement between [Mr. [redacted]] and [Pi Korea] on 5 March 2008. Thereafter, Defendants offered [Mr. [redacted]], under the pretext of PM service management fee, KRW2.86 billion in total, including KRW1.76 billion on 31 March 2008, and KRW220 million on 22 April 2008, 23 May 2008, 20 June 2008, 30 July 2008, and 30 August 2008 respectively, as the consideration for his arrangement of the above loans in accordance with the promise above, at the office of [Pi Korea] at 1703-ho, Trade Center 159-1, Samsung-dong, Gangnam-gu, Seoul.

Accordingly, Defendants conspired to offer money as above with respect to the duty of an executive/employee of a financial institution."[97]

94. Moreover, when discussing the arguments raised on behalf of Mr. [redacted], the Court described the promise to pay Mr. [redacted] KRW5.6 billion "under the pretext of service fees through the form of a PM agreement" as appearing "to have arisen as a means of concrete

[97] Exhibit C-241 at pages 2 and 3.

implementation after the Defendants had already decided to pay [Mr. [redacted]] the reward for the loan arrangement around September 2007".[98]

95. The Claimant was also convicted, separately, of embezzling USD 4,080,000 in 2008, and of offering bribes to Mr. [redacted] and other members of Woori Bank's Trust Business Group visiting Beijing in the form of entertainment and other expenses on various occasions between mid-October 2007 and November 2009.[99]

96. The Claimant was sentenced to 5 years imprisonment, and Mr. [redacted] to 6 years imprisonment.[100]

97. The Tribunal notes that, prior to this, on 6 September 2011, Mr. [redacted] had been sentenced to 6 years imprisonment for agreeing to accept the bribe of KRW5.6 billion.[101]

98. There was an appeal to the Seoul High Court which, on 10 October 2016, decided amongst other things to change the Claimant's sentence to 6 years and that of Mr. [redacted] to 8 years.[102] The Court also quashed the conviction relating to entertainment and other expenses paid in China on the ground that it had not been proved that such payments constituted offences in China.[103]

99. When sentencing the Claimant, the High Court observed, amongst other things:

> *"The fact that the Defendant also admits the facts regarding the crime of providing bribery to an executive or employee of a financial institution, [and a number of other points] are favourable circumstances to the Defendant."*[104]

[98] Exhibit C-241 at page 15.

[99] See Exhibit C-241 at pages 6, 7 and 8. The decision also dealt with certain other charges which are not material for present purposes.

[100] Exhibit C-241 at page 2.

[101] Exhibit C-241 at page 13 and Exhibit R-006.

[102] Exhibit C-242 at page 3.

[103] Exhibit C-242 at pages 51 to 54.

[104] Exhibit C-242 at page 95.

However, during his oral evidence in the arbitration, the Claimant denied making any such admissions.[105]

100. On 22 March 2017, the Korean Supreme Court dismissed appeals by the Claimant and Mr. [redacted], and also the prosecution's appeal against the reversal of the Claimant's conviction relating to entertainment and other expenses.[106]

101. The Respondent says that the facts and matters recorded above demonstrate that the Pi Korea Shares were not used in accordance with the applicable laws and regulations of the Republic of Korea and are thus not "investments" protected by the Treaty. The Claimant disputes this.

E. THE PARTIES' POSITIONS ON THE TREATY

(1) The Respondent's Position

102. The Respondent argues that, for the purposes of jurisdiction, the key question under Article 1(1) of the Treaty[107] is whether the alleged investment (that is, the Pi Korea Shares) is "used", in the sense of being utilised or deployed, in compliance with the laws of the host State. The word "use" in Article 1(1) denotes an active deployment, or utilization, of the asset in question for a specific purpose. The words "in accordance with the applicable laws and regulations" modify the requirement that the assets be "used" as investment. Thus, it is the utilization or deployment of the alleged "investment" that mut be compliant with the laws of the host State. It is not necessary for the illegality in question to render the existence of the asset comprising the purported investment void or illegal under the host State's law. This follows from the deliberate choice of the word "used" which is different from other treaties, which require investments to be "made", "implemented" or "accepted" in accordance with the applicable law.[108]

[105] Transcript, Day 2, pages 100 and 101.

[106] Exhibits C-158, C-243, and R-013.

[107] See paragraph 63 above.

[108] Respondent's Post-Hearing Brief, paras. 25, 26 and 27.

103. According to the Respondent, what is required is that the illegality is committed in connection with the "use" of the investment. This is consistent with investment treaty jurisprudence as illustrated by *Metal-Tech v. Uzbekistan* and *Mamidoil v. Albania.*[109]

104. As appears below, the Respondent says that the sole purpose, or the *raison d'être* of the Pi Korea Shares was the facilitation of a criminal scheme involving the promise and payment of bribes to employees of financial institutions to obtain the Loans.[110]

105. In the course of oral argument, the following discussion took place.

> *"MR. HODGSON:…you have to look at what the project involves as a whole, what's the investment as a whole. Here, we say, quite clearly, what was involved was the obtaining of loans in order to acquire an asset in Beijing. The intention and, indeed, the only way that was ever possible was by the corrupt procurement of those loans in relation to which Pi Korea was integral part, as we shall see in the evidence.*
>
> *MR. DRYMER: Is there a temporal aspect to that standard? At which point in time is one to look at, and I think I am quoting you, "the objective to which the investment is used"?*
>
> *MR. HODGSON: Well, we would concede that that would need to be in place by the time of incorporation, by 30 October 2007. If, for instance, what happened later, as the chairman's point, was a year after that, a corrupt scheme was concocted, that wouldn't be jurisdictional, we concede, but our case is it was in place before that. Indeed, PI Korea came into existence to give effect to that scheme.*

[109] Respondent's Post-Hearing Brief, para. 28 (citing Exhibit RL-073, *Metal-Tech Ltd. v. Republic of Uzbekistan*, ICSID Case No. ARB/10/3, Award, 4 October 2013 ("*Metal-Tech*"), para. 381; and Exhibit RL-078, *Mamidoil Jetoil Greek Petroleum Products Société Anonyme S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award, 13 March 2015 ("*Mamidoil*"), paras. 363-369).

[110] Respondent's Post-Hearing Brief, para. 32.

MR. DRYMER: But the objective had to have been in place at the time that the investment came into existence, is that correct, an intention to use? I'm trying to just sus this out somewhat.

MR. HODGSON: So certainly the illegality would need to be in place at the time the investment was borne at 30 October, as we say it was, and I would have to consider the relevance of intention, but certainly we say that in this case, the criminal scheme was already in place and, unfortunately, the deal had been done in September beforehand, and we think on any view, that must be enough.

PRESIDENT: Well, as I understand what you've told us, you are saying that Pi Korea was brought into existence in order, in part, at any rate, to provide Mr. [redacted] *with his 30 per cent, and you say it's immaterial, as I understand it, that actually thereafter they decided he should be paid off in a slightly different way?*

MR. HODGSON: Correct, sir, you've understood rightly."[111]

(2) The Claimant's Position

106. The Claimant argues that for the purposes of the Tribunal's jurisdiction, Article 1(1) does not require that the qualifying investment's "use" be in accordance with the applicable laws of the host State.[112] The legality requirement is temporally limited in scope to the establishment of the investment. This is consistent with *Metal-Tech v. Uzbekistan*[113] and *Teinver v. Argentina*,[114] in the latter of which the tribunal observed that "… the critical time period for determining an investment's legality is the time the investment was made … the relevant enquiry is whether the Claimants' entry into the investment … is legal."[115]

[111] Transcript, Day 2, pages 11 and 12.

[112] Claimant's Post-Hearing Brief, para. 62.

[113] See *Metal-Tech*, para. 193.

[114] Exhibit CL-195, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2012 ("*Teinver*").

[115] *Teinver*, para. 318. See also Claimant's Post-Hearing Brief, para. 62.

107. The sole requirement of legality with any bearing on the Tribunal's jurisdiction applies only to and at the time of the making of the investment. Other aspects of the investment, including how the investment was financed, do not have jurisdictional repercussions.[116]

108. Likewise, in *Mamidoil v. Albania*, the issue was whether the "fundamental permits" required for the tank farm had not been secured before construction started, in violation of Albanian law.[117]

109. In the present case, says the Claimant, assessing the investment's legality would involve assessing the legality of the Claimant's incorporation by Korea as the sole shareholder and Pi Korea's core business. Even if the Respondent's allegations regarding the bribes to secure the Korean Loans were true (which they are not) they were not an integral part of the Claimant's investment, because they were not a prerequisite to the real estate investment that the Claimant and Pi Korea intended to engage in. Nor were the Loans part of the fundamental substance of the investment in the sense that the permits were in *Mamidoil*. In no case has how the investment was financed factored into a legality analysis. The alleged corrupt procurement of the Loans has nothing to do with the legality of the Claimant's investment at the time it was made.[118]

110. Corruption that taints an investment which has a legitimate purpose (in this case, investment in real estate) does not have jurisdictional consequences. The kind of illegality that has jurisdictional implications may be either substantive or procedural. On substance, the illegality must pertain to the nature of the investment itself, *i.e.*, investments in prohibited geographic and sectoral areas, as considered in *Mamidoil*. There is no suggestion that the Claimant or Pi Korea lacked any of the regulatory approvals necessary to invest in the real estate sector in China, or that the investment contradicts any other applicable substantive law. On procedure, *Mamidoil* recognises that fraud and corruption may sometimes have jurisdictional repercussions. The lack of necessary permits to the

[116] Claimant's Post-Hearing Brief, para. 63.
[117] Claimant's Post-Hearing Brief, para. 63.
[118] Claimant's Post-Hearing Brief, para. 64.

operation of the investment in that case potentially resulted in illegality in the core investment itself from its inception. But there is no such procedural illegality in this case.[119]

111. The bribery alleged did not constitute bribery to public officials and accordingly has no jurisdictional consequence. There is no consensus that the scope of the prohibition on bribery in international public policy extends beyond those circumstances that aim at the corruption of government officials. This is consistent with the United Nations Convention against Corruption, in which bribery to non-public officials is a non-mandatory offence. The Respondent contends that it is not making an international public policy objection but one based on the clear terms of legality in the Treaty itself. However, the Treaty requires that the establishment and admission of the investment must be in accordance with the host State's law and regulations. The Respondent is attempting to extend the temporality of the legal requirement beyond the making of the investment and into its implementation. This rests on an artificial reading of the words "used as an investment" where the proper modifier of the words in accordance with the applicable laws and regulations of that other Contracting Company is the phrase "at the time of investment". The Respondent's interpretation would require that every qualifying investment be used in accordance with the host State's laws and regulations, which is contrary to the plain language of the Treaty.[120]

112. Moreover, to be relevant, any bribery or corruption must have a causal link to Mr. Min's investment; and the State must not by its own conduct be precluded from relying on it.[121]

[119] Claimant's Post-Hearing Brief, para.65.

[120] Claimant's Post-Hearing Brief, para. 75.

[121] Claimant's Post-Hearing Brief, para. 66.

113. The Claimant also relies on the decisions in *Saba Fakes v. Turkey*,[122] *Khan v. Mongolia*,[123] and *Fraport v. Philippines*.[124]

F. THE PARTIES' POSITIONS ON THE FACTS

(a) The Respondent's Position

114. The Claimant's case in this arbitration cannot stand in the face of the objective fact that:

(a) the Claimant did in fact purchase five life insurance policies from Mr. [redacted]'s wife;

(b) the Claimant himself effected the transfer of 1500 shares (being 30 per cent of Pi Korea's share capital) to Mr. [redacted] in December 2007.

The only credible explanation of the share transfer is what the Claimant told the police namely that they were transferred to Mr. [redacted] to hold for Mr. [redacted]. The suggestion that the transfer was made pursuant to a request by Woori Bank defies commonsense.[125]

115. The Respondent asserts that the Claimant admitted during the criminal investigation that he subscribed to insurances from Mr. [redacted]'s wife to smooth progress to obtaining the Korean Loans and that Mr. [redacted] had requested him to buy life insurance in order to assist with her promotion and to allow her to obtain a salary increase and annual bonus. This in itself was a clear breach of Article 6 of the Economic Crimes Act. It is immaterial that the Claimant was not indicted for this.[126]

116. The Respondent says that the Claimant also admitted during the investigation that he had agreed with Mr. [redacted] and Mr. [redacted] to set up a special purpose company in Korea and

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[122] Exhibit RL-063, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, 14 July 2010 ("*Saba Fakes*"), para. 119. See Claimant's Reply Memorial, paragraph 330.

[123] Exhibit CL-223, *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and Monatom Co., Ltd*, PCA Case No. 2011-09, Decision on Jurisdiction, 25 July 2012 ("*Khan Resources*"), para. 384. See Claimant's Reply Memorial, para. 331.

[124] Exhibit RL-060, *Fraport v. Republic of the Philippines*, ICSID Case No. ARB/03/25, Award, 16 August 2007 ("*Fraport*"). Claimant's Rejoinder, paras. 330-332. Claimant's Post-Hearing Brief, para.70(a).

[125] Respondent's Post-Hearing Brief, para. 35.

[126] Respondent's Post-Hearing Brief, para. 30(a).

divided the shares 30/40/30 in return for Mr. [redacted]'s assistance regarding the procurement of the Korean Loans. The Claimant had admitted to transferring the shares pursuant to this agreement in December 2007, including by transferring 30 per cent of the Pi Korea Shares to Mr. [redacted], who was to hold them on behalf of Mr. [redacted]. Again, this was an offence against Article 6 of the Economic Crimes Act, which criminalises promising bribes in addition to actual payment. In fact, the Claimant was eventually convicted of bribery for his promise under the Project Management Agreement to pay KRW5.6 billion (around USD5.1 million) to Mr. [redacted], which was held to be "a means of concrete implementation" of the agreement made in September 2007.[127]

117. The Claimant's criminal scheme was in place and well under way before Pi Korea was established. The illegality existed "at the time of investment". Moreover, it is immaterial that the Claimant and Mr. [redacted] subsequently decided to pay Mr. [redacted] off through the Project Management Agreement.[128]

118. The sole purpose of the Pi Korea Shares was the facilitation of the criminal scheme involving the promise and payment of bribes to employees of financial institutions, including Mr. [redacted], to obtain (and subsequently extend) the Korean Loans. Originally the Pi Korea Shares were themselves intended to be the subject matter of the bribes. And the company was established in anticipation that 30 per cent of its shares would be given to Mr. [redacted] to reward him for arranging the loans.[129]

119. The criminal scheme occurred in exactly the way the Claimant admitted during the SID investigation. [130] There is no reason to doubt the Claimant's admissions during the course of that investigation. [131] There is no credible explanation why he would falsely make self-incriminating statements repeatedly. He was accompanied by his own counsel from at least the interrogation on 26 July 2010, and from then on his counsel signed the records of the

[127] Respondent's Post-Hearing Brief, para. 30(b).
[128] Respondent's Post-Hearing Brief, para. 31.
[129] Respondent's Post-Hearing Brief, para. 32.
[130] Respondent's Post-Hearing Brief, para. 33.
[131] Respondent's Post-Hearing Brief, para. 34.

interrogations.[132] His oral evidence about the police records was internally inconsistent. Sometimes he suggested the records were false and at other times that they were accurate but they had been made as a result of improper pressure and that he had lied. [133] In fact, in accordance with Korean law, he had signed the records or approved them using his personal seal, and at least on one occasion he had taken the opportunity to make a handwritten amendment.[134]

120. Neither the Claimant nor his counsel had raised any complaints of misconduct or improper pressure or challenged the authenticity or accuracy of the interrogation records during the Korean Criminal Proceedings. Moreover, one of the matters referred to a favourable circumstance when sentencing him was his admission of the facts underlying the bribery charge.[135]

121. The Project Management Agreement was a sham, as payments were made despite the fact that Wealth Care did not provide any substantial service to Pi Korea. It only existed to facilitate payment of bribe monies to Mr. [redacted]. The only thing that was ever done under the agreement was to procure a financial consultation service contract with an intermediary to arrange financing and this occurred some 18 months after the Project Management Agreement had been made. However, as the Claimant accepted, payment under that agreement was not conditional upon successful refinancing of the project and most of the payments were made long before the purported financial consultation service contract was entered into.[136]

(b) The Claimant's Position

122. The Claimant, relying on *Sistem v. Kyrgyzstan,* submits that the Respondent has the burden of proving a sufficient causal link between the alleged bribes and the Claimant's

[132] Respondent's Post-Hearing Brief, para. 34(a).

[133] Respondent's Post-Hearing Brief, para. 34(b).

[134] Respondent's Post-Hearing Brief, paragraph 34 (c)(i) (citing Exhibit R-023 at pages 4116-4117 (English) and 4145-4146 (Korean)).

[135] Respondent's Post-Hearing Brief, para 34(d).

[136] Respondent's Post-Hearing Brief, para. 35(c).

investment.[137] The Respondent has failed to establish the causal link between the alleged bribes and the procurement of the Korean Loans.[138] The only Woori Bank employee convicted of receiving bribes was Mr. [redacted], and he could not have procured the approval of the Korean Loans on his own.[139] The contemporaneous documents indicate that other Woori Bank officials senior to Mr. [redacted] were closely involved in the review, and voted in favour of the loans, and that other senior personnel supported them.[140] Even after Mr. [redacted] and the Claimant had been investigated and charged, Woori Bank extended the repayment deadline of the Korean Loans on multiple occasions in 2010 and 2011 and never sought to avoid the loan agreements on the basis of the alleged bribes.[141]

123. Moreover, the Respondent, through Woori Bank, effectively ratified the illegality by knowingly endorsing the Korean Loans without any illegality complaint. The Claimant submits that a respondent State's conduct may constitute ratification of any alleged illegality, or a State may be estopped from invoking a legality objection if its conduct has demonstrated a consistent acceptance of the alleged illegality.[142]

124. According to the Claimant, despite knowledge of the alleged illegality, State-owned Woori Bank knowingly endorsed and benefitted from the Korean Loans and never protested these loans were obtained through illegal means. Nor did Korean prosecutors seek to invalidate them. The Korean Loans were repeatedly extended and Woori Bank took steps in and from the summer of 2011 to enforce its security rights. [143] Woori Bank could not have done any of these without the State's acquiescence. [144] To uphold the Respondent's legality defence based on the very illegality it has knowingly ratified would be highly unfair, particularly since the "severe consequences" of a lack of jurisdiction would deprive the Claimant of

[137] Claimant's Post-Hearing Brief, para. 65.

[138] Claimant's Post-Hearing Brief, para. 69.

[139] Claimant's Post-Hearing Brief, para. 69.

[140] Claimant's Post-Hearing Brief, para. 69.

[141] Claimant's Post-Hearing Brief, paras. 68 and 69.

[142] Claimant's Post-Hearing Brief, para. 70 (citing Exhibit CL-101, *Desert Line Projects LLC v. Republic of Yemen,* ICSID Case No. ARB/05/17, Award, 6 February 2008; *Fraport*; and Exhibit CL-153 *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010 ("*Kardassopoulos*")).

[143] Claimant's Post-Hearing Brief, para. 70(b).

[144] Claimant's Post-Hearing Brief, para. 70(b).

Treaty protection and effectively leave him with no practical remedy for the injustices committed against him by the Respondent.[145]

125. The only two illegal acts that the Respondent itself claims meet the temporal requirements of Article 1(1) of the Treaty are the purchase of the insurance policies and the alleged 30 per cent share bribe. The Claimant, however, has categorically denied both allegations in his written testimony and in cross-examination.[146]

126. According to the Claimant, the Respondent relies solely on the interrogation records and the Tribunal must decide whether they should be given any weight, given the Claimant's evidence of intimidation and his subsequent disavowal. Moreover, even after these interrogations occurred, due to lack of evidence, the Prosecutor's Office chose not to indict the Claimant, and the Korean Courts did not convict him of either the alleged insurance bribe or the alleged 30 per cent share bribe. The former were not even mentioned in the Korean Court's judgments.[147]

127. During the interrogations, the Claimant's Korean counsel, who accompanied him for all but the first one, was pressured by the SID not to speak or raise any objection. The SID refused to allow the Claimant and his counsel to leave the interrogation without signing the records presented to him, affirming both the correctness of the record and the lack of any improper treatment at the hands of the police. Moreover, his Korean counsel advised him to sign the records since he would have the right to disavow them later in court, as indeed he did. The Claimant submits that the Tribunal should disregard his alleged confessions. The Project Management Agreement cannot be backdated by saying that it "was a concrete means of giving effect to" the alleged 30 per cent bribe.[148]

128. According to the Claimant, even though a mere promise to give money or other benefits to an officer or employee of a financial institution would trigger criminal liability, the

[145] Claimant's Post-Hearing Brief, para. 70.
[146] Claimant's Post-Hearing Brief, para. 71.
[147] Claimant's Post-Hearing Brief, para.71.
[148] Claimant's Post-Hearing Brief, para. 72.

Prosecutor's Office never pressed any charges against him regarding the alleged 30 per cent share bribe.[149]

129. Mr. [redacted], to whom 30 per cent of the Pi Korea Shares were transferred, was Mr. [redacted]'s agent, not Mr. [redacted]'s. This is consistent with the Korean Court's description of Mr. [redacted] in their judgments as Mr. [redacted]'s "acquaintance" without referring to any relationship between Mr. [redacted] and Mr. [redacted]. Even assuming that Mr. [redacted] did offer 30 per cent of the Pi Korea Shares to Mr. [redacted], an offer the Claimant did not know of beforehand and said in cross-examination was dropped, this has no relevance to the Tribunal's jurisdiction over the Claimant's claims in this arbitration.[150]

130. The Project Management Agreement was not a sham.[151] It was entered into at Woori Bank's request with the genuine belief that Pi Korea would benefit from Mr. [redacted]'s services.[152] Moreover, Mr. [redacted] did provide consulting services and introduced potential investors to Pi Korea pursuant to the agreement.[153] Woori Bank always had full knowledge of the payments made under the agreement and indeed, between March and August 2008, it used the Korean Loans to fulfil Pi Korea's payment obligations to Wealth Care.[154] The Claimant required the Bank to stop making these payments as soon as he discovered that it had been using funds set aside as Beijing Zhongtian's monthly operating fees for monthly payments to Wealth Care and no further payments were made after that.[155] He would not have stopped these payments had they been intended as a bribe.[156]

131. As it turned out, Mr. [redacted] of Woori Bank, who is the person who asked the Claimant to sign the Project Management Agreement, was charged with the crime of occupational breach of trust against the Bank regarding his unauthorised use of the loan proceeds to settle interest payments of two Korean companies he oversaw (neither of which

[149] Claimant's Post-Hearing Brief, para. 72.
[150] Claimant's Post-Hearing Brief, para. 72.
[151] Claimant's Post-Hearing Brief, para. 73.
[152] Claimant's Post-Hearing Brief, para. 73 (citing Min 2, para. 29; Tr. 88:18-21).
[153] Claimant's Post-Hearing Brief, para. 73(b).
[154] Claimant's Post-Hearing Brief, para. 73(c).
[155] Claimant's Post-Hearing Brief, para. 73(d).
[156] Claimant's Post-Hearing Brief, para. 73.

was related to Pi Korea).[157] If he had a hidden agenda when he asked the Claimant to sign the Project Management Agreement, the Claimant knew nothing about it.[158]

132. The Claimant further assert that the alleged bribery under the Project Management Agreement, and indeed the alleged offer of 30 per cent of the Pi Korea Shares, did not constitute bribery of a public official and consequently has no jurisdictional effect.[159] According to the Claimant, *Kim v. Uzbekistan* shows that, "there is no clear consensus that the scope of the prohibition on bribery in international public policy at present extends beyond those circumstances that aim at the corruption of government officials.":[160]

133. Unlike other cases, the Claimants points out that the Respondent has already prosecuted and punished the Claimant for the alleged bribery (which he has consistently denied).[161] He was subjected to prolonged travel bans followed by nearly 6 years of imprisonment. [162] The Claimant argues that even assuming that the alleged illegality did occur, the Claimant has already been fully penalised for it. It would be improper and unfair to punish him a second time for the same illegality by denying him "Treaty protection".[163] The legality objection calls for the application of a proportionality tests even when a violation is of a "fundamental" national law (such as fraud or corruption).[164] As was said in *Kim v. Uzbekistan*, it "requires a case-by-case analysis examining both the seriousness of the investor's conduct and the significance of the obligation not complied with so as to ensure that the harshness of the sanction of placing the investment outside the protection of the BIT is a proportionate consequence for the violation examined."[165] In this case, denying

[157] Claimant's Post-Hearing Brief, para. 74.

[158] Claimant's Post-Hearing Brief, para. 74.

[159] Claimant's Post-Hearing Brief, para. 75.

[160]Claimant's Post-Hearing Brief, para. 75 (citing Exhibit CL-196, *Vladislav Kim and Others v. Republic of Uzbekistan*, ICSID Case No. ARB/13/6, Decision on Jurisdiction, 8 March 2017 ("*Vladislav Kim*"), para. 598). See also the United Nations Convention against Corruption, where bribery of non-public officials is a non-mandatory offence.

[161] Claimant's Post-Hearing Brief, para. 76.

[162] Claimant's Post-Hearing Brief, para. 76.

[163] Claimant's Post-Hearing Brief, para. 76 (citing Tr. 79:3-16).

[164] Claimant's Post-Hearing Brief, para. 76 (citing *Vladislav Kim*, paras. 395-396, 398).

[165] *Vladislav Kim*, para. 404.

Treaty protection would be clearly disproportionate to the alleged Korean law violations by the Claimant.[166]

G. THE TRIBUNAL'S ANALYSIS: THE TREATY

134. So far as material, Article 1 of the Treaty is set out at paragraph 62 above. Before, however, the Tribunal examines its language, it is helpful to turn first to the principal authorities relied on by the parties in relation to its meaning and effect.

135. In *Fraport v. Philippines*, the relevant treaty defined the term "investment" as meaning, "any kind of asset accepted in accordance with the respective laws and regulations of either Contracting State". It went on, in Article 2, to provide that:

> *"Each Contracting State shall promote as far as possible investments in its territory by investors of the other Contracting State and admit such investments in accordance with its Constitution, laws and regulations as referred to in Article 1 paragraph 1. ..."*

136. The investor in that case was alleged to have made its investment in breach of the foreign ownership and control legislation of the Philippines. When considering the applicable legal standards, the tribunal was clear that the time at which to judge compliance with the host State's laws was the time of the initiation of the investment.[167] The tribunal also observed, amongst other things, that:

> *"Principles of fairness should require a tribunal to hold a government estopped from raising violations of its own law as a jurisdictional defense when it knowingly overlooked them and endorsed an investment which was not in compliance with its law."*[168]

137. However, when it came to its conclusion, the tribunal held that:

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[166] Claimant's Post-Hearing Brief, para. 76.

[167] *Fraport*, para. 345.

[168] *Fraport*, para. 346.

> *"… the investor, Fraport, concluded that the only plausible way for its equity investment to prove profitable was to arrange secretly for management and control of the project in a way in which the investor knew were not in accordance with the law of the Philippines. This was accomplished by [an Article of a Shareholders' Agreement] which allowed Fraport … to have a casting and controlling vote over matters which fell within its "area of expertise and competence". Thus the violation could not be deemed to be inadvertent and irrelevant to the investment. It was central to the success of the project. The awareness that the arrangements were not in accordance with Philippine law was manifested by the decision to make the arrangements secretly and to try to make them effective under foreign law. …"*[169]

138. The tribunal went on to conclude that:

> *"Fraport knowingly and intentionally circumvented the [relevant Philippine law] by means of secret shareholder agreements. As a consequence, it cannot claim to have made an investment "in accordance with law". Nor can it claim that high officials of the Respondent subsequently waived the legal requirements and validated Fraport's investment, for the Respondent's officials could not have known of the violation. Because there is no "investment in accordance with law", the Tribunal lacks jurisdiction ratione materiae."*[170]

139. In *Ioannis Kardassopoulos and Ron Fuchs v. Georgia* the respondent State was not permitted to escape from the consequences of entities, whose acts were attributable to the State, having represented and warranted that certain agreements had been entered into in compliance with Georgian law. Moreover, the tribunal also held that the failure, over a period of years, of the State to protest or claim the agreements were illegal under Georgian

[169] *Fraport*, para. 398.
[170] *Fraport*, para. 401.

law created a legitimate expectation for the claimant that his investment was made in accordance with that law, and would be entitled to treaty protection.[171]

140. In *Saba Fakes v. Turkey*, the relevant treaty provided that:

> *"[t]he present Agreement shall apply to investments owned or controlled by investors of one Contracting Party in the territory of the other Contracting Party which are established in accordance with the laws and regulations in force in the latter Contracting Party's territory at the time the investment was made."*[172]

141. In the light of that provision, the tribunal observed:

> *"115. ... This provision plainly states that the BIT protection shall not apply to investments which have not been established in conformity with the Respondent's laws and regulations, the term "investment" having been defined in Article 1(b) of the BIT. If this condition is not satisfied, the BIT does not apply. ...*
>
> ...
>
> *119. The Tribunal is not convinced by the Respondent's position that any violation of any of the host State's laws would result in the illegality of the investment within the meaning of the BIT and preclude such investment from benefiting from the substantive protection offered by the BIT. As to the nature of the rules contemplated in Article 2(2) of the Netherlands-Turkey BIT, it is the Tribunal's view that the legality requirement contained therein concerns the question of the compliance with the host State's domestic laws governing the admission of investments in the host State. This is made clear by the plain language of the BIT, which applies to "investments ... established in*

[171] See *Kardassopoulos*, paras. 273 -280.

[172] *Saba Fakes*, para. 115.

accordance with the laws and regulations ...". The Tribunal also considers that it would run counter to the object and purpose of investment protection treaties to deny substantive protection to those investments that would violate domestic laws that are unrelated to the very nature of investment regulation. In the event that an investor breaches a requirement of domestic law, a host State can take appropriate action against such investor within the framework of its domestic legislation. However, unless specifically stated in the investment treaty under consideration, a host State should not be in a position to rely on its domestic legislation beyond the sphere of investment regime to escape its international undertakings vis-à-vis investments made in its territory.

120. *In the present case, the Respondent alleges the Claimant's transaction was made in breach of the Republic of Turkey's legislation relating to the encouragement of foreign investment, the regulation of the telecommunication sector, as well as Turkish competition law. The first violation, if demonstrated, might be covered by the legality requirement of Article 2(2) of the Netherlands-Turkey BIT and – as a consequence – might lead the present Tribunal to conclude that the conditions set forth by the BIT for an investment to be protected were not met and, hence, the Respondent did not give its consent to arbitration within the meaning of Article 25(1) of the ICSID Convention. On the other hand, the Tribunal believes that a violation of the regulations in the telecommunication sector or of competition law requirements would not trigger the application of the legality requirement in Article 2(2) of the BIT. In the latter case, the violations of Turkish law, if established, are not covered by the language of Article 2(2) of the BIT according to which the BIT applies "to*

investments ... established in accordance with the laws and regulations in force ... at the time the investment was made".

142. On the facts, however, the tribunal concluded that Mr. Fakes had never made an investment that satisfied the other requirements of the treaty and so the issue of legality did not arise.[173]

143. In *Khan v. Mongolia*, (an Energy Charter Treaty case), the tribunal observed that previous awards had merely stated the rule that the protection of an investment treaty cannot be extended to an investment *made* illegally. The tribunal made the point that:

> *"An investor who has obtained its investment in the host State only by acting in bad faith or in violation of the laws of the host State, has brought him or herself within the scope of the application of the ECT only as a result of his wrongful acts. Such an investor should not be allowed to benefit as a result, in accordance with the maxim nemo auditor propriam turpitudinem allegans."*[174]

144. However, the right to invoke the ECT would not be denied to an investor who had breached the law of the host State simply during the course of its investment.[175]

145. In *Quiborax v. Bolivia*[176] the tribunal considered the scope of the legality requirement in the context of treaties requiring the investment to be "made in accordance with the laws and regulations" of the host State.[177]

146. It concluded that:

> *"264 ... within the limits set by the applicable treaty interpretation rules, the Tribunal favours a balanced interpretation that takes*

[173] *Saba Fakes*, paras. 147 and 148.

[174] *Khan Resources*, para. 383.

[175] *Khan Resources*, paras. 380- 385.

[176] Exhibit RL-067, *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* ICSID Case No. ARB/06/2, Decision on Jurisdiction, 27 September 2012 ("*Quiborax*").

[177] *Quiborax*, para. 264.

account of the need to protect foreign investments, on the one hand, and of the State's other responsibilities, on the other. …

265. *Bearing this in mind, construction of the legality requirement calls for a line-drawing exercise in which the Tribunal must determine what violations are covered by the legality requirement. Or, differently stated, what violations of the legality requirement exclude the investment from the scope of the Treaty and the jurisdiction of the Tribunal. Other tribunals have already grappled with the question of the scope of similarly – or identically – worded legality requirements. The Tribunal will draw guidance from these cases, which, while still in a relatively emerging state, already outline the contours of the legality requirement.*

266. *The Tribunal considers that the BIT's legality requirement has both subject-matter and temporal limitations. The subject-matter scope of the legality requirement is limited to (i) non-trivial violations of the host State's legal order … (ii) violations of the host State's foreign investment regime …, and (iii) fraud – for instance to secure the investment … or profits. Additionally, under this BIT, the temporal scope of the legality requirement is limited to the establishment of the investment; it does not extend to the subsequent performance. Indeed, the Treaty refers to the legality requirement in the past tense by using the words investments "made" in accordance with the laws and regulations of the host State …"*[178]

[178] See also Exhibit CL-224, *Vannessa Ventures Ltd v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/04/06, Award, 16 January 2013, paras. 109 and 167, where the treaty defined "investment" (similarly to the treaty in *Saba Fakes*) as "any kind of asset owned or controlled by an investor of one Contracting Party either directly or indirectly … in the territory of the other Contracting Party in accordance with the latter's laws" and the Tribunal held that "the jurisdictional significance of the *"legality requirement*" in the definition of an investment in Article I(f) is exhausted once the investment has been made."

147. In *Teinver v. Argentina*, the relevant treaty defined investments as meaning "any kind of assets, such as property and rights of every kind, acquired or effected in accordance with the legislation of the country receiving the investment".[179] Accordingly, the tribunal commented:

> *"... as the Treaty itself makes clear, the critical time period for determining an investment's legality is the time the investment was made ... The application of ordinary meaning of Article 1(2) to the Claimants is perfectly straightforward: in order to qualify as an "investment" under the Treaty, Claimants' investments must have been acquired or effected in accordance with Argentine law, the country receiving the investment. In other words, the relevant enquiry is whether Claimants' entry into the investment, here its acquisition of shares in Interinvest through Air Comet, is legal."*[180]

148. In *Metal-Tech v. Uzbekistan*, the relevant treaty defined investments as, "any kind of assets, implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made".[181] The tribunal first asked itself, "whether "implemented" means "established" or "established and operated"."[182] Its conclusion was:

> *"... the term "assets implemented" refers to the time when the investment was made. In other words, the Treaty requires that the investment must be legal when it is initially established. Article 1 simply does not address whether or not the investment must be operated lawfully after it is in place."*[183]

149. The tribunal found as a fact that the joint venture and contractual assets which the claimant had lost had originally been obtained by bribing State officials, concluding that:

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[179] *Teinver*, para. 209.
[180] *Teinver*, para. 318.
[181] *Metal-Tech*, para. 130.
[182] *Metal-Tech*, para. 185.
[183] *Metal-Tech*, para. 193.

> *"... corruption is established to an extent sufficient to violate Uzbekistan law in connection with the establishment of the Claimant's investment in Uzbekistan. As a consequence, the investment has not been "implemented in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made" as required by Article 1(1) of the BIT."*[184]

150. In *Mamidoil v. Albania*, the tribunal considered the issue of jurisdiction under both the Greece-Albania BIT and under the Energy Charter Treaty. The principle of legality in the BIT did not appear in a definition of "investment", but in Article 2 which provided:

> *"Each Contracting Party shall in its territory promote, as far as possible, investments by investors of the other Contracting Party and admit such investments in accordance with its legislation."*[185]

151. As to the ECT, the tribunal agreed with an earlier decision that:

> *"Unlike a number of Bilateral Investment Treaties, the ECT does not contain a provision requiring the conformity of the Investment with a particular law. This does not mean, however, that the protections provided for by the ECT cover all kinds of investments, including those contrary to domestic or international law."*[186]

152. The tribunal also observed:

> *"291. In exchange for their acceptance to enter into investment treaties and giving their consent to the resolution of investment disputes by arbitral tribunals, States expect that such protection would extend only to investments that have been made lawfully."*

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[184] *Metal-Tech*, para. 372.

[185] *Mamidoil*, para. 292.

[186] *Mamidoil*, para. 293 (quoting *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, para. 138).

Moreover, the tribunal returned to this point a little later on, saying:

> *"359. … the Tribunal shares the widely-held opinion that investments are protected by international law only when they are made in accordance with the legislation of the host State. States accept arbitration and accept to waive part of their immunity from jurisdiction to encourage and protect investments in international conventions. In doing so, they cannot be expected to have agreed to extend that mechanism to investments that violate their laws; likewise, it cannot be expected that States would want illegal investments by their nationals to be protected under those international conventions."*

153. *Mamidoil* concerned the construction of a tank farm in Albania and the creation of an Albanian company to own and operate it. The relevant assets were the shareholding in the Albanian company, a lease contract concluded by that company, and the tank farm held by the Albanian company. The tribunal held that these three elements formed a unity.[187]

154. Two legality objections were raised by Albania.

> *"370. … It alleges first that Claimant failed to perform any due diligence, rushed in recklessly and built the petroleum reservoir at a moment when it was obvious that the transport sector and the seaports in particular would soon undergo a fundamental re-structuring and re-zoning, in particular in the densely populated port of Durres. It further alleges that in order to present Respondent with a fait accompli, it did not bother to avail itself of fundamental permits, which it knew were important and to be received before the construction started.*

[187] *Mamidoil*, paras. 366 and 369.

> *371. The Tribunal realizes that the two allegations aim at different dimensions of potential illegality, the first at a violation of substantive law, and the second at a violation of procedural rules.*
>
> *372. The Tribunal finds that an investment can be illegal and as a consequence not protected by investment conventions when it contravenes substantive law, in other words when it does not comply with material norms regulating investments. Norms may prohibit certain business activities, such as the production of drugs, or they may reserve certain sectors to national entities or protect certain sectorial or geographical areas, for example, by making an investment in a national park illegal."*

155. The tribunal rejected the substantive illegality case on the basis that the "decisive moment for the appreciation of the investment's substantive legality is when the investment is planned and made". At that time, neither of the parties anticipated changes and restrictions on the port of Durres.[188] Moreover, the tribunal did not accept that subsequent events could render the investment retroactively illegal.

156. As to the permits:

> *"378. ... In the Tribunal's view, an investment can be found illegal for procedural reasons when the investor does not respect the norms regulating the process of investment. The investment may be legal in substance but still tainted by illegality when the investor violates procedural norms and regulations for setting up its investment. Fraud and corruption are prominent examples of such behaviour. However, such serious contraventions of law are not alleged in this case."*

[188] *Mamidoil*, para. 375.

157. The tribunal then carried out an extensive examination of the factual and legal position in relation to each relevant permit, concluding that Albanian law had been violated by the construction and operation of the tank farm without certain of the permits. However, in the event this did not bar jurisdiction because, in brief, Albania had shown itself willing to disregard the illegality and had treated it as susceptible of being cured. That being so, the tribunal decided that the absence of permits was to be determined as a question of merits rather than jurisdiction.[189]

158. The decisions reviewed above include cases where the relevant treaty provided for investments to be "accepted in accordance with", "established in accordance with", "acquired or affected with" and "implemented in accordance with" the laws of the host State. A constant theme of those decisions is that the time at which legality must be tested is the moment at which the investment is initially made. However, although tribunals have made attempts to formulate the scope of the legality requirement, this Tribunal does not find those attempts entirely satisfactory for present purposes. The overriding principle must be, as indicated in *Mamidoil*, that States do not expect to extend, and do not expect their nationals to receive, protection for investments that have not been made lawfully. However, although the Tribunal accepts that, as suggested in *Mamidoil*, relevant illegality may be either substantive or procedural, the precise contours of what constitutes illegality for the purposes of deciding what is an unlawful investment are not entirely clear and, in the final analysis, will turn on the language of the treaty in question.

159. The decisions reviewed also indicate that a State may, whether by representation or conduct, be precluded from challenging jurisdiction on the basis that an investment was initially made unlawfully.

160. Turning to the present case, the language used to define "investments" in the Treaty is subtly different from that used in the cases discussed above. Article 1(1) defines them as meaning "every kind of asset, used as investment by investors of one Contracting Party

[189] *Mamidoil*, paras. 492-494.

within the territory of the other Contracting Party, in accordance with the applicable laws and regulations of that other Contracting Party at the time of investment".[190]

161. In one respect the article is quite clear. Whatever the words "in accordance with the applicable laws and regulations of that other Contracting Party at the time of investment" relate to, the relevant laws and regulations are those of the host State "at the time of the investment". So that is the moment at which legality must be tested. In that respect at least, the article is similar to those discussed above. However, to what in the preceding parts of the article do those words refer? To "every kind of asset", or to "used as investment by investors of one Contracting Party within the territory of the other Contracting Party"?

162. If the words within the commas ("used as investment by investors of one Contracting Party within the territory of the other Contracting Party") are omitted, the article would say, "every kind of asset … in accordance with the applicable laws" of the host State, which does not seem to make grammatical sense. On the other hand, "used as investment by investors of one Contracting Party within the territory of the other Contracting Party, in accordance with the applicable laws" of the host State, does make grammatical sense.[191] This is because the only verb that makes clear grammatical sense of this passage is "used", and that appears within the commas. Accordingly, on the language of this Treaty, the words "in accordance with the applicable laws" of the host State must relate back to the words within the commas. Thus, to fulfil the requirements of Article 1(1), the asset must be "used" in accordance with the applicable laws of the host State at the time of investment. In the case of an asset created at the time of investment (for example, the issue of the initial share capital of a newly incorporated company), that must mean that the company and the shares are required to be brought into existence for use in accordance with such laws.

163. Thus, if a Chinese investor formed, and took the shares in, a corporation in Korea, and the evidence demonstrated that, from the outset, the or a purpose for which it was formed was to import and distribute prohibited drugs, or to receive and sell stolen goods, in breach of the laws of Korea, such an investment would not be protected. The same would be true if

[190] Exhibit C-001.

[191] Although "as an investment" would be more grammatical.

the investor were Korean, the corporation was formed in China, and the laws to be broken were Chinese.

164. Whatever may be the position elsewhere, this Treaty clearly provides that an investment must not be made for illicit use. In line, however, with the decisions referred to above, the intention to use the asset contrary to the laws of the host State must be present at the outset for protection to be denied. If an investor makes an investment and then only later decides to use it contrary to the laws of the host State, the investment will still be covered by the Treaty.

165. Accordingly, the Tribunal rejects the Respondent's submission that, to fall outside the Treaty's protection, all that is required, "is that the illegality is committed in connection with the "use" of the investment".[192] That is too wide. To fall outside protection, the investment must be made to be used for an illegal purpose. The Tribunal also rejects the Claimant's submission that substantive illegality is confined to investment in a prohibited geographic or sectoral area. It includes (at least in the context of this Treaty) investment in a corporation formed with the purpose of carrying out a scheme which is criminal under the laws of the host State: in this case, allegedly, a scheme, illegal under Korean law, to bribe a bank official to help obtain the loans necessary to buy the Building in Beijing.

166. Nor does the Tribunal accept the suggestion by the Claimant that, in the case of bribery, only the bribery of a public official would affect its jurisdiction, because international public policy does not at present extend further.[193] Whether international public policy is so limited or not, it is nothing to the point. The Treaty refers in clear terms to the domestic law of the host State.

[192] Respondent's Post-Hearing Brief, para. 28.
[193] Claimant's Post-Hearing Brief, para. 75.

167. The Claimant also argues that the Respondent must prove causal links between the alleged bribes and the Claimant's investment. He relies, in particular, on a passage from the award in *Sistem v. Kyrgyzstan* cited in *Kim v. Uzbekistan*, and on *Niko v. Bangladesh*.[194]

168. The full passage in *Sistem* reads as follows.

> *43. If an agreement is to be nullified, or benefits under a BIT are to be denied, because the transaction is tainted by corruption, the case needs to be clearly made out. In this context, one important element of the concept of bribery or corruption is the link between the advantage bestowed and the improper advantage obtained. In the present case Sistem had made its investment in 1993. The refurbishment occurred in mid-1995. Sistem lost control of the hotel in December 1995. Only in 1999 did it recover control. No plausible explanation was suggested as to how the refurbishment could be linked to any improper advantage. The only suggestion was that "there is no explanation of the [1999] main agreement if there was no bribe involved."*[195]

169. The alleged bribe in that case was a refurbishment of the Kyrgyz President's guest residence in 1995. The issue the tribunal was addressing was whether this was a bribe at all, or merely "a goodwill gesture of the sort commonly made by companies".[196] The tribunal was unable to see any connection between the refurbishment in 1995 and a contract made four years later, and accordingly concluded the refurbishment had not constituted a bribe at all.

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[194] Claimant's Post-Hearing Brief, para. 68 (citing *Vladislav Kim*; Exhibit CL-230, *Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh and Others*, ICSID Cases Nos. ARB/10/11 and ARB/10/18, Decision on Jurisdiction ("*Niko Resources*")).

[195] Exhibit CL-227, *Sistem Muhendislik Insaat Sanayi ve Ticret A.S. v. Kyrgyz Republic,* ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009 ("*Sistem Muhendislik*"), para. 43.

[196] *Sistem Muhendislik*, para. 41.

170. Similarly, in *Kim v. Uzbekistan*[197] the issue was whether corruption had taken place at all,[198] and in particular whether a bribe had been given "for performance or nonperformance of certain action, which the official must or could have officially performed, in the interests of the person giving a bribe" contrary to Article 211 of the Uzbek Criminal Code. The tribunal determined there could not have been such a bribe, as defined in the Article, because the person supposedly bribed was not in a position to do anything to advantage the claimant.[199] In this case, of course, a requirement that the "advantage" was caused, or was capable of being caused, by the bribe was built into the Uzbek domestic statute.

171. The Tribunal recognises the crucial importance of properly proving any allegation of corruption. However, in the present case, the domestic bribery law alleged to have been breached (the Economic Crimes Act) makes it an offence to promise an officer or employee of a financial institution, such as Woori Bank, or for that person to accept or demand, money or other benefit "in connection with his duties". Thus, the relevant question in the present case is not whether there was a bribe promised or given to Mr. [redacted] which caused the making of the Korean Loans, but merely whether a bribe was promised or given to him in connection with his duties as an officer or employee of the bank.

172. The passage referred to in *Niko* (that is, paragraphs 453 to 455) is even less apposite. After discussing the rights of an innocent party to a contract which has been obtained by the other party bribing the innocent party's agent, the tribunal was pointing out that "the contracts on which the claims in this arbitration are based" had not been procured by bribery.[200]

173. The investment of which the Claimant in this arbitration claims to have been deprived is not the Korean Loans, or the agreements under which they were advanced, it is the Pi Korea Shares. Of course the Pi Korea Shares were not obtained by bribery. They, or rather the company of which they constituted the entire share capital, were not the fruit of bribery but were, allegedly, a vehicle for bribery. The company and its shares were called into

[197] See *Vladislav Kim*, paras. 578-591.
[198] See *Vladislav Kim,* para. 543.
[199] See *Vladislav Kim,* para. 588.
[200] *Niko Resources*, para. 454.

existence, it is said, in order to carry out a corrupt scheme. Indeed, it is alleged that, before the company was incorporated, 30 per cent of those shares were promised as a bribe to Mr. [redacted] to procure his assistance in obtaining the loans.

174. In the Tribunal's judgment, it is in the circumstances of this case not a necessary requirement for the Respondent to prove a causal connection between the (alleged) bribery and the making of the Korean Loans. It is, however, necessary for it to prove that any alleged bribe was made to an officer or employee of a financial institution in connection with his duties at that institution.

H. THE TRIBUNAL'S ANALYSIS: THE FACTS AND CONCLUSIONS

175. There are a number of preliminary observations the Tribunal must make about the facts. First, as the Tribunal has already recorded, the Claimant has been convicted by the Korean Courts of promising a bribe to Mr. [redacted]. The Tribunal, however, does not sit in appeal from the Korean Courts, and it is not bound by their findings. The Tribunal's task is to decide independently whether, and if so what bribery took place and, if bribery did take place, what effect that has on the Tribunal's jurisdiction. In short, the Tribunal has to decide for itself whether there was bribery and, if so, what is the effect of that on these proceedings.[201]

176. Secondly, it is clear from Articles 5 and 6 of the Economic Crimes Act that promising or giving a bribe to an officer or employee of a financial institution is a serious criminal offence in Korea; and Mr. [redacted] was, at least until the Spring of 2008, such an officer or employee.

177. Thirdly, the Tribunal does not need to address the allegation that, in China, the Claimant bribed employees of Woori Bank with improper travel and entertainment expenses. Even if true (as to which the Tribunal makes no finding) the Korean Courts have decided that this did not constitute an offence under Korean law and the Tribunal sees no reason to doubt this. Likewise, the Tribunal does not address the allegations of embezzlement said

[201] In the Tribunal's judgment, the other criminal charges of which the Claimant was convicted are immaterial to the Legality Objection.

to have taken place in 2008. Even if the factual allegations are true and constituted a breach of Korean law (as to which the Tribunal again makes no finding) there is no evidence linking these allegations to the creation of Pi Korea and thus, for reasons discussed above, they would not impact on the legality of the Claimant's initial investment in the company in October 2007.[202] For present purposes, the Tribunal is concerned with the allegations of bribery of Mr. [redacted].

178. Fourth, it is impossible to separate the Pi Korea Shares from the incorporation of Pi Korea as a company. The company was formed, and the shares were issued all on the same day. It was clearly a single operation.[203] If Pi Korea was, at its inception, tainted by corruption, then so were the Pi Korea shares.

179. Fifth, for the purposes of considering the Legality Objection, the Tribunal will assume that the acts and omissions of Woori Bank are attributable to the Respondent. That is a proposition which is both disputed and doubtful, but the Tribunal does not need to make any finding and, for present purposes, will take the view most favourable to the Claimant.

180. A number of basic facts are not in dispute.

(a) At all material times until the Spring of 2008, Mr. [redacted] was Head of the Real Estate Finance Team of the Trust Business Department of Woori Bank, acted as chairman of its Real Estate Working Committee, and served as a member of the Bank's Investment Committee.

(b) In December 2006, the Claimant purchased five AIG life insurance policies from Mrs. [redacted].

(c) Not later than mid-2007, the Claimant and Mr. [redacted] decided to fund their acquisition of the Building in Beijing with loans from Korean financial institutions, and by

[202] Likewise, the Tribunal is not concerned with the allegation that, in 2010, the Claimant and his wife attempted to dilute Woori Bank's security.

[203] See the share certificates at Exhibit C-055.

September of that year decided to incorporate a Korean company (Pi Korea) for that purpose.

(d) Some time in September 2007, the Claimant, Mr. [redacted] and Mr. [redacted] met in Seoul and, during that meeting, Mr. [redacted] offered Mr. [redacted] 30 per cent of the shares in Pi Korea.

(e) Pi Korea was in fact incorporated on 30 October 2007 with 5,000 shares all held by the Claimant.

(f) In the absence of Mr. [redacted], Woori Bank's Real Estate Working Committee declined to support the project but, on 29 November 2007, with Mr. [redacted] in the chair, it reversed that decision, sending the proposal to the Investment Committee. That committee, the following day, with Mr. [redacted] in attendance as a member, approved the proposal.

(g) On 27 December 2007, a week after a loan agreement had been made with Korea Life Assurance, the Claimant transferred 30 per cent of the Pi Korea Shares to Mr. [redacted].

(h) On 27 March 2008, the Claimant, on behalf of Pi Korea, signed a Project Management Agreement with Mr. [redacted]'s company, Wealth Care, under which the latter was unconditionally promised a fee of KRW5.6 billion in respect of services that might or might not ever be rendered [redacted].

181. These were all matters that were addressed during the course of the Claimant's interviews with the SID.

182. The Tribunal does not find the evidence that the Claimant gave during the arbitration about the content of those interviews at all convincing. The Tribunal can understand that hours of interrogation, even with the subject's lawyer present, may be exhausting and extremely stressful, and may sometimes lead people into making false admissions. It is also apparent that the translation of the interrogation record here into English is far from perfect.

However, the Claimant's answers to the SID were not only broadly consistent over more than one interview, the story they tell is also broadly consistent with the facts proved and on occasion admitted, in this arbitration. Overall, the Tribunal is satisfied that the gist of what was said during the interview emerges from the English translation, and that what the Claimant is recorded as telling the SID was substantially true.

183. The Tribunal has no doubt that, despite his protestations to the contrary, the Claimant bought the insurance policies from Mrs. [redacted] at least in part in order to ingratiate himself and Mr. [redacted] with someone from whom they knew they might want help at some later stage for a real estate project in China. The Claimant's explanations in his witness statement (set out at paragraph 70 above), and in his oral evidence in response to a question from the Tribunal,

> *"Mr. Drymer:… How did you meet Mrs. [redacted], and how did you happen to learn that she sold the life insurance that you needed?*
>
> *A: At that time, the wife of Mr. [redacted], Mrs. [redacted], came to our office, because that's what they do when they sell policies; they pay visits to the clients. So they came to our company, and they explained their product to us. So we said it was not bad; it just happened that we needed that policy. That's why we bought the policy."*[204]

stretch credulity to breaking. That, apparently fortuitously, Mrs. [redacted], the wife of a senior official of Woori Bank with whom the Claimant was already dealing, happened to canvas the Claimant's office for business at that time, and had just the insurance or insurances he needed to buy, was a happy set of coincidences is not a suggestion the Tribunal is able to accept.

184. Even if it was Mr. [redacted] who promised Mr. [redacted] 30 per cent of the Pi Korea shares, this was plainly the promise of a bribe to a man whom he and the Claimant needed to help them to obtain the loans they required to buy the Building. It was also clearly a promise in connection with Mr. [redacted]'s duties at Woori Bank. If it matters, it is also clear that the

[204] Transcript, Day 2, page 57.

promise was made in Korea. The Claimant's description to the SID of what happened is entirely credible and consistent with other elements of the evidence; his attempts to distance himself from Mr. [redacted]'s offer and to suggest that it was unconnected with obtaining loans are not. The Tribunal is satisfied that Mr. [redacted] told the Claimant they must give Mr. [redacted] a share or "he wouldn't get things going". The Tribunal is also satisfied that the shares transferred to Mr. [redacted] were intended for Mr. [redacted], as the Claimant told the SID. It may be that these arrangements were subsequently changed,[205] and Mr. [redacted] was paid off under the Project Management Agreement instead.[206] However, the giving and receiving of the promise of the shares, made in September 2007, involving an officer of Woori Bank, were clear breaches of the Economic Crimes Act, something which is not changed by the Korean Prosecutor's decision to indict the Claimant and Mr. [redacted] in respect of a bribe made by means of the Project Management Agreement rather than the earlier promise of shares.

185. As for the Project Management Agreement itself, the Tribunal accepts that the Claimant told the SID that Mr. [redacted] "wanted to get the payment in return for the loan," and that this was true.

186. From all this it is plain to the Tribunal that the relationship between the Claimant and Mr. [redacted] on the one side, and Mr. [redacted] on the other, was a corrupt one. To effect their corrupt purpose the Claimant and Mr. [redacted] used Pi Korea, promising to pay bribes to Mr. [redacted] so that he would use his position at Woori Bank to help them obtain the Bank's financial support.

187. In the Tribunal's judgment, Pi Korea was a company formed for the purposes of being used to obtain loans from Korean financial institutions by bribery. To echo the tribunal in *Fraport*, bribing Mr. [redacted] was central to the success of the project. It is unreal to regard Pi Korea as a company with a legitimate purpose or use (investment in real estate) to which any taint of corruption was only collateral. At the time of incorporation, it was intended

[205] The point is unclear. At one stage the Claimant is recorded as telling the SID that Mr. [redacted] wanted the Project Management Agreement payment, and to get the shares later.

[206] If, as the Claimant asserted in evidence, the promise to give Mr. [redacted] 30 per cent of the Pi Korea Shares was "dropped", it was only dropped in the sense that it was replaced by a promise to pay money.

that 30 per cent of the Pi Korea shares would form, or would form part of, the bribe to Mr. [redacted]. The fact that the plan may have later changed and, instead of shares, Mr. [redacted] was given a contract under which he was to be paid the equivalent of over USD 5 million for, in effect, doing nothing, does not retrospectively remove the taint from the formation and use of the company and the issue of its share capital. Pi Korea was created as part of, and in order to further, a criminal enterprise: procuring loans from Korean financial institutions by bribery.

188. As to the Claimant's causation argument, the asset that the Claimant says was expropriated was the Pi Korea Shares not the Korean Loans.[207] Whilst it might matter whether bribing Mr. [redacted] alone would, or might, not have been sufficient to cause Woori Bank to arrange and (in effect) underwrite the Korean Loans as regards whether the Korean Loans were voidable, for the reasons given above it is immaterial to the issue here, which is whether Pi Korea was created and its share capital was issued and used, for the purpose of carrying out a criminal scheme.

189. However, the fact that the first meeting of the Real Estate Working Committee (from which Mr. [redacted] was absent) rejected the project, whereas the second meeting (which Mr. [redacted] chaired) accepted it suggests that, without his assistance, Woori Bank would never have helped the Claimant and Mr. [redacted] to secure the financing the project required. On any view, Mr. [redacted] assisted the Claimant and Mr. [redacted], and thus Pi Korea, to obtain the Korean Loans, which were of course made on terms that required Woori Bank to take them over as lender if they were not repaid on time, as indeed it did. Moreover, the fact that the Claimant was prepared to enter into the purported Project Management Agreement, which promised Mr. [redacted] KWR5.6 billion (that is about USD 5.13 million) just days after the first loan agreement was made strongly suggests that he and Mr. [redacted] believed that Mr. [redacted] had in fact procured the Korea Life loan for Pi Korea. Indeed, it seems obvious that this is what they did believe, and that they were right. Accordingly, if it mattered whether

[207] See Claimant's Memorial, paras. 243 and 245: "Mr. Min is a natural person of Chinese nationality who invested in the territory of Korea in the form of his ownership of the Pi Korea Shares." "He has therefore made an investment in Korea that falls within the definition of "investment" under Article 1(1) of the Treaty, over which the Tribunal has jurisdiction." See also Claimant's Reply Memorial, paragraph 265.

the bribery more likely than not caused the making of the Korean Loans, the Tribunal holds that it did.

190. Turning to the issue of estoppel and acquiescence, the first point to make (or rather repeat) is that the asset for which the Claimant claims protection under the Treaty is not the Korean Loans, or the agreements pursuant to which they were made, but the Pi Korea Shares.

191. For the Respondent to be precluded from relying on the violation of its law as a jurisdictional defence, the Tribunal would have to find that the Respondent knowingly overlooked or endorsed the use for which Pi Korea and the Pi Korea Shares were created: that is the establishment of a company to effect a scheme to secure loans by bribery. So far from endorsing that scheme, the Respondent investigated, prosecuted and punished the Claimant, Mr. [redacted] and Mr. [redacted] for bribery. For this purpose it does not matter that the actual act for which they were indicted was the final promise to pay KRW5.6 billion rather than the original promise of 30 per cent of the Pi Korea Shares. For both formed parts of a single continuous corrupt relationship. In the Tribunal's judgment, neither Woori Bank's extending the loans nor enforcing them involved any endorsement of or acquiescence in the illegality involved in setting up Pi Korea and issuing the Pi Korea shares.

192. The Tribunal should perhaps add, in relation to the suggestion that failing to void the agreements for the Korean Loans constituted endorsement of, or acquiesce in, that illegality, that it seems likely that voiding them would have meant also voiding the charge over the Pi Korea Shares which secured those loans. This would have made the task of recovering the money lent to Pi Korea more difficult, if not impossible, as Woori Bank would have lost its security. Principles of fairness do not require a State to choose between abandoning the best chance of recovering some part of the losses caused or contributed to by an investor's criminal act, or being accused of endorsing, or acquiescing, in that act.

193. The Claimant also suggests that:

> *"Even assuming that the alleged illegality did occur, Mr. Min has already been fully penalized for it. It would be improper and unfair to*

punish him a second time for that same illegality by denying him Treaty protection."[208]

However, there is no warrant in the Treaty for overlooking the fact that the Claimant's investment was not used in accordance with the applicable laws of the Republic of Korea as required. Moreover, the fact that the Claimant has already been punished by law for bribery does not somehow buy him the right to have the Pi Korea Shares treated as an investment protected under the BIT. There is nothing disproportionate in denying the Claimant Treaty protection for an investment made for criminal purposes.

I. THE TRIBUNAL'S DECISION ON JURISDICTION

194. For the reasons discussed above, the Tribunal concludes that the Pi Korea Shares were issued, and the Claimant's investment was made, for use in a scheme that was criminal under Korean law and, accordingly, they do not fulfil the requirements set out in Article 1 to constitute investments protected by the Treaty. Therefore, the Tribunal has no jurisdiction in this case, which must be dismissed. Accordingly, all other issues of jurisdiction and on the merits fall away.

VII. COSTS

A. THE CLAIMANT'S COST SUBMISSIONS

195. In his submissions on costs, the Claimant argues that under ICSID Arbitration Rule 28 the Tribunal has the discretion to order that one party bear all the costs of the arbitration, and that tribunals have consistently applied the "*costs follow the event*" principle in exercise of this authority.[209] The Claimant submits that the Tribunal should award Mr. Min all of his costs.

196. First, Mr. Min is entitled to his costs in defeating Korea's unsuccessful Rule 41(5) objections and request for bifurcation (totalling USD 522,099.50 and RMB 724,990), and

[208] Claimant's Post-Hearing Brief, para. 76.

[209] Claimant's Cost Submissions, paras. 4-5.

should the Tribunal find a treaty breach, the Respondent should pay for all of his costs as set out below.[210] Second, the Respondent's conduct in this arbitration also calls for a costs award in favour of the Claimant as the Respondent pursued unsuccessful dilatory applications (such as the Rule 41(5) objection and bifurcation request), and the Respondent refused to agree with several of Claimant's proposals to facilitate the efficient conduct of proceedings, such as the Respondent's selective, incomplete and belated document production and the Claimant's restricted access to counsel during his incarceration.[211] Moreover, the Claimant submits that Korea unreasonably objected to Mr. Min's remote testimony due to his inability to travel (due to official constraints) and even acted unreasonably in the logistical planning of Mr. Min's remote testimony.[212]

197. The Claimant has submitted the following claims for legal and other costs (excluding advances made to ICSID):

CLAIMANT'S COSTS SCHEDULE

PART A—LEGAL REPRESENTATION

	Professional Fees	Expenses	Total
King & Spalding LLP	USD 6,958,431.00	USD 150,086.98	USD 7,108,517.98
Hui Zhong Law Firm	RMB 11,229,276.09	RMB 252,682.38	RMB 11,481,958.47
KLP Baker McKenzie	USD 1,050,024.00	USD 82,029.20	USD 1,132,053.20
DongIn Law Group	USD 425,280.00	RMB 31,002.27 + KRW 4,170,700.00	USD 425,280.00 + RMB 31,002.27 + KRW 4,170,700.00
Counsel Total	***USD 8,433,735.00 + RMB 11,229,276.09***	***USD 232,116.18 + RMB 283,684.65 + KRW 4,170,700.00***	***USD 8,665,851.18 + RMB 11,512,960.74 + KRW 4,170,700.00***

[210] Claimant's Cost Submissions, paras. 7-10; 24-25.

[211] Claimant's Cost Submissions, paras. 11-17.

[212] Claimant's Cost Submissions, paras. 19-20.

PART B—EXPERTS

	Professional Fees (USD)	Expenses (USD)	Total (USD)
[redacted]	146,118.77	17,456.85	163,575.62
BRG	811,357.44	21,533.76	832,891.20
Professor [redacted]	50,300.00	3,132.00	53,432.00
Professor [redacted]	71,300.52	14,017.76	85,318.28
Experts Total	***USD 1,079,076.73***	***USD 56,140.37***	***USD 1,135,217.10***

PART C—WITNESSES

	Expenses
Mr [redacted]	KRW 135,452,950
Ms [redacted]	KRW 135,452,950

Witnesses Total	***KRW 270,905,900***

PART D—MISCELLANEOUS EXPENSES

Payments to ICSID	
Filing fee	USD 25,000
Advance on costs	USD 275,000
Other Costs	
Agreed hearing bundle for Tribunal and witnesses - printing and hyperlinking costs[40]	RMB 14,788.28 + USD 7,708.97
Agreed hearing bundle for Tribunal and witnesses – courier charge (from Beijing to Singapore)[28]	RMB 26,378.79
Chinese transcription services	RMB 47,931.65
Remote hearing venue costs[41]	RMB 93,294.27
Consultation/potential experts	USD 50,000
Other Expenses Total	***USD 357,708.97 + RMB 182,392.99***

GRAND TOTAL: USD 10,158,777.25 + RMB 11,695,353.73 + KRW 275,076,600

198. The Claimant asserts that these costs are reasonable as the case involved novel and complex issues that spanned over twenty years, including complicated financial transactions involving the Korean Loans and Pi Korea Shares. Additionally, the case touched upon difficult issues of Korean and international law involving numerous consultations with potential experts and two legal expert witness evidence as well as a quantum and real estate

evaluation. Moreover, there were extensive legal and factual briefs from both Parties that totalled over 1,400 pages and a 7-day period.[213]

199. In his reply submission on costs, the Claimant notes that the Parties agree that the Tribunal has discretion to award costs and tribunals have generally applied the "*cost follows event*" principle, taking into account various factors like the Parties' conduct.[214] The Claimant, however, disagrees with the Respondent's proposed application of the concept, especially Korea's contention that the alleged reasonableness or good faith in bringing the unsuccessful applications should override the "*cost follows event principle*."[215] If the Tribunal concludes that Korea breached the Treaty, the Claimant should be awarded all his costs as the successful party, even if he does not prevail on every claim.[216] The Claimant also objects to the Respondent's various complaints, including that the Claimant refined his claims and requests for relief as the arbitration progressed and the accusations of meritless procedural manoeuvres.[217] The Claimant takes the position that a holistic approach should be used when assessing the parties' relative success, as opposed to a pure mathematical approach based on the number of successful claims, which the Claimant argues is more in line with prior ICSID cases.[218]

B. THE RESPONDENT'S COST SUBMISSIONS

200. The Respondent submits that pursuant to the ICSID Convention Article 61(2) and Rule 28(1)(b) of the 2006 ICSID Arbitration Rules, the Tribunal has broad discretion to decide that related costs for a proceeding can be borne by one party unless there is an agreement between the Parties on costs.[219] Moreover, according to the Respondent, the Parties agree that tribunals typically consider the "costs follow the event" principle and consider various factors in exercising their discretion, including "procedural misconduct, the existence of a frivolous claim or an abuse of the [investment arbitration] process or of the international

[213] Claimant's Cost Submissions, paras. 21-24.
[214] Claimant's Reply Cost Submissions, para. 1.
[215] Claimant's Reply Cost Submissions, para. 2.
[216] Claimant's Reply Cost Submissions, para. 3.
[217] Claimant's Reply Cost Submissions, para. 7, *et seq*.
[218] Claimant's Reply Cost Submissions, para. 8.
[219] Respondent's Cost Submissions, paras. 4-8. Respondent's Reply Cost Submissions, para. 4.

investment protection regime" as well as the reasonableness of the parties' legal costs and their proportionality.[220]

201. In its submission on costs, the Respondent asserts that, following the "costs follow the event" rule, the Claimant should bear all the costs and expenses of these proceedings, including the Respondent's legal fees and expenses, plus interest at a Tribunal-determined commercial rate, compounded monthly, if the Tribunal dismisses the Claimant's claims on jurisdictional grounds or the merits.[221] This approach is warranted as the Claimant should not have brought this meritless claim in the first place, and the Claimant acted unreasonably during the proceedings, including abandoning many of his original claims, introducing new arguments at the hearing, misrepresenting investment-treaty jurisprudence, misinterpreting unambiguous treaty provisions and misapplying the law governing the dispute.[222]

202. If the Claimant succeeds on jurisdiction and merits, the Respondent contends that the Tribunal should exercise its discretion to apportion arbitration costs depending on the relative success of the parties[223] and the conduct throughout the proceedings.[224] Specifically, the Respondent argues that Claimant's case has shifted, he has engaged in a series of meritless procedural manoeuvres, and the Claimant has deliberately withheld key financial information.[225] The Respondent asserts that in this scenario, it should be entitled to recover at least part of its costs from the Claimant, or at a minimum, the Respondent should not be required to bear the Claimant's unjustified and disproportionate costs.[226]

203. The Respondent has submitted the following claims for legal and other costs up to and including 19 February 2024 (excluding advances made to ICSID):[227]

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[220] Respondent's Reply Cost Submissions, para. 5.

[221] Respondent's Cost Submissions, paras. 20, 22-23. Respondent's Reply Cost Submissions, para. 14.

[222] Respondent's Cost Submissions, paras. 23-27. Respondent's Reply Cost Submissions, paras. 11-13.

[223] *See* Respondent's Cost Submissions, para. 31.

[224] Respondent's Cost Submissions, para. 30.

[225] Respondent's Cost Submissions, paras. 32-42.

[226] Respondent's Cost Submissions, para. 30. Respondent's Reply Cost Submissions, para. 15.

[227] Respondent's Reply Cost Submissions, Appendix 1 (excluding Part 4- "Korea's share of fees and expenses of the Tribunal and ICSID).

Allen & Overy- Fees	KRW 2,889,029,499.00
Allen & Overy – Other costs and disbursements	KRW 90,605,919.50
Yulchon – Fees	KRW 1,622,457,300.00
Yulchon – Other costs and disbursements	KRW 122,781,441.00
Fees, Costs and disbursements of independent experts	KRW 893,241,711.00
Other costs incurred by Korea	KRW 29,112,200.00
TOTAL AMOUNT	KRW 5,647,228,070.50

204. Korea submits that its costs were reasonably incurred and reasonable in amount, given the fact-intensive nature of the case that spanned over a decade, requiring multiple witnesses and experts and a seven-day hearing, and the substantial sum at stake. In fact, citing to a 2021 study of costs incurred in over 400 investor-State cases, Korea nots that the mean costs incurred by respondent States where a similar sum was claimed was USD 4.9 million (as compared to Korea's ~USD 4.2 million).[228] By contrast, Korea submits that the costs claimed by the Claimant (close to USD 12 million) are unreasonable and almost three times Korea's costs. [229] As a comparison, the Respondent notes the Claimant's costs are more than double the average costs spent by other claimants with similarly valued treaty claims.[230]

C. THE TRIBUNAL'S DECISION ON COSTS

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

[228] Respondent's Cost Submissions, para. 19 (citing RL-254).

[229] Respondent's Reply Cost Submissions, paras. 6-9.

[230] Respondent's Reply Cost Submissions, para. 6 (citing RL-254).

> *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.*

206. 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.

207. The Tribunal agrees with the Parties that this is a case in which costs should, at least broadly speaking, follow the event.

208. The Respondent has succeeded in repelling the Claimant's claim altogether by prevailing on the issue of jurisdiction. Accordingly, all other things being equal, the Respondent would be entitled to recover all its own costs, and the whole of its share of the costs of the arbitration, from the Claimant.

209. However, at an earlier stage the Respondent substantially failed in its Rule 41(5) objection, and also failed in its application for bifurcation. In the Tribunal's judgment, that these two applications may have been made in good faith, and not unreasonably, does not affect the fact that they required the Claimant to incur costs, and that they proved unsuccessful.

210. That being so, it is appropriate to make the Respondent pay both its own and the Claimant's costs of those two applications as well as the costs of arbitration attributable to those two applications, and for this to be effected by deducting the costs to be borne or paid by the Respondent from the Respondent's total claim.

211. The Claimant says that it spent USD 522,099.50 and RMB 724,990 on those applications and, for the reasons already given, those sums are payable by the Respondent to the Claimant and so need to be deducted from the Respondent's total claim for costs.

212. The Respondent has not identified how much it spent on these two applications. However, as on average the Respondent's costs are about one-third of those of the Claimant, it is

reasonable to infer that they amounted to the equivalent of about USD 175,000 and RMB250,000. These amounts thus also need to deducted from the Respondent's total claim.

213. The total costs of the arbitration, including the fees and expenses of the Tribunal, ICSID's administrative fees and direct expenses, amount to (in USD):

Arbitrators' fees and expenses	
Mr. Ian Glick KC	153,433.33
Mr. Stephen Drymer	187,728.20
Prof. Donald McRae	104,895.08
ICSID's administrative fees	178,000.00
Direct expenses (estimated)	166,180.92
Total	**790,237.53**

214. The above costs have been paid out of the advances made by the Parties in equal parts.[231] As a result, each Party's share of the costs of arbitration amounts to USD 395,118.77.

215. A modest proportion of the costs of the arbitration, totalling USD 95,860.85, is attributable to the two applications referred to above, as follows:

	Rule 41(5) Objection Costs (USD)	**Bifurcation Costs (USD)**
Tribunal Fees and Expenses	**46,781.25**	**21,206.25**
ICSID Administrative Fees	15,750.00	8,750.00
Direct Expenses	3,373.35	--
TOTAL	**USD 65,904.60**	**USD 29,956.25**

[231] The remaining balance will be reimbursed to the parties in proportion to the payments that they advanced to ICSID.

216. The Respondent's total claim amounts to KRW 5,647,228,070.50 plus USD 395,118.77 (for the Respondent's share of the costs of arbitration). However, for the reasons set out above, from these sums must be deducted the sums to be borne or paid by the Respondent related to the two applications, namely USD 522,099.50 and RMB 724,990 (the Claimants' costs for the two applications); USD 95,860.85 (portion of the costs of arbitration attributable to the two applications); and USD 175,000 and RMB 250,000 (the Respondent's costs for the two applications).[232]

217. Accordingly, the Tribunal orders the Claimant to pay the Respondent the net balance, namely KRW 4,912,601,421.53.

218. The Tribunal has come to the conclusion that interest should be paid in accordance with the foregoing on the net balance, totalling KRW 4,912,601,421.53, which shall commence to run 45 days after the date of the Award at the Secured Overnight Financing Rate (SOFR) on a simple interest basis. The Tribunal does not think that the Respondent has justified awarding interest compounded monthly.

VIII. AWARD

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

(1) the Tribunal lacks jurisdiction in respect of the Claimant's claims (except in respect of costs) and, accordingly, except in respect of costs, they are all dismissed;

(2) as regards costs, the Claimant shall pay to the Respondent the sums of KRW4,912,601,421.53, being the net balance of the costs determined by the Tribunal

[232] To make this calculation, the Tribunal has first deducted USD 792,960.35 owed by the Respondent to Claimant from the USD 395,118.77 owed from the Claimant to the Respondent, and then converted the remaining amounts owed to the Respondent into KRW. To convert the USD and RMB amounts to KRW, the Tribunal is using the exchange rates as at the date of the Award from Bloomberg, which was the source of the exchange rate used by the Respondent in its cost submissions. Respondent's Reply Costs Submissions, n. 4; Respondent's Cost Submissions, n. 16 (citing Exhibit R-126, Bloomberg, USD to KRW exchange rate). The rates used are USD 1 equals KRW 1,379.37 and RMB 1 equals KRW 190.6234.

to be payable by the Respondent to the Claimant and by the Claimant to the Respondent; and

(3) simple interest shall be payable at the Secured Overnight Financing Rate on any sums unpaid 45 days after the date of this Award, to accrue until payment thereof.

Mr. Stephen Drymer
Arbitrator

Date: 30 May 2024

Prof. Donald M. McRae
Arbitrator

Date: 30 May 2024

Mr. Ian Glick KC
Arbitrator

Date: 30 May 2024