I. INTRODUCTION AND PARTIES

1. This case concerns a dispute submitted to the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") by Ansung Housing Co., Ltd. ("Ansung" or "Claimant"), a privately-owned company incorporated under the laws of the Republic of Korea, against the People's Republic of China ("China" or "Respondent"). Claimant and Respondent shall be referred to collectively as the "Parties." Claimant and Respondent shall be each referred to as a "Party."

2. The dispute relates to Ansung's investment in a golf course and condominium development project in Sheyang-Xian, China. This dispute was submitted to ICSID on the basis of the Agreement Between the Government of the Republic of Korea and the Government of the People's Republic of China on the Promotion and Protection of Investments that entered into force on December 1, 2007 ("China-Korea BIT" or "Treaty"), and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which entered into force on October 14, 1966 ("ICSID Convention").

3. Before the First Session, China filed "Respondent's Objection Pursuant to ICSID Arbitration Rule 41(5)" ("Rule 41(5) Objection" or "41(5) Objection"), contending that Ansung's claim "is manifestly without legal merit." Rule 41(5) of the ICSID Rules of Procedure for Arbitration Proceedings ("Arbitration Rules" or "ICSID Arbitration Rules" or "Rules") provides that the Tribunal "after giving the parties the opportunity to present their observations on the objection, shall, at the first session or promptly thereafter notify the parties of its decision on the objection."

4. The Tribunal conducted the First Session and a hearing on the Rule 41(5) Objection on December 14, 2016 ("Rule 41(5) Hearing" or "Hearing"). This Award embodies the Tribunal's decision upholding China's Rule 41(5) Objection, which the Tribunal relayed to the Parties in summary form at the end of the Hearing. Following the letter and spirit of Rule 41(5), the Tribunal determined to provide an oral ruling to save the Parties unnecessary time and resources post-Hearing.

II. PROCEDURAL HISTORY

A. Notice of Intent

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

B. Request for Arbitration

6. On October 7, 2014, ICSID received an electronic copy of a request for arbitration dated October 7, 2014 from Ansung against China together with Exhibits C-001 through C-008, which was supplemented by Claimant's letters of October 27, 2014 and November 3, 2014 ("RFA" or "Request" or "Request for Arbitration"). The ICSID Secretariat received a hard copy of the Request on October 8, 2014.

7. On November 3, 2014, Ansung submitted a letter to the ICSID Secretary-General ("Secretary-General") in response to her request for additional information on the claim.

8. On November 4, 2014, the Secretary-General notified the Parties that she registered the Request in accordance with Article 36(3) of the ICSID Convention. The Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Rule 7(d) of ICSID's Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings ("ICSID Institution Rules" or "Institution Rules").

C. Tribunal Constitution

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

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

10. On February 4, 2014, Dr. Michael Pryles, an Australian national, accepted his appointment by Claimant as arbitrator, and Mr. J. Christopher Thomas, Q.C., a Canadian national, accepted his appointment by Respondent as arbitrator.

11. On December 3, 2015, the Parties were notified that Mr. J. Christopher Thomas, Q.C. withdrew his acceptance as arbitrator.

12. On July 13, 2016, pursuant to Article 38 of the ICSID Convention, Claimant filed a request for the Chairman of the Administrative Council to appoint the arbitrators not yet appointed in this case.

13. On July 25, 2016, Professor Albert Jan van den Berg, a Dutch national, accepted his appointment by Respondent as arbitrator.

14. On September 2, 2016, Professor Lucy Reed, a U.S. national, accepted her appointment by the Chairman of the Administrative Council, in accordance with Article 38 of the ICSID Convention, as presiding arbitrator.

15. On September 2, 2016, the Secretary-General, in accordance with ICSID Arbitration Rule 6(1), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. The Secretary-General designated Ms. Geraldine R. Fischer, ICSID Legal Counsel, to serve as Secretary of the Tribunal.

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

16. On September 15, 2016, China filed its Rule 41(5) Objection together with Legal Authorities RLA-001 through RLA-020. On September 27, 2016, following the Parties' exchanges of correspondence, the Tribunal set the pleading schedule for the Rule 41(5) Objection.

17. On October 28, 2016, Ansung filed its First Observations on the Rule 41(5) Objection ("Claimant's First Observations") together with Legal Authorities CLA-001 through CLA-016.

18. On November 16, 2016, China filed its Observations on its Rule 41(5) Objection ("Respondent's Observations") together with Legal Authorities RLA-021 through RLA-040.

19. On December 2, 2016, Ansung filed its Second Observations on the Rule 41(5) Objection ("Claimant's Second Observations") together with Legal Authorities CLA-017 through CLA-024.

20. In accordance with ICSID Arbitration Rule 13(1), the Tribunal held a First Session and a Rule 41(5) Hearing with the Parties on December 14, 2016 in Singapore.

21. In addition to the Members of the Tribunal and the Secretary of the Tribunal, the following persons were present on behalf of the Parties at the First Session and Rule 41(5) Hearing:

For Claimant:

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

For Respondent:

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

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

proceeding. Among other things, the Parties confirmed that the Tribunal was properly constituted[2] and agreed to the following procedural matters:

a) Arbitration Rules: The applicable Arbitration Rules are those in effect from April 10, 2006.

b) Language: The procedural language is English.

c) Publication: "The parties consent to ICSID publication of the award and any order or decision issued in the present proceeding. For the avoidance of doubt, the parties do not consent to the publication by ICSID of pleadings, transcripts of hearings or any other document exchanged in the arbitration."[3]

23. In light of this Award terminating the arbitration, the Tribunal did not issue Procedural Order No. 1.

E. Post-Hearing Procedure

24. On January 17, 2017, as directed by the Tribunal at the end of the First Session, each Party submitted a Statement of Costs, with the Claimant submitting Legal Authorities CLA-025 through CLA-028 with its Statement of Costs.

25. On January 19, 2017, Respondent objected that Claimant's Statement of Costs was a submission on costs rather than the costs statement requested by the Tribunal. On January 23, 2017, the Tribunal authorized Respondent to file any responsive submissions. Respondent filed its Observations on Claimant's Submission on Costs ("Respondent's Observations on Costs") together with Legal Authorities RLA-041 through RLA-046 on February 3, 2017.

26. On February 6, 2017, Claimant sought permission to respond to Respondent's Observations, to which Respondent objected on February 7, 2017. On February 8, 2017, the Tribunal authorized Claimant to file its response by February 15, 2017. Claimant

[2] Hearing Tr. 6:6-16.

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

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

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

III. LEGAL TEXTS

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

> (5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.
>
> (6) If the Tribunal decides that the dispute is not within the jurisdiction of the Centre or not within its own competence, or that all claims are manifestly without legal merit, it shall render an award to that effect.

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

> 1. For the purposes of this Article, an investment dispute is a dispute between one Contracting Party and an investor of the other Contracting Party that has incurred loss or damage by reason of, or arising out of, an alleged breach of this Agreement with respect to an investment of an investor of that other Contracting Party.
>
> …
>
> 3. In case of international arbitration, the dispute shall be submitted, at the option of the investor, to:

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

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

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

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

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

…

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

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

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

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

> (d) the dispute-settlement procedures set forth in paragraph 3 (a) to (b) of this Article which the investor concerned will seek.
>
> …
>
> 7. Notwithstanding the provisions of paragraph 3 of this Article, an investor may not make a claim pursuant to paragraph 3 of this Article if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge that the investor had incurred loss or damage.[4]

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

> 3. Each Contracting Party shall in its territory accord to investors of the other Contracting Party and to their investments and activities associated with such investments by the investors of the other Contracting Party treatment no less favourable than that accorded in like circumstances to the investors and investments and associated activities by the investors of any third State (hereinafter referred to as "most-favoured-nation treatment") with respect to investments and business activities [defined in paragraph 1 as "the expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investments"], including the admission of investment.
>
> ….
>
> 5. Treatment accorded to investors of one Contracting Party within the territory of the other Contracting Party with respect to access to the courts of justice and administrative tribunals and authorities both in pursuit and in defence of their rights shall not be less favourable than that accorded to investors of the latter Contracting Party or to investors of any third State.[5]

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

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

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

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

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

IV. FACTUAL BACKGROUND

32. For purposes of ruling on Respondent's Rule 41(5) Objection, the Tribunal assumes the truth of the facts alleged by Claimant. The factual background set out below therefore comes from Ansung's Notice of Intent, Request for Arbitration, First and Second Observations on the Rule 41(5) Objection, and oral submissions at the Rule 41(5) Hearing.

33. In April 2005 and April 2006, Mr. Jin Woo Pae, Ansung's CEO, attended several presentations held in Korea by representatives from Yancheng-Shi, China, where he learned about possible investment opportunities to develop and operate a golf course in the Yancheng-Shi district.[7]

34. On or around September 13, 2006, Ansung identified a 1,500 *mu* parcel of land[8] for a project in Sheyang-Xian (a sub-district of Yancheng-Shi) that had been partially developed by a joint venture company called "Sheyang Seashore International Golf Course Co. Ltd." ("Sheyang Seashore").[9]

35. In November 2006, Ansung's management decided to build a golf resort in Sheyang-Xian by acquiring the Sheyang Seashore joint venture. Ansung planned to build a 27-hole golf course and related facilities on 3,000 *mu*, which included Sheyang Seashore's 1,500 *mu* land and an additional 1,500 *mu* in adjacent lands. Ansung filed an application with the Communist Party of the Sheyang Harbor Industrial Zone Administration Committee ("Committee") to obtain an investment approval from the local Sheyang-Xian government, which application attached a report outlining Ansung's overall scheme for a golf course project with more than 18 holes and not more than 36 holes.[10]

36. On December 12, 2006, Ansung entered into an Investment Agreement with the Committee "under which the Committee acknowledged that the related authorities of

[7] RFA, para. 21.

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

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

[10] RFA, para. 27 and n. 10.

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

37. As requested by the Committee, on January 16, 2007, Ansung's officers briefed local government officials on Ansung's "master plan" to build a 27-hole golf course on 3,000 *mu*.[14] On January 29, 2007, Ansung's officers met with Committee Secretary You Dao-jun to ask whether the local government could provide the entire 3,000 *mu* at the outset, but Secretary You informed the officers that "the government would provide the additional 1,500 *mu* for the second phase immediately after the completion of the first phase."[15]

38. On March 5, 2007, Ansung commenced construction work for the first phase of the project. Throughout the work, blueprints and concept drawings for the 27-hole golf course and related facilities were posted in front of the construction site.[16]

39. In March 2007, shortly after initiating construction of the first phase, Ansung observed that a nearby park called "Sheyang Island Park," which was to be operated by a Chinese company, was apparently being developed as a golf course.[17]

40. On April 5, 2007, Ansung's CEO, Mr. Jin Woo Pae, expressed his concern to Committee Secretary You Dao-jun about "the illegal development of a golf course in Sheyang Island

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

[12] RFA, n. 18.

[13] RFA, para. 31.

[14] RFA, para. 32.

[15] RFA, para. 33.

[16] RFA, para. 34.

[17] RFA, para. 36.

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

41. On or around June 27, 2007, when Ansung requested the 300 *mu* necessary for the related facilities for the first phase, Secretary You explained that China had changed its real estate policy so the Committee could no longer provide the land at the price stipulated in the Investment Agreement and Ansung would have to apply for land use rights through a public sale at higher prices. He informed Ansung that the joint venture would not be eligible to develop a clubhouse and condominiums on this 300 *mu* without establishing a Chinese subsidiary.[21]

42. On July 10, 2007, after further discussions with Secretary You, Ansung established a Chinese company, "Sheyang Mirage Field Co., Ltd." ("Mirage"), for the sole purpose of building a clubhouse and condominiums on the 300 *mu* as part of the first phase.[22]

43. On May 20, 2008, the Committee requested Ansung, through Mirage, to agree to pay a substantially higher price for the 300 *mu*. Given its already substantial investment and the importance of a clubhouse, "despite the Committee's outright repudiation of the Investment Agreement, Ansung had no alternative but to build the clubhouse" by paying the higher price.[23]

[18] RFA, para. 37.
[19] *Ibid.*
[20] RFA, para. 38.
[21] RFA, paras. 39-41.
[22] RFA, para. 43.
[23] RFA, para. 44.

44. On May 27, 2008, the Sheyang-Xian government awarded Ansung the land use rights for 100 *mu* at a price higher than originally agreed, and refused to provide the further 200 *mu*. This left Ansung unable to develop the condominiums.[24]

45. On June 30, 2009, with the first phase almost complete, the Committee arranged for a third-party development company to loan funds to Mirage to expedite construction of the clubhouse.[25]

46. In August 2009, Ansung learned that Sheyang Island Park had become an operating 18-hole golf course, and complained to various government officials.[26] Although the officials represented that they would intervene, "it is clear that the Sheyang-Xian government took no measures to enjoin the illegal operation of the golf course in the Park as it has been illegally operating the golf course up to the present date."[27]

47. Ansung completed the 18-hole first phase of the project in November 2010. At that time, Ansung repeatedly requested the Committee to provide the additional land necessary for the second phase, in order to avoid bearing costly construction-related expenses, but "officials avoided giving clear answers and only advised Ansung to wait" or rejected Ansung's meeting requests.[28]

48. On March 24, 2011, Ansung's Chairman Jin Woo Pae visited Secretary Xu Chao, the Communist Party Secretary of Sheyang-Xian, to request the additional land. Chairman Pae received assurances from Secretary Xu that he would "take the steps necessary to address the problem."[29] On March 25, 2011, "the very next day, Secretary You contacted Chairman Pae to inform him that Secretary Xu…had no authority to address the issue…and he was the only person with the actual power to handle all land-related issues

[24] RFA, paras. 45-46.
[25] RFA, para. 47.
[26] RFA, para. 53. *See also* R. 41(5) Obj., para. 29 (citing RFA, para. 53).
[27] RFA, para. 54.
[28] RFA, para. 49. *See also* R. Obs., para. 38 (citing RFA, para. 49).
[29] RFA, para 50.

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

49. In June 2011, Mirage was unable to repay the loan arranged by the Committee, because, with only an 18-hole golf course, "Ansung was unable to produce sufficient returns from its investments in the JV and Mirage as to justify their continued existence…[or] contribute additional financing from Korea into its Subsidiaries, including Mirage, given the Sheyang-Xian government's manifest failure to honor its aforementioned commitments and assurances."[31]

50. Also in June 2011, Ansung employees reported that Committee officials visited the golf course to demand repayment of the debt by "unlawful means" such as "blockad[ing] the main gate of the golf course and even assault[ing] Ansung's employees," with requests for police protection going unheeded, "leaving Ansung's officers and employees in perpetual danger." [32]

51. Without the planned full 27-hole golf course with luxury condominiums, and facing the competing illegal golf course at Sheyang Island Park and harassment by local officials, Ansung found itself unable to sell memberships to the golf course and hence "incapable of sustaining a profitable and stable golf business in Sheyang-Xian."[33] Consequently, in October 2011, "Ansung had no alternative but to dispose of its entire assets of the golf business, including its shareholding in [Mirage], to a Chinese purchaser at a price significantly lower than the amount that Ansung had invested toward the project, causing serious financial losses and damage to Ansung."[34]

[30] *Ibid.*

[31] RFA, para. 55.

[32] RFA, para. 56.

[33] RFA, paras. 58 and 59.

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

52. As also pleaded in the introduction to the Request for Arbitration: "As a consequence of the foregoing, Ansung was forced to dispose of its entire investment in Sheyang-Xian in October 2011 in order to avoid further losses."[35]

53. The factual background in Claimant's Request for Arbitration ends at October 2011. In Ansung's letter of November 3, 2014 to the ICSID Secretary-General and in its First Observations, Ansung describes the sales transactions that it alleges took place in November and December 2011.

54. Ansung provides the following description of events in its November 3, 2014 letter:

a) "On 2 November 2011, Claimant entered into a share transfer agreement with a Chinese purchaser to sell its shareholdings in the Subsidiaries. However, the agreement did not set a fixed price for the share transfer."

b) "On 17 December 2011, the parties reached agreement on the final price for the transfer arrangement as well as the date on which the transfer would occur; and this was reduced to writing and reflected in an instrument called a 'supplementary agreement.'"

c) "On 19 December 2011, pursuant to the supplementary agreement, Claimant transferred the shares of the Subsidiaries to the Chinese purchaser."[36]

55. In Claimant's First Observations, the alleged November and December 2011 events were described as follows:

a) "[O]n 2 November 2011, Ansung tentatively agreed to transfer the shares. However it was yet to sell the Project, because the share price for the sale was not yet settled."

[35] RFA, para. 12.

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

b) "After further negotiations, in mid-December 2011, the parties arrived at the final price for the share transfer and decided the date on which the transfer would occur."

c) "On 17 December 2011, *considering that the additional land was not still provided by the local government*, Ansung finally agreed to transfer the shares at the agreed price."[37]

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

[38] R. 41(5) Obj., paras. 1-6.

[39] R. Obs., para. 5.

[40] Cl. First Obs., paras. 2, 66.