

IN THE MATTER OF AN ARBITRATION
UNDER THE ARBITRATION RULES OF THE UNITED NATIONS
COMMISSION ON INTERNATIONAL TRADE LAW

BETWEEN

MASON CAPITAL L.P.
MASON MANAGEMENT LLC

Claimants,

AND

THE REPUBLIC OF KOREA

Respondent.

**NOTICE OF ARBITRATION
AND
STATEMENT OF CLAIM**

September 13, 2018

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I. INTRODUCTION

1. Mason Capital L.P. and Mason Management LLC (together, “**Mason**” or “**Claimants**”) hereby commence arbitration proceedings against the Republic of Korea (“**Korea**” or “**Respondent**”) under the Free Trade Agreement between the Republic of Korea and the United States of America (the “**FTA**”),¹ and pursuant to the 1976 Arbitration Rules of the United Nations Commission on International Trade Law (the “**UNCITRAL Rules**”).
2. This arbitration arises out of Korea’s interference with Mason’s investments in Samsung C&T Corporation (“**SC&T**”) and Samsung Electronics, Inc. (“**SEC**”), two publically listed Korean companies that form part of the Samsung group of companies (“**Samsung**” or “**Samsung Group**”). The Samsung Group was at all material times controlled by one family (the “**Family**”). Having taken at least US\$ 7.8 million in bribes from the **Family**, the then-President of Korea, **Family**, and other senior government officials, subverted the internal procedures of Korea’s National Pension Service (the “**NPS**”) in order to enable the merger of SC&T with Cheil Industries Incorporated (“**Cheil**”) at a gross undervalue to SC&T’s shareholders.
3. As the criminal trials leading to the convictions of President **Family** (“**President Family**”) and her associates have since revealed, the purpose of this scheme was to further the interests of the **Family** by facilitating the transfer of control of the Samsung Group from **Family**, the head of the **Family**, to his son, **Family** (“**Family**”) at minimal costs. The merger was structured so that SC&T shares would be undervalued and Cheil shares would be overvalued, enabling **Family**, a significant shareholder in Cheil, to acquire SC&T at an undervalue. This in turn allowed **Family** to obtain control over SC&T’s shares in SEC, the “crown jewel” of the Samsung Group.
4. The Government’s role in this scheme has been established in numerous subsequent proceedings in Korea, and has now been admitted by the NPS itself in its own internal review. The steps taken by President **Family** and senior Korean Government officials in relation to a favored *chaebol* and its controlling family were motivated both by corruption

¹ CLA-23, FTA.

and by nationalistic prejudice against foreign US investors. Through this scheme, Korea acted both by improper means and with improper motives, in breach of the FTA. Korea's actions were both arbitrary and discriminatory, and constitute clear violations of the minimum standard of treatment and national treatment standard.

5. Korea's measures caused the merger to take place on terms that resulted in loss and damage to Mason in an amount currently estimated to be no less than US\$ 200 million. In accordance with basic principles of international law, Mason seeks compensation for those losses, including compound interest on all sums due and attorney's fees.
6. Despite Mason's efforts to seek amicable resolution of this dispute since the service of Mason's Notice of Intent on June 7, 2018, Korea has refused to offer any compensation for Mason's losses to date.

II. THE PARTIES

A. Mason

7. Mason Capital Management LLC is an investment management firm. It actively manages a portfolio of investments with the objective of achieving capital appreciation over time. Its investments are made through two funds:
 - a) Mason Capital L.P.,² a limited partnership organized under the laws of the State of Delaware, the United States of America (the “**Domestic Fund**”); and
 - b) Mason Capital Master Fund L.P., an exempted limited partnership governed by the Exempted Limited Partnership Law, 2014 of the Cayman Islands (the “**Cayman Fund**”).
8. The general partner of both the Domestic Fund and the Cayman Fund is Mason Management LLC,³ a limited liability company established under the laws of the State of Delaware, the United States of America, with file number 3259698 (the “**General Partner**”).
9. The Claimants in this arbitration are the Domestic Fund and the General Partner, both of which legally held shares in SC&T and SEC at the time of the Merger vote, as explained in further detail in Sections III and IV below.
10. The Domestic Fund’s registered address is:

Mason Capital L.P.
c/o Corporation Service Company
251 Little Falls Drive
Wilmington, DE 19808
United States of America

² C-1, Mason Capital L.P. Formation Certificate.

³ C-2, Mason Management LLC Formation Certificate.

11. The General Partner's registered address is:

Mason Management LLC
c/o Corporation Service Company
251 Little Falls Drive
Wilmington, DE 19808
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12. Mason is represented in these proceedings by Latham & Watkins LLP and KL Partners,
whose addresses are as follows:

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13. All communications in connection with this arbitration should be directed to Mason’s counsel at the above addresses.

B. The Republic of Korea

14. The Respondent in this arbitration is the Republic of Korea, a Party to the FTA.
15. Mason’s claims arise out of the actions of the Korean governmental organs, authorities and officials described below. For the reasons set out below, their actions are attributable to Korea under the FTA and customary international law.

1. President [REDACTED]

16. President [REDACTED] was at all relevant times the President of the Republic of Korea. She was therefore the head of the Korean central government within the meaning of Article 11.1(3)(a) of the FTA and also an organ of the state within the meaning of Article 4 of the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001) (the “**ILC Articles**”). As explained in further detail below, she has been impeached and removed from office, found guilty of bribery, abuse of power and coercion and sentenced to 25 years in prison.⁴

⁴ **CLA-7**, *Impeachment of President* ([REDACTED]), Decision, Case 2016*Hun-Nal* (Constitutional Court March 10, 2017); **CLA-15**, *Prosecutor v.* [REDACTED], Decision, Case 2018*No*1087 (Seoul High Court, August 24, 2018) (“**Seoul High Court President [REDACTED] Decision**”).

2. The Ministry of Health and Welfare (the “MHW”)

17. The MHW is a ministry under the executive branch of the Government of Korea. The MHW is entrusted with, among other things, managing national pension and health care, health insurance, basic living insurance, welfare support, social security and social service policies, and population policy. The MHW is therefore an authority of the central government within the meaning of Article 11.1(3)(a) of the FTA and also an organ of the state within the meaning of Article 4 of the ILC Articles.

3. Minister of Health and Welfare [REDACTED] (“Minister [REDACTED]”)

18. Minister [REDACTED] is the former Minister of MHW. Under the National Pension Act of Korea, Minister [REDACTED] was empowered to oversee the NPS, and broadly authorized to take “necessary measures” to supervise the NPS.⁵ Minister [REDACTED] is therefore a constituent body of the central government within the meaning of Article 11.1(3)(a) of the FTA and also an organ of the state within the meaning of Article 4 of the ILC Articles. As explained below, he is currently serving a two and a half year jail sentence on charges of abuse of power and perjury.⁶

4. The National Pension Service

19. The NPS is the national pension fund of the Republic of Korea, overseeing over US\$ 580 billion in assets. It is a state agency under the direct control and supervision of the MHW.⁷ The NPS was created by law under the National Pension Act (the “Act”). The NPS is under the direct supervision of the Minister of Health and Welfare.⁸ The Minister oversees the NPS’s “business operation plan and budget proposal for each fiscal year, as determined by Presidential Decree.” Additionally, the Minister is authorized to take “necessary

⁵ **CLA-25**, National Pension Act (Korea), arts. 24, 30 and 41.

⁶ **C-19**, *South Korea’s ex-health minister found guilty of swaying Samsung vote*, LOS ANGELES TIMES (June 8, 2017).

⁷ Under art. 5(2) of the Act on the Management of Public Institutions, the NPS is a quasi-governmental institution. **CLA-20**, Act on the Management of Public Institutions (Korea), art. 5(2).

⁸ **CLA-25**, National Pension Act (Korea), art. 41.

measures” in supervising NPS, including, *inter alia*, “ordering [NPS] to alter its Articles of Incorporation.” Therefore, the NPS is a quasi-governmental body exercising powers delegated to it by the central government within the meaning of Article 11.1(3)(b) of the FTA.⁹

5. Officials and employees of the NPS, including Chief Investment Officer
[REDACTED] (“CIO [REDACTED]”)

20. CIO [REDACTED] is the former Chief Investment Officer of the NPS. CIO [REDACTED] was instrumental in subverting the NPS’s decision on the merger, including commissioning the creation of a bogus synergy report to support the merger.¹⁰ The actions of NPS officials and employees, in their official capacities, are “measures adopted and maintained” by the state on the same basis as the NPS itself. As explained below, CIO [REDACTED] is currently serving a two and a half year jail sentence on charges of occupational breach of trust.¹¹
21. The relevant actions of each of these entities and/or individuals described in Section III below constitute “measures adopted or maintained by a Party” within the meaning of Article 11.1(3) of the FTA.
22. Pursuant to Article 11.27 and Annex 11-C of the FTA, Korea’s address for service is as follows:

Office of International Legal Affairs
Ministry of Justice of the Republic of Korea
Government Complex, Gwacheon
Korea

⁹ **CLA-23**, FTA, art. 11.1(3)(b). The NPS is also an entity controlled by the State within the meaning of Article 8 of International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (2001). See **CLA-24**, ILC Articles, art. 8.

¹⁰ See *infra* ¶ 42.

¹¹ **C-22**, Appeals court upholds jail term for ex-health minister involved in [REDACTED] scandal, KOREA HERALD (November 14, 2017); **CLA-14**, *Prosecutor v. [REDACTED]*, Decision, Case 2017No1886 (Seoul High Court November 14, 2017), p. 2 (“[REDACTED] **High Court Decision**”).

23. Mason understands that Korea is represented in connection with this dispute by:

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III. FACTUAL BACKGROUND

A. Mason Invested in SC&T and SEC

24. In furtherance of its long-term investment goals, Mason began to prepare an investment strategy in entities affiliated with the Samsung Group in or around 2013. Of particular interest to Mason was the “crown jewel” of Samsung, SEC. Mason also became interested in SC&T, Samsung’s construction and trading arm, which held a significant ownership interest in SEC.
25. By July 17, 2015, when the shareholders of SC&T and Cheil voted to approve the merger (as explained below), Mason’s total investment consisted of 3,046,915 SC&T common voting shares and 81,901 SEC common voting shares.¹² The legal ownership of those investments was divided between Mason Management LLC (as the General Partner of the Cayman Fund and legal owner of its shares), which held 1,951,925 shares in SC&T and

¹² C-29, Goldman Sachs Brokerage Letter, dated September 10, 2018.

52,466 shares in SEC, and Mason Capital L.P., which held 1,094,990 shares in SC&T and 29,435 shares in SEC. This is shown on Figure 1 below:

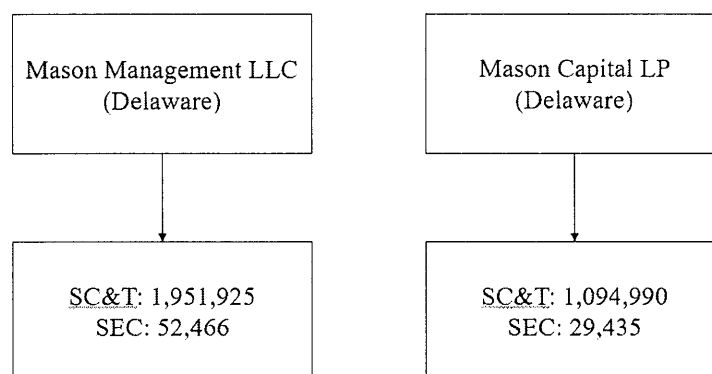


Figure 1: legal ownership of shares in SC&T and SEC by relevant Mason entity

B. The Boards of SC&T and Cheil Announced a Planned Merger

26. On May 26, 2015, SC&T and another Samsung affiliate, Cheil, announced plans to merge.¹³ The two companies agreed, subject to shareholder approval, to a merger in which 54.7 million Cheil shares would be issued at a swap ratio of 0.3500885 shares per outstanding SC&T share.¹⁴ The new company was to use the “Samsung C&T Corp.” name.¹⁵
27. The two companies purported to justify the merger as a business decision. Cheil claimed that the merger would allow it to use SC&T’s global network to “develop new opportunities overseas for Cheil’s fashion, resort and catering businesses.” SC&T echoed

¹³ C-5, KH 디지털 2, *Cheil Industries Announces Merger with Samsung C&T*, KOREA HERALD (May 26, 2015).

¹⁴ C-9, Institutional Shareholder Services, Inc., Special Situations Research, Samsung C&T (KNX:000830): Proposed Merger with Cheil Industries (KNX:028260), Analysis (July 3, 2015), p. 12 (“ISS Special Situations Research”).

¹⁵ C-5, KH 디지털 2, *Cheil Industries Announces Merger with Samsung C&T*, KOREA HERALD (May 26, 2015).

this view, claiming that “Samsung C&T’s capabilities to manage businesses globally, when combined with Cheil’s expertise, will help us become more competitive.”¹⁶

28. However, at the time of the announcement, it was apparent and widely understood that the merger was part of the █████ Family’s succession plan for an orderly transfer of power from Samsung’s Chairman █████ to his son █████, following █████’s heart attack the previous year.¹⁷ █████ held a 23.2% interest in Cheil, and thus would emerge as the largest shareholder in the newly combined company, with a 16.5% stake.¹⁸ The merger would also allow him to have more control over SEC, through SC&T’s 4.06% stake in SEC.¹⁹ As the Seoul High Court has found, the SC&T-Cheil merger was the “most essential piece of the succession plan” from █████ to █████.²⁰
29. Under Korean law, the exchange ratio in a merger between listed companies is based on historical trading prices, rather than negotiations between the merging parties.²¹ The ratio is calculated based on a volume weighted average of the most recent one-month share price prior to the announcement of the deal,²² making the timing of a board’s decision to enter into a merger transaction critical.²³ After the merger announcement, independent analysts noted that the merger ratio overvalued Cheil and undervalued SC&T. For example, ISS Special Situations Research found that SC&T was trading at a 50% discount, and that the merger was announced during a period of extreme SC&T undervaluation (of around 70%),²⁴ and while Cheil was trading at an approximate premium of 40% of its estimated net asset value – concluding that the exchange ratio should have been 0.95x rather than

¹⁶ *Id.*

¹⁷ *Id.* See also C-4, Jonathan Cheng and Min-Jeong Lee, *Samsung Heir Apparent █████ Consolidates Power With Merger*, WALL STREET JOURNAL (May 26, 2015).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ **CLA-15**, Seoul High Court President █████ Decision, p. 86.

²¹ **C-9**, ISS Special Situations Research, *supra* note 14, p. 1.

²² See **CLA-21**, Enforcement Decree of the Financial Investment Services and Capital Markets Act (Korea), art. 176-5(1).

²³ **C-9**, ISS Special Situations Research, *supra* note 14, p. 1

²⁴ *Id.* at 15.

0.35x.²⁵ By overvaluing Cheil and undervaluing SC&T, this ratio was highly favorable to the █████ Family, as █████ held substantial shares in Cheil and none in SC&T.

30. It was clear to Mason and other investors that the proposed merger was unfair to SC&T's shareholders, and that any rational shareholder would vote against the merger. For these reasons, another U.S. fund, Elliott Associates ("Elliott"),²⁶ publically criticized the merger and sought to enjoin it from proceeding.²⁷ Elliott first announced its opposition to the transaction the next day, on June 4, 2015, and spent the next several weeks campaigning against, and seeking injunctions in Korean courts to block, the merger.²⁸ Mason held approximately 2.18 percent of SC&T shares prior to the merger vote and also opposed the merger.
31. The Korean government sought to oppose these efforts (as explained below) and found support among those expressing overt prejudice and discrimination against American investors. For example, Korea Financial Investment Association chairman Hwang Young-key characterized a vote against the merger as "akin to surrender to a foreign 'vulture'".

²⁵ *Id.* at 17. It later emerged, SC&T was artificially lowering its share price in order to manipulate this ratio. SC&T failed to announce that it won a bid to construct a power plant in Qatar for approximately KRW 2 trillion until after the merger vote, and in 2014 and 2015 transferred away construction projects to its affiliate, Samsung Engineering Co., Ltd. **CLA-13**, *Prosecutor v. █████*, Decision, Case 2017Gohap34, 183 (Seoul Central District Court June 8, 2017), pp. 3-4 ("█████ **District Court Decision**"). As a Korean court found, "[t]hese objective events cast a reasonable doubt that the Samsung Group intentionally kept the SC&T share price low to select a specific time of the Merger, favoring █████, the controlling █████ family, and shareholders of Cheil over the SC&T shareholders." *Id.* at 4. Further, as has recently come to light, Cheil's share price was artificially inflated, through the fraudulent accounting practices of its subsidiary, Samsung BioLogics. **C-27**, Eun-Young Jeong and Timothy W. Martin, *South Korea Regulator Says Samsung BioLogics Violated Accounting Rules*, WALL STREET JOURNAL (July 12, 2018).

²⁶ **C-9**, ISS Special Situations Research, *supra* note 14, pp. 7, 9.

²⁷ Elliott emerged as the third-largest shareholder of SC&T on June 3, 2015 after purchasing a 2.17% stake in the company, increasing its holdings to 7.12%. **C-14**, *Chronology of Samsung C&T's merger with Cheil Industries*, KOREA HERALD (July 17, 2015).

²⁸ *Id.* See also **C-9**, ISS Special Situations Research, *supra* note 14, p. 9. In addition to attempting to block the sale itself, Elliott unsuccessfully attempted to block SC&T's June 11, 2015 sale of all of its treasury shares, worth 5.8% of issued shares, to KCC Corp. – a major shareholder in Cheil. SC&T openly disclosed that the board approved the placement of treasury shares to KCC to help secure the votes to approve the transaction. *Id.* at 12.

fund.”²⁹ This prejudice manifested itself in shocking anti-Semitism against Elliott’s Jewish-American head. For example, multiple Korean press outlets explained away ISS’s negative report on the merger with contentions such as “ISS, like Elliott, is founded upon Jewish money . . . ISS’s opposition to the merger can be interpreted along the lines of Jewish alliance,” and “[t]he fact that Elliott and ISS are both Jewish institutions cannot be ignored[.]”³⁰

32. Other Korean press sources targeted Mason and other foreign investment funds, suggesting that a group of foreign investors, including Mason, was planning the “launch of massive raid of activist funds on Samsung Group.”³¹

C. The Korean Government Interfered with the Merger Vote

33. At the time of the vote, SC&T’s largest shareholder was the NPS, with an 11.21% stake.³² As explained in Section II above, the NPS was created by the Korean State.³³ Its chief executive officer is appointed and dismissed by the Korean President, and its other executives are appointed and dismissed by Korea’s Minister of Health and Welfare (a government official).³⁴ The Minister of Health and Welfare oversees the NPS, and is authorized to take “necessary measures” in supervising the NPS.³⁵
34. When exercising voting rights, the NPS’s normal practice is to rely on an expert voting committee (the “**Voting Committee**”) for any “matters that are difficult to decide.”³⁶ For

²⁹ C-8, Gee-hyun Suk, *Hwang defends Samsung against ‘vulture’ fund*, KOREA HERALD (June 14, 2015).

³⁰ C-12, Ken Kurson, *Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting*, OBSERVER (July 13, 2015) (quoting Korean media outlets Mediapen and MoneyToday, respectively).

³¹ C-11, Jin-cheol Lee, *Korean Firms Fall Prey to Speculative Capital... In Need of Measures to Defend Corporate Control*, E-DAILY (July 8, 2015).

³² CLA-14, ██████████ High Court Decision, p. 78.

³³ CLA-25, National Pension Act (Korea), art. 24.

³⁴ *Id.* at art. 30.

³⁵ *Id.* at art. 41.

³⁶ CLA-14, ██████████ High Court Decision, p. 10.

example, on June 17, 2015, when the NPS was faced with voting on a merger of the *chaebol* affiliates SK Holdings Co. and SK C&C Co., the NPS determined that, because it “needs to set clear standards for exercising voting rights related to mergers in the future when governance of *chaebol* companies undergo change”, it would refer the matter to the Voting Committee.³⁷

35. Without the knowledge of Mason or other independent SC&T investors, the Korean government – including through actions of the President, the Ministry of Health and Welfare, and the NPS’s officials – subverted the NPS’s internal procedures by, *inter alia*, preventing the matter from being decided by the Voting Committee, in order to procure the NPS’s vote in favor of the merger.
36. President █████, who was inaugurated on February 25, 2013,³⁸ played a central role in this scheme. Over the course of her administration, █████ and Samsung made corrupt payments to the family of and entities controlled by President █████’s confidante, █████, in exchange for favorable treatment including Korean governmental support for the Cheil-SC&T merger.³⁹ As explained in further detail below, President █████ and numerous other senior government officials have since been tried and convicted by the Korean courts for accepting bribes and/or improperly interfering with the NPS’s vote.
37. Around late June 2015, President █████ ordered the █████ to “attend to” the NPS’s vote in the merger.⁴⁰ █████ then ordered other senior government officials to “figure out the situation.”⁴¹ Senior governmental officials began communicating with MHW officials regarding the merger – for example, on June 26, 2015 the Administrator at the Office for

³⁷ *Id.* at 13.

³⁸ C-3, Justin McCurry, █████ Takes Office as South Korean President, GUARDIAN (February 25, 2013).

³⁹ C-21, Hyun-ju Ock, Samsung Heir Jailed 5 Years for Bribery, KOREA HERALD (August 25, 2017); C-28, Appeals Court ups Jail Term for Ex-Leader █████ to 25 Years in Corruption Trial, KOREA TIMES (August 24, 2018).

⁴⁰ CLA-14, █████ High Court Decision, p. 37.

⁴¹ *Id.*

Employment and Welfare sent a text message to the deputy director of the MHW saying “. . . please let me know in advance if the SC&T merger case goes to the committee . . . there are a lot of people who are in interested in Samsung.”⁴²

38. The Minister of the MHW, Minister ██████, met with the ██████ ██████ ██████, and gave an order to the effect of “I want the Samsung merger to be accomplished.”⁴³
39. On June 30, 2015, ██████, along with another official, visited the NPS and told Chief Investment Officer, CIO ██████, and others to convey the instruction of Minister ██████ that the NPS’s internal Investment Committee, rather than the Voting Committee, should vote on the merger.⁴⁴ CIO ██████ asked “[c]ould I say that I did it due to pressure from MHW?” to which ██████ replied “[e]ven a little child would know that, but you should not say that MHW intervened.”⁴⁵
40. On July 8, 2015, ██████ summoned NPS officials, including CIO ██████, to the MHW offices and again instructed them to decide the merger in the Investment Committee rather than the Voting Committee.⁴⁶ The following day, CIO ██████ reported to the MHW that the merger decision would be made by the Investment Committee, and not the Voting Committee.⁴⁷
41. The Investment Committee was composed only of NPS employees under CIO ██████’s direction and supervision,⁴⁸ including some that he hand-picked.⁴⁹ In early July 2015, CIO

⁴² *Id.* at 38-39.

⁴³ *Id.* at 14.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 17.

⁴⁷ *Id.* at 19.

⁴⁸ *Id.* at 20.

⁴⁹ *Id.* The Investment Committee includes the CIO, the heads of divisions, and three other members nominated by the CIO. While normally CIO ██████ would receive a nomination proposal, contrary to past convention, CIO ██████ himself nominated the three additional members.

45. On July 17, 2015, the merger was approved by SC&T's shareholders, with 69.5% of votes, slightly more than the required two-thirds majority.⁵⁸ Voters for the merger included the NPS, other Samsung affiliates, KCC Corp (a Samsung ally which had been allowed to purchase SC&T treasury shares on the expectation that it would vote for the merger),⁵⁹ and certain Korean asset managers.⁶⁰ Mason, Elliott, and a number of foreign institutional investors, including the Dutch and Canadian pension funds, voted against the merger.⁶¹ The NPS was the largest shareholder of SC&T. Had the NPS voted against the merger, the merger would not have been approved.⁶²
46. In light of the unexpected and then-unexplained result of the merger vote, in the weeks that followed, Mason sold practically all of its SC&T and SEC shares.

D. The Korean Courts Convicted President ██████ and Other Government Officials for their Interference with the Merger

47. On September 1, 2015, the merger closed. Just two weeks later, on September 14, 2015, CIO ██████ testified before the Korean National Assembly and was confronted with questions about why the NPS voted for a deal so unfavorable to the NPS and favorable to the ██████ Family. CIO ██████ denied any wrongdoing.⁶³

⁵⁸ C-13, Jonathan Cheng and Min-Jeong Lee, *Samsung Shareholders Back \$8 Billion Merger, in Blow to U.S. Hedge Fund*, WALL STREET JOURNAL (July 17, 2015).

⁵⁹ C-14, *Chronology of Samsung C&T's merger with Cheil Industries*, KOREA HERALD (July 17, 2015).

⁶⁰ C-17, *Asset Managers Face Possible Flak Over Samsung Merger*, YONHAP (December 8, 2016) (noting that asset managers in Korea had supported the merger, and were subsequently criticized for "having paid excessive attention to the stance of Samsung Group and the state pension operator."). See also C-15, Korea National Assembly Minutes, September 14, 2015, p. 20 ("Assemblyman Park Byung-suk: 'I think the SC&T merger was eventually consummated because Samsung appealed to the national sentiment. In addition, a party that raised an objection to the merger was a foreign entity, which have strengthened Samsung's appeal to the national sentiment. And that is why many minority shareholders approved the merger [.]'").

⁶¹ C-7, Jonathan Browning, *\$486 Billion Dutch Fund Says Samsung Burned Bridges in Fight*, BLOOMBERG (June 11, 2015); C-10, Jonathan Cheng, *Samsung Merger Plan Gets 'No' Vote From Canada Pension Board*, WALL STREET JOURNAL (July 8, 2015).

⁶² CLA-14, ██████ High Court Decision, p. 28.

⁶³ See C-15, National Assembly Minutes, September 14, 2015, p. 80.

48. On November 1, 2016, ██████████, President ██████'s confidante, was detained and questioned by prosecutors after news reports the previous month alleged that she had received confidential presidential documents and edited key speeches despite having no official governmental position.⁶⁴ On November 8, 2016, investigators raided SEC headquarters. In mid-November 2016, Korean prosecutors questioned both Minister ██████ and CIO ██████, and the head office of the NPS's fund management department was raided.⁶⁵
49. On December 9, 2016, the National Assembly voted to impeach President ██████. She was subsequently removed from office, arrested, tried, and on April 6, 2018, found guilty of corruption charges and sentenced to 24 years in prison,⁶⁶ a sentence which was subsequently increased to 25 years by the appellate court.⁶⁷ The Seoul High Court found that part of Samsung's donations to ██████'s foundations was a bribe, citing an implicit understanding between President ██████ and ██████ for governmental support for the SC&T-Cheil merger.⁶⁸
50. Minister ██████ and CIO ██████ were also arrested, tried, and on June 8, 2017, each sentenced to two and a half years in prison on abuse of authority, perjury, and breach of trust charges.⁶⁹ On November 14, 2017, their sentences were upheld by the Seoul High

⁶⁴ C-18, ██████████, *Timeline, Downfall of ██████████*, FINANCIAL TIMES (March 9, 2017).

⁶⁵ *Id.*; C-16, Chang Jae Yoo, *Q&A: NPS Embroiled in Korea's Political Scandal over Samsung Units' Merger*, KOREA ECONOMIC DAILY, (November 29, 2016).

⁶⁶ C-24, Paula Hancocks, *Former South Korean President ██████ Sentenced to 24 Years in Prison*, CNN (April 6, 2018).

⁶⁷ C-28, *Appeals Court ups Jail Term for Ex-Leader ██████ to 25 Years in Corruption Trial*, KOREA TIMES (August 24, 2018) (noting that "[t]he Seoul High Court also increased her fine by 2 billion won (\$1.78 million)").

⁶⁸ *Id.* See also CLA-15, Seoul High Court President ██████ Decision, p. 103.

⁶⁹ CLA-13, ██████████ District Court Decision, pp. 1-2.

Court.⁷⁰ [REDACTED] was also arrested, tried, and sentenced to prison for bribery, though most of his sentence has been commuted.⁷¹

51. Between March and June 2018, the NPS conducted an internal audit into the its decision to vote in favor of the merger, including in light of the facts identified in the judgments of the criminal courts convicting Minister [REDACTED] and CIO [REDACTED]. The NPS released the findings of its audit on July 3, 2018, and concluded that its personnel had manipulated the financial information and data used to calculate the merger ratio in order to inflate the value of Cheil and undervalue SC&T.⁷²

⁷⁰ **CLA-14**, [REDACTED] High Court Decision, p. 2.

⁷¹ **C-23**, Sang-Hun Choe, *Samsung Heir Freed, to Dismay of South Korea's Anti-Corruption Campaigners*, N.Y. TIMES (February 5, 2018).

⁷² **C-26**, Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger (July 3, 2018).

IV. JURISDICTION AND ADMISSIBILITY

A. The Respondent has Consented to Arbitrate Under the FTA

52. Pursuant to Article 11.17 of the FTA, Korea has consented to arbitration of claims by investors of the United States alleging breaches of obligations under the FTA.
53. By this Notice of Arbitration and Statement of Claim, Mason consents to arbitration in accordance with the procedures set forth in Chapter Eleven of the FTA. Mason has taken all necessary internal actions to authorize the commencement of this Arbitration and has authorized Latham & Watkins LLP and KL Partners to act on its behalf in this Arbitration.

B. The Claimants are Investors of the United States of America

54. The FTA provides protection to “an[y] investor of a Party that is a party to an investment dispute with the other Party.”⁷³
55. The definition of an “investor of a Party” includes “a national or an enterprise of a Party that attempts to make, is making, or has made an investment in the territory of the other Party.”⁷⁴
56. “Enterprise” is defined as “any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including any corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization.”⁷⁵
57. The Domestic Fund qualifies for protection under the FTA with respect to its direct investment in shares of SC&T and SEC. The Domestic Fund is a limited partnership organized under the laws of the state of Delaware, the United States of America, and has invested in shares in SC&T and SEC in Korea. As of the date on which the merger was

⁷³ **CLA-23**, FTA art. 11.28.

⁷⁴ *Id.*

⁷⁵ *Id.* at art. 1.4.

approved, the Domestic Fund owned 1,094,990 common voting shares of SC&T and 29,435 common voting shares of SEC.⁷⁶

58. The General Partner qualifies for protection under the FTA with respect to its direct investment in shares in SC&T and SEC. The General Partner is a limited liability company organized under the laws of the state of Delaware, the United States of America, and has invested in shares in SC&T and SEC in Korea. As of the date on which the merger was approved, the General Partner legally owned and controlled 1,951,925 common voting shares of SC&T and 52,466 common voting shares of SEC.⁷⁷

C. Mason Has Made Investments in the Territory of Korea

59. The FTA defines covered “investments” as:

[E]very asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: [...] (b) shares, stock, and other forms of equity participation in an enterprise[.]⁷⁸

60. Mason’s shares in SC&T and SEC fall squarely within the definition of “investment” under the FTA. As of the date on which the merger was approved, Mason owned 3,046,915 common voting shares of SC&T, representing approximately 2.18% of the outstanding common stock of SC&T, and 81,901 common voting shares of SEC.

⁷⁶ C-29, Goldman Sachs Brokerage Letter, dated September 10, 2018.

⁷⁷ *Id.* The general partner held these shares on statutory trust for the benefit of Mason Capital Master Fund, L.P., an Exempted Limited Partnership under the laws of the Cayman Islands, pursuant to Section 16.1 of the Exempt Limited Partnership Law of the Cayman Islands. CLA-22, Cayman Islands: Exempted Limited Partnership Law, 2014, p. 13 (“Any rights or property of every description of the exempted limited partnership, including all choses in action and any right to make capital calls and receive the proceeds thereof that is conveyed to or vested in or held on behalf of any one or more of the general partners or which is conveyed into or vested in the name of the exempted limited partnership shall be held or deemed to be held by the general partner and if more than one then by the general partners jointly, upon trust as an asset of the exempted limited partnership in accordance with the terms of the partnership agreement”).

⁷⁸ CLA-23, FTA, art. 11.28.

D. The Tribunal has Jurisdiction *Ratione Temporis*

61. The FTA entered into force on March 15, 2012.⁷⁹ The FTA does not bind either State Party “in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of [the FTA].”⁸⁰ The acts and facts giving rise to this arbitration, summarized in Section III above, all arose after March 15, 2012. The Tribunal therefore has jurisdiction *ratione temporis* over Mason’s claims.

E. The Claims are Admissible

62. Mason has complied with the procedural preconditions for arbitrating claims under the FTA:
- a. Mason submitted a Notice of Intent and served it by hand at Korea’s designated address for service, the Office of International Legal Affairs, on June 8, 2018.⁸¹ The Notice of Intent expressed Mason’s intention to seek to resolve the dispute through consultation and negotiation, as envisaged by Article 11.15. Ninety days have elapsed since the Notice of Intent was delivered to Korea. Despite Mason’s efforts to seek amicable resolution of the dispute, no such resolution has been achieved to date.
 - b. Mason has also satisfied the requirement of Article 11.16(3) of the FTA “that six months have elapsed since the events giving rise to the claim.” The events giving rise to the claim took place principally in 2015, as explained in Section V below. Mason has therefore complied with the six-month waiting period requirement under the FTA.
 - c. Finally, Mason has also submitted these claims to arbitration within the three-year limitation period provided for under Section 11.18.1 of the FTA. Information

⁷⁹ *Id.*

⁸⁰ *Id.* at art. 11.1.2.

⁸¹ **C-25**, Mason Capital Notice of Intent, dated June 7, 2018.

concerning governmental interference with the Merger vote was only revealed later, through the Korean criminal trials beginning in 2016.

F. Waiver

63. In accordance with Article 11.18.2 of the FTA, Mason hereby waives the right to initiate before any administrative tribunal or court under the law of either Party to the FTA, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 11.16.

V. **KOREA’S BREACHES OF ITS OBLIGATIONS UNDER THE FTA AND INTERNATIONAL LAW**

A. **Korea Breached the Minimum Standard of Treatment Under Article 11.5 of the FTA**

64. Under Art. 11.5 of the FTA, Korea agreed to provide covered investments “treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.”⁸² Annex 11-A to the FTA specifies that “the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.”⁸³
65. Korea, through its President, government ministers and officials, and the NPS, violated the minimum standard of treatment owed to Mason’s investments, including the obligation to treat Mason’s investments in accordance with the fair and equitable treatment standard.⁸⁴
66. The contemporary formulation of the minimum standard of treatment, applied by numerous tribunals,⁸⁵ was described by the *Waste Management II* tribunal as follows:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct [that] is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory . . . or involves a lack of due process leading to an outcome which offends judicial propriety—as might be the case with . . . a **complete lack of transparency and candour** in an administrative process.⁸⁶

⁸² **CLA-23**, FTA art. 11.5.1.

⁸³ *Id.* at Annex 11-A.

⁸⁴ See **CLA-4**, *CMS Gas Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, May 12, 2005, ¶ 284 (“the Treaty standard of fair and equitable treatment and its connection with the required stability and predictability of the business environment, founded on solemn legal and contractual commitments, is not different from the international law minimum standard and its evolution under customary law”).

⁸⁵ See **CLA-3**, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶ 442 (“[t]he formulation . . . by the *Waste Management [II]* Tribunal is particularly influential, and a number of other tribunals have applied its formulation of the international minimum standard[.]”).

⁸⁶ **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 98 (emphasis added).

67. Korea's actions readily satisfy this standard.
68. *First*, Korea's actions were arbitrary, grossly unfair and/or unjust.⁸⁷ Arbitrary conduct includes conduct made without legitimate purpose, founded on prejudice or preference rather than on reason or fact, and taken in willful disregard of due process and proper procedure.⁸⁸ There can be no doubt that Korea has acted arbitrarily in voting in favor of the Merger. Prior to the vote, it was widely understood that the Merger was unfavorable to SC&T shareholders including the NPS.⁸⁹ The Merger was therefore detrimental to the NPS's own interests and duties of stewardship over the pensions of Korean citizens. Korea, through the NPS, had no legitimate reason to vote in favor of the SC&T-Cheil merger. Indeed, Korea's arbitrary actions were also grossly unfair and unjust because, as subsequently confirmed by the Korean courts in their judgments over the government officials involved, they were driven by corruption and favoritism. Further, Korea, through the NPS, acted against its own principles. Under Article 4 of the NPS's internal guidelines, "the Minister of Health and Welfare shall manage the fund according to" principles including profitability, stability, public interest, liquidity, and management independence,⁹⁰ none of which supported a vote in favor of the Merger.
69. *Second*, Korea's actions were discriminatory. Discrimination occurs when the State treats a claimant's investments differently without justification.⁹¹ As explained in further detail in Section V.B. below, Korea's actions were based on corruption, bribery, and favoritism, rather than on reason, fact, or any *bona fide* justification. The NPS's vote benefitted the ██████ Family to the detriment of SC&T shareholders (and Korean citizens).

⁸⁷ See **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010 ¶ 259 ("Any arbitrary or discriminatory measure, by definition, fails to be fair and equitable."). It is sufficient if the action is either arbitrary or discriminatory – it need not be both. *Id.* at ¶ 260.

⁸⁸ *Id.* at ¶ 262.

⁸⁹ **CLA-14**, ██████ High Court Decision, pp. 13; **C-9**, ISS Special Situations Research, *supra* note 14, pp. 1-2.

⁹⁰ **C-6**, Guidelines for Management of National Pension Service Fund – National Pension Service Fund Investment Policy Fund (June 9, 2015), art. 4.

⁹¹ **CLA-8**, *Lemire v. Ukraine*, ¶ 261.

70. *Third*, Korea's actions were carried out in willful disregard of due process and proper procedure. For example, Korea was aware that proper procedure at the NPS would have been for the Voting Committee to decide which way to vote on the merger (as was done in the SK merger vote). However, Korea was also aware that the vote would be more likely to pass if it went through the Investment Committee, and for this reason key government officials pressured CIO ██████ to bypass the Voting Committee (despite his initial reluctance).⁹²
71. *Finally*, there was no transparency or candor in Korea's illegal actions. The extent of Korea's misconduct was only revealed later, through the criminal trials of the government officials involved in the wrongdoing.
72. Korea's actions adversely affected both Mason's investments in SC&T and its investments in SEC. The NPS's merger vote was intended to, and did allow the ██████ Family to consolidate its control over SEC (via SC&T's 4.1% stake in SEC), thereby increasing its influence over SEC to the detriment of Mason and other independent shareholders. Moreover, the vote reasonably caused Mason to lose confidence in the integrity of the corporate governance arrangements within the Samsung Group (and any prospects that those arrangements would improve), and led Mason to sell its shares in SEC to mitigate its losses.
73. Even if the contemporary formulation of the minimum standard of treatment, as set out in *Waste Management II*, were not to be applied, Korea's actions readily meet the historical standard of conduct "*amount[ing] to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.*"⁹³ Korea's corruption, bribery, overt discrimination, and flaunting of its own laws was outrageous.

⁹² CLA-14, ██████ High Court Decision, pp. 17-18.

⁹³ CLA-10, *Neer v. Mexico*, 4 R. Int'l Arb. Awards, October 15, 1926, ¶ 4 (emphasis added); *See also* CLA-16, *Railroad Dev. v. Republic of Guatemala*, ICSID Case No. ARB/07/23), Award, June 29, 2012, ¶¶ 218-219 (adopting the *Waste Management II* formulation and finding that "the minimum standard of treatment is 'constantly in a process of development,' including since *Neer*'s formulation.").

The Korean justice system has recognized as much by impeaching President [REDACTED] and convicting her and other government officials involved in procuring the Merger.

B. Korea Breached the National Treatment Standard Under Article 11.3 of the FTA

74. Article 11.3 of the FTA requires Korea not to discriminate against US investors in relation to their covered investments. Specifically, under Article 11.3 of the FTA, Korea agreed to accord to investors of the United States:

[T]reatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory;⁹⁴ [and]

[T]reatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.⁹⁵

75. In interpreting similar provisions, tribunals have established that three elements must be satisfied in order for a violation of the national treatment standard to be found:

- (1) the respondent State must have accorded to the foreign investor or its investment, some kind of treatment with respect to the relevant investments;
- (2) the foreign investor or investments must be “in like circumstances” to an investor or investment of the respondent State; and
- (3) the treatment given to the foreign investor must have been less favorable than that accorded to the Comparator.⁹⁶

76. *First*, there can be no question that Korea has “treated” Mason’s SC&T and SEC investments. While the word “treatment” is not defined in the FTA, it has been found to

⁹⁴ **CLA-23**, FTA art. 11.3.1.

⁹⁵ *Id.* at 11.3.2.

⁹⁶ **CLA-6**, *Corn Products Int’l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 117.

simply mean “behavior in respect of an entity or a person.”⁹⁷ The NPS’s vote, and the associated corrupt and criminal actions of officials at the highest levels of government, constituted behavior in respect of Mason’s investments.

77. *Second*, Mason and the █████ Family were in like circumstances. Both Mason and the █████ Family were investors and shareholders in Samsung entities, including SEC and SC&T.⁹⁸ Both were interested in the same proposed transaction – the █████ Family stood to gain if the SC&T-Cheil merger passed, and Mason stood to lose.
78. *Third*, the treatment given to Mason was plainly less favorable than that accorded to the █████ Family.⁹⁹ Korea actively and in bad faith promoted the interests of its “national champion”¹⁰⁰ (the █████ Family) at the expense of Claimants by causing the NPS to subvert its procedures and vote in favor of the merger – conferring substantial benefits onto the █████ Family and causing substantial losses to Mason and other foreign investors.
79. Finally, while an intent to discriminate against a foreign investment is not required to show a breach of national treatment,¹⁰¹ if discriminatory intent can be shown, then this is “decisive for the third part of the test.”¹⁰² In this case, as explained in Section III above, Korea overtly and intentionally discriminated against Mason and other U.S. investors. For

⁹⁷ **CLA-17**, *Siemens A.G. v. Argentina*, ICSID No. ARB/02/8, Decision on Jurisdiction, August 3, 2004, ¶ 85.

⁹⁸ While █████ did not personally hold SC&T shares prior to the merger, the head of the █████ Family, █████, held a 1.4% stake in SC&T. **C-9**, ISS Special Situations Research, *supra* note 14, p. 7.

⁹⁹ A violation “is not mitigated by existence of discrimination against other domestic investors or investments as well as against foreign investors and investments. It is . . . enough to establish that a [party to the treaty] has given one or more of its investors or investments more favorable treatment.” **CLA-18**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24 2007, ¶¶ 59-60.

¹⁰⁰ See **CLA-12**, *Pope & Talbot v. Government of Canada*, Award on Damages, June 30, 2002, 7 ICSID Rep. 148, ¶ 60.

¹⁰¹ **CLA-2**, *Cargill, Inc. v. Republic of Poland*, ICSID Case No. ARB(AF)/04/2, Award, March 5, 2008, ¶¶ 342-344.

¹⁰² **CLA-6**, *Corn Products Int'l v. United Mexican States*, at ¶ 138 (“While the existence of an intention to discriminate is not a requirement for a breach of [national treatment] . . . where such an intention is shown, that is sufficient to satisfy the third requirement.”).

example, the █████ administration created documents which were described by a subsequent administration as showing that the “National Pension Service should be actively used against overseas hedge funds’ aggressive attempts to interfere in management rights, but the initiatives should be carried out prudently in order to avoid the perception that the government was supporting conglomerates.”¹⁰³ Further, CIO █████ invoked the name of a famous Korean traitor to persuade Investment Committee members to vote for the Cheil-SC&T merger, and instructed them that if the merger fails the NPS would have “sold out the national wealth to the hedge funds”¹⁰⁴ (which would include Mason).

80. Korea’s direct, intentional, and overt discrimination against Mason and its investments in favor of the █████ Family adversely impacted Mason’s investments in both SC&T and SEC. The merger was unfavorable to SC&T and its shareholders by substantially undervaluing SC&T. It was also unfavorable to the shareholders of both SC&T and SEC and led Mason to divest itself of virtually all of its shares in mitigation of its losses.

¹⁰³ C-20, Myo-Ja Ser, █████’s *Paper Trail Grows Longer, More Detailed*, Korea, JOONGANG DAILY (July 21, 2017). One of these documents was titled “Review of domestic companies’ measures to defend management rights against overseas hedge funds.”

¹⁰⁴ CLA-14, █████ High Court Decision, p. 25.

VI. MASON IS ENTITLED TO COMPENSATION

A. Mason has Suffered Substantial Losses as a Result of Korea's Breaches

81. As a result of Korea's actions, Mason has suffered substantial losses amounting to, at a minimum, the difference between the intrinsic value of the SC&T and SEC shares that Mason held prior to the merger vote and the value that Mason was able to obtain for those shares in mitigation of its losses after the Merger approval. Had the merger vote not passed, Mason would not have sold its shares in either company, and would have sold them at a price reflecting their intrinsic value. Due to Korea's actions, Mason sold its shares of both companies at a significantly lower price.
82. Mason will set out its case on damages at an appropriate stage of these proceedings, but currently estimates its losses to total no less than US\$ 200 million.

B. Mason is Entitled to Compensation for its Losses in Accordance with the Standard of Full Reparation, Including Interest and Costs

83. In accordance with basic principles of international law, Mason seeks compensation for its losses in an amount of no less than US\$ 200 million, together with an award of compound interest and attorney's fees and costs.
84. The FTA does not set out a specific compensation standard for breaches of the minimum standard of treaty and national treatment. In the absence of a *lex specialis*, customary international law applies to the valuation of damages payable to Mason as a consequence of Korea's violations of the FTA. The principle under customary international law is that any breach of a State's international obligation should be compensated in full.¹⁰⁵ The principle of full compensation was stated by the Permanent Court of International Justice in the seminal case of *Chorzów Factory*:

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this

¹⁰⁵ CLA-24, ILC Articles, art. 31.

is not possible, payment of a sum corresponding to the value which a restitution in kind would bear; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.¹⁰⁶

85. Article 31 of the ILC Articles codified this principle while explicitly referring to *Chorzów Factory* in its commentary:

(1) The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

(2) Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.¹⁰⁷

86. Thus, a monetary award to Mason should put it in the position that it would have occupied had Korea's wrongful acts never occurred. As the tribunal in *Vivendi v. Argentina II* stated:

Based on these principles [of international law], and absent limiting terms in the relevant treaty, it is generally accepted today that, regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.¹⁰⁸

87. In accordance with these principles, Mason is entitled to an award of damages of no less than US\$ 200 million (See Section VI.A. above).
88. In addition, Mason is entitled to an award of interest, calculated on a compound basis from the date of Korea's breaches until full payment of the award. An award of interest is an integral component of the full reparation principle under international law, because, in

¹⁰⁶ **CLA-1**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17, p. 47.

¹⁰⁷ **CLA-24**, ILC Articles, art. 31.

¹⁰⁸ **CLA-5**, *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. The Argentine Republic*, ICSID Case No ARB/97/3, Award, August 20, 2007, p. 244.

addition to losing its property and other rights, an investor loses the opportunity to invest the funds to which that investor was rightfully entitled.¹⁰⁹ A State's duty to make full reparation arises immediately after its unlawful act causes harm. To the extent that payment is delayed, the claimant loses the opportunity to use the funds for productive ends. That loss must be compensated in order to restore the claimant to the position that it would have been in had the State not acted wrongfully.¹¹⁰ Numerous tribunals have confirmed that compound interest best gives effect to the customary international law standard of full reparation.¹¹¹ Furthermore, to the extent that Korea may not immediately satisfy an eventual damages award issued by the Tribunal, Mason is entitled to compound interest accruing on such an award from the date of the award until payment is made in full.

89. Finally, Mason seeks payment of all of the costs and expenses of this arbitration, none of which Mason would have incurred but for Korea's breaches of the FTA and its refusal to compensate Mason for Korea's breaches. Such costs include Mason's attorney's fees, expert fees, the fees of the Tribunal and all other costs associated with this arbitration.

¹⁰⁹ *Id.* at p. 256 (to give effect to “the Chorzów principle [...] it is necessary for any award of damages in this case to bear interest.”); *id.* (“the liability to pay interest is now an accepted legal principle.”).

¹¹⁰ **CLA-9**, *Metalclad Corporation v. The United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, August 30, 2000, p. 34.

¹¹¹ *See e.g. CLA-11*, *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No ARB/06/11, Award, October 5, 2012, p. 312 (“[M]ost recent awards provide for compound interest. This practice accords with the Chorzów principle as an award of compound interest will usually reflect the damages suffered.”).

VII. PROCEDURAL MATTERS

A. Applicable Arbitration Rules

90. By this Notice of Arbitration and Statement of Claim, Mason submits its claim to arbitration under the UNCITRAL Rules, as permitted by Article 11.16.3 of the FTA.

B. Language of Arbitration

91. Article 11.20(3) provides that both English and Korean shall be the official languages to be used in the arbitration. Mason proposes that this arbitration be conducted in English. As a courtesy, a copy of this Notice of Arbitration and Statement of Claim is also being submitted in Korean. For the avoidance doubt, Mason does not accept that the FTA requires submissions or other documents to be provided in both English and Korean, and Mason will not provide its future submissions in both English and Korean unless ordered to do so.

C. Appointment of Arbitrators

92. Article 11.19 provides that the Tribunal is to comprise three arbitrators unless otherwise agreed between the disputing parties. As no contrary agreement has been reached between Mason and Korea, the Tribunal to be constituted is to comprise of three arbitrators.
93. As required by Article 11.16.6 of the FTA, Mason hereby appoints Dame Elizabeth Gloster as its party-appointed arbitrator. Her contact details are as follows:

Dame Elizabeth Gloster
One Essex Court
Temple
London EC4Y 9AR
+44 (0)20 7583 2000
EGloster@oeclaw.co.uk
teamd@oeclaw.co.uk.

94. To the best of Mason's knowledge and belief, Dame Elizabeth Gloster is independent of the parties and impartial.

VIII. REQUEST FOR RELIEF

95. For the reasons set out in this Notice of Arbitration, Mason requests that the Tribunal render an award:
- a. declaring that Korea has breached the FTA in relation to Mason's investments;
 - b. ordering that Korea pay damages and compensation to Mason in an amount currently estimated to total no less than US\$ 200 million;
 - c. ordering that Korea pay compound interest on the compensation ordered at a rate to be determined by the Tribunal from the date of Korea's breaches until payment of the award;
 - d. ordering that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and
 - e. ordering such other relief as the Tribunal may deem appropriate.

Dated: September 13, 2018



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