

**IN THE MATTER OF AN ARBITRATION UNDER THE
ARBITRATION RULES OF THE UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW AND THE FREE TRADE
AGREEMENT BETWEEN THE REPUBLIC OF KOREA AND THE
UNITED STATES OF AMERICA**

BETWEEN

ELLIOTT ASSOCIATES, L.P.

Claimant

AND

REPUBLIC OF KOREA

Respondent

**CLAIMANT'S
REJOINDER ON PRELIMINARY OBJECTIONS**

23 December 2020



THREE CROWNS

KOBRE & KIM

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I. INTRODUCTION

1. As will by now be clear to the Tribunal, the facts of this case make for distressing reading for the ROK.¹ They involve corruption at the highest levels of its Government and wrongdoing that flowed from the Presidential Blue House through the Ministry of Health and Welfare and into the ROK's National Pension Service. That wrongdoing included:
 - a. bribery, for which the former President of the ROK, ██████████, has been impeached (and removed), convicted and incarcerated and for which the scion of the Samsung Group's ██████ Family, ██████, was convicted, with a penal sentence that is currently on appeal;
 - b. abuse of power, including the illegal intervention in and subversion of the intended independence by which the NPS was to take its decision on the SC&T-Cheil Merger, for which Minister of Health and Welfare, ██████████, and NPS Chief Investment Officer, ██████████, have both been convicted and incarcerated; and
 - c. ultimately, and as a consequence of the foregoing, the taking of a manifestly arbitrary decision to vote in favor of the Merger, in order to achieve an outcome favorable to the Samsung Group's controlling ██████ Family, notwithstanding that it was highly damaging to SC&T's minority shareholders, including both the NPS and the Claimant.
2. As those criminal convictions confirm, there is significant, incontrovertible evidence of this wrongdoing at all levels of the ROK Government. Indeed, as the Claimant has previously observed,² the evidentiary record in this arbitration is almost uniquely rich, including the sworn testimony of numerous individuals directly involved in the relevant acts and the findings of the ROK's own courts in relation to those acts. The ROK advances no evidence whatsoever from any Government official who actually played a role in the events at issue in this arbitration to counter the settled narrative that emerges

¹ All definitions in Claimant's Amended Statement of Claim dated 4 April 2019 (and Claimant's Statement of Reply and Defence to Preliminary Objections dated 17 July 2020 (*Reply*)) are adopted in this Rejoinder on Preliminary Objections.

² Reply, ¶ 85.

from this record. And indeed, even today, the ROK itself continues to advance new prosecutions in its own courts relating to the Merger.³ Moreover, outside of these proceedings the current ROK President ██████████ has publicly endorsed these prosecutions as confirming the ROK’s corrupt arrangement with Samsung and has acknowledged that Minister ██████ acted “at the *behest of the Blue House*” to “*force an approval vote for the [M]erger*”.⁴ The ROK cannot, in good faith, now dispute its *own* claims and findings concerning the underlying facts, which it endorses everywhere except before this Tribunal.

3. While outside these proceedings the ROK has prosecuted those wrongdoers with appropriate vigor, in this arbitration it has purported to adopt a “dispassionate” stance on the facts.⁵ This posture sees the ROK ostensibly taking “no view as to the accuracy of the findings”⁶ of its own courts and prosecutors and seeking at every turn to divert attention away from the evidence of its misconduct and the loss to the Claimant resulting therefrom. This tactic of diversion has constrained the ROK to adopt several unfortunate procedural tactics in an effort to limit the Claimant’s opportunities fully to present its case. To recall:
 - a. The ROK initially attempted to prevent the Claimant from filing an Amended Statement of Claim and went so far as to ask the Tribunal to direct that the Claimant not be allowed to submit fact or expert witness evidence in support of its claim because (in the usual way) the Claimant had not filed witness statements or expert reports with its Notice of Arbitration.⁷
 - b. Throughout the case, the ROK has failed to produce documents that it has been ordered to produce, even though such documents are undeniably in the possession of its own prosecutors or courts in relation to various criminal

³ “[Exclusive] We release the indictment against Jae-yong Lee in full”, *Ohmy News*, 10 September 2020, **Exh R-316**; see also Seoul Central District Prosecutors’ Office Press Release, “Investigation Results on Samsung Group’s Unlawful Merger and Accounting Fraud Case”, 1 September 2020, **Exh C-698**.

⁴ See, e.g., “Jae-in Moon ‘Grounds for Impeachment Have Become Clearer with Special Investigation’”, *JoongAng Ilbo*, 6 March 2017, **Exh C-493**, p. 2 (emphasis added).

⁵ Defence, fn. 2 and ¶ 25; ROK’s Statement of Rejoinder and Reply to Defence to Preliminary Objections dated 13 November 2020, ¶ 8.

⁶ Defence, ¶ 15.

⁷ Letter from the Respondent to the Tribunal, 17 January 2019.

proceedings. Most recently, the ROK has refused to produce any of the documents identified in its own recent public indictment of ██████ for additional alleged crimes arising out of market manipulation relating directly to the very Merger at the center of this arbitration⁸—this despite the fact that the ROK admits (as was self-evident) that its prosecutors possess the “underlying” evidence on which they relied to indict Mr. ██████.⁹

- c. And indeed the ROK even sought to prevent the Claimant from having the usual opportunity to file a sur-reply to the ROK’s putative preliminary objections,¹⁰ notwithstanding that the ROK pleaded these objections for the first time in its Statement of Defence, and that the Tribunal’s procedural orders expressly permitted the filing of this Rejoinder on Preliminary Objections.
4. Looking at the grab-bag of arguments advanced in the ROK’s Rejoinder and Reply to Defence to Preliminary Objections in relation to those objections, it becomes clear why the ROK fought so hard to deprive the Claimant of a normal right of final reply. These so-called preliminary objections are unified by two things: first, the ROK’s apparent willingness to advance any argument, no matter how ambitious, that could conceivably enable it to avoid scrutiny of the substance of its wrongdoing by this Tribunal; and second, a regrettable tendency to mischaracterize the witness, expert and documentary evidence that is on the record.
 5. As the Claimant made clear in its Reply, and does so again here, those Preliminary Objections need not trouble the Tribunal because:
 - a. The Claimant’s major shareholding in SC&T is unquestionably a protected investment under the Treaty (**Section II**);
 - b. The ROK’s governmental conduct that forms the subject-matter of this claim is manifestly subject to the standards of protection in the Treaty, and the ROK

⁸ Letter from the Respondent to the Tribunal, 1 December 2020.

⁹ Rejoinder, fn. 372 (“The underlying evidence supporting the indictment . . . is held by the Prosecutor’s Office”). The Respondent’s procedural defaults in respect of document production, which implicate more than the putative preliminary objections addressed in this submission, will be the subject of a separate application to the Tribunal.

¹⁰ Procedural Order No. 15, ¶¶ 11-15.

cannot evade those protections by adopting an unnaturally narrow interpretation of the word “measures” in the Treaty (**Section III**);

- c. There can be no question that the conduct of the ROK’s Presidential Blue House and Ministry of Health and Welfare is attributable to the ROK, and so is the conduct of the NPS (**Section IV**);
 - d. The additional purported “sovereign power” requirement for which the ROK contends is not good law and is irrelevant (**Section V**); and
 - e. The Claimant’s claims are not an abuse of process because: (i) the Claimant did not restructure its investment, let alone at a time when the ROK’s concealed conduct—the subject matter of this claim—was foreseeable; and (ii) the Claimant’s Settlement Agreement with SC&T—resolving a different claim and raising a different cause of action against a different party—cannot prevent the Claimant’s invocation of its international treaty protections (**Section VI**).
6. The Claimant submits this Rejoinder on Preliminary Objections (***Rejoinder on Objections***) as directed by Procedural Order No. 15 and in response to the ROK’s Rejoinder and Reply to Defense to Preliminary Objections filed on 13 November 2020 (***Rejoinder***). This Rejoinder on Objections addresses only those aspects of the ROK’s self-styled “threshold objections” that go to jurisdiction and admissibility, while all other arguments are reserved. The Rejoinder on Objections is accompanied by the third witness statement of Mr. James Smith dated 23 December 2020 (***Third Smith Statement***), and 22 fact exhibits and 11 legal authorities.

II. THE CLAIMANT'S INVESTMENT IN SC&T IS A PROTECTED INVESTMENT

7. In the Rejoinder, the ROK continues to press the surprising argument that the Claimant's 7.12% shareholding in SC&T does not constitute a protected investment under the Treaty. This contention is surprising for at least two reasons. First, it is surprising because, as was pointed out in the Reply,¹¹ the 11,125,927 SC&T shares owned by the Claimant are a paradigmatic example of a protected investment and expressly identified as such in Article 11.28 of the Treaty.¹² Second, it is surprising because the ROK itself certainly thought that the Claimant was a Treaty-protected investor at the time that the ROK was breaching the Treaty; hence the contemporaneous recognition within the ROK Government—long before any claim had been notified or even thought of by the Claimant—that it would be exposed to investment treaty claims brought by the Claimant as a result of the governmental conduct that forms the subject matter of this claim.¹³
8. The Rejoinder nevertheless maintains this objection on the basis of two factual assertions that the ROK has concocted with heavy doses of spin and innuendo, rather than evidence.¹⁴ Those assertions are:

¹¹ Reply, ¶ 217.

¹² As set out in the Reply, the Claimant founds jurisdiction on the investment it held directly in shares. However, the Claimant maintains, for the reasons set out in its prior submissions, that its swaps referencing SC&T shares would also have been protected by the Treaty. *See* Reply, ¶¶ 241-258.

¹³ *See, e.g.*, Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 (Around late June 2015, CIO ██████████ telephoned Senior Presidential Secretary, Mr. ██████████, expressing his concerns about a potential ISD claim to be brought by Elliott, triggered by the Blue House and Ministry's proposal to have the Investment Committee decide in favor of the Merger). *See also* ASOC, ¶ 102; Reply, ¶ 121.

¹⁴ Consistent with well-established principles, the ROK has the burden of proving the facts upon which its objections are based. *See* UNCITRAL Rules, Article 27 (“[e]ach party shall have the burden of proving the facts relied on to support its claim or defence”); *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **Exh CLA-179**, ¶¶ 174, 176 (“The general rule is that the party asserting the claim bears the burden of establishing it by proof. . . . The Respondent in this case therefore bears the burden of proving its objections. . . . [T]he general principle applies to require the Respondent to produce sufficient evidence to establish its objections to jurisdiction.”); *Philip Morris Asia Limited v Commonwealth of Australia* (UNCITRAL) Award on Jurisdiction and Admissibility, 17 December 2015, **Exh RLA-77**, ¶ 495 (“. . . it is . . . for the Respondent to allege and prove the facts on which its objections are based”).

- a. that the Claimant did not intend to maintain its investment “for a duration sufficient to warrant Treaty protection”¹⁵ (albeit what duration *would* suffice to attract Treaty protection is notably not specified); and
 - b. that “more than half of the shares [the Claimant] held were bought with funds belonging to another Elliott Group entity” as a result of which the Claimant “has not made the necessary commitment of capital to attract Treaty protection for those shares.”¹⁶
9. Neither of those factual assertions is supported by the evidence the ROK cites, nor are they correct. In any event, as has already been addressed in the Reply,¹⁷ neither states a basis for denying to the Claimant’s investment in SC&T the protection of the Treaty.
- A. THE CLAIMANT’S INVESTMENT IN SC&T SATISFIES ANY “DURATION” REQUIREMENT READ INTO THE TREATY**
10. The Claimant’s rebuttal of the putative “inherent” duration requirement that the ROK would read into the Treaty is set forth in detail in the Reply.¹⁸ There is no such requirement under the Treaty, and the ROK’s attempt to import one here is contrary to canons of treaty interpretation and has been rejected in similar circumstances by other arbitral tribunals. Those submissions are not repeated here.
11. In the Rejoinder, by reference to *KT Asia v. Kazakhstan*, the ROK accepts that, in evaluating the “duration” of an investment, what matters is not actual duration but intended or expected duration.¹⁹ The evidence confirms that the Claimant’s investment easily meets such a standard.

¹⁵ Rejoinder, ¶ 109.

¹⁶ Rejoinder, ¶ 123.

¹⁷ Reply, ¶¶ 213-217.

¹⁸ Reply, ¶¶ 223-240. Unlike in *KT Asia v. Kazakhstan*, the present arbitration engages the KORUS FTA rather than the ICSID Convention or a BIT. Moreover, there is no consistent interpretation of the meaning of “investment” in the ICSID Convention. Compare, for example, *Ceskoslovenska Obchodni Banka, A.S. v. Slovakia*, ICSID Case No. Arb/97/4, Decision on Objections to Jurisdiction, 24 May 1999, **Exh CLA-181**, ¶ 64, with *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 295.

¹⁹ Rejoinder, ¶ 115. Contrary to what the ROK implies, in confirming that “it is the intended duration period that should be considered to determine whether the criterion is satisfied,” the tribunal in *KT Asia* did not accept the argument that an expected “long-term relationship” was required. *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case no ARB/09/8), Award, 17 October 2013, **Exh RLA-72**,

12. As to the actual duration of the Claimant’s investment in SC&T, against a backdrop of investing in SC&T that extended back to 2003,²⁰ the investment that is at issue in this arbitration comprised a mix of swaps and shares over a period of more than seven months prior to the measures by the ROK that breached the Treaty and for a total period of more than fifteen months.²¹ Within that period, the investment was entirely in shares throughout March and most of April 2015, and entirely in shares from early June 2015 until the Claimant sold the investment in March 2016, following the ROK’s breaches and the resulting losses the Claimant incurred. This investment is accordingly plainly distinguishable from the fact patterns found to fall outside of the definition of investment in the other awards under other treaties cited by the ROK. In those cases, tribunals expressly declined to impose a particular minimum time requirement to constitute a protected investment—in the words of the tribunal in *Romak v. Uzbekistan* (cited with approval in *KT Asia*, on which the ROK otherwise relies), they “[did] not consider that, as a matter of principle, there is some fixed duration that determines whether assets qualify as investments.”²² Instead, in these cases, tribunals excluded from treaty protection one-off transactions that had no “duration” at all.²³

¶¶ 208-209 (citing *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 304).

²⁰ First Smith Statement, ¶ 12 *et seq.*

²¹ See Second Smith Statement, Appendix A; Spreadsheet of Elliott’s swap holdings in SC&T from November 2014 to 4 June 2015, **Exh C-383**; Spreadsheet of EALP’s shareholding in SC&T from 27 January to 4 June 2015, **Exh C-384**. In September 2015, the Claimant sold its Non-Appraisal Shares (i.e., those shares in respect of which the Claimant did not have appraisal rights). It was not until March 2016 that the Claimant sold its Appraisal Shares (which formed the majority of its shareholding) in accordance with the terms of a Share Transfer Agreement entered into with SC&T.

²² *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. 2007-07/AA280), Award, 26 November 2009, **Exh RLA-49**, ¶ 225 (observing further that “[s]hort-term projects are not deprived of ‘investment’ status solely by virtue of their limited duration. Duration is to be analysed in light of all the circumstances, and of the investor’s overall commitment”); *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case no ARB/09/8), Award, 17 October 2013, **Exh RLA-72**, ¶ 208, fn. 90 (citing the *Romak* decision with approval); *Doutremepuich v. The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 23 August 2019, **Exh RLA-92**, ¶¶ 141, 143 (noting further that “[t]he Tribunal is of the view that there can be no fixed minimum duration requirement”).

²³ *Romak S.A. v. The Republic of Uzbekistan* (PCA Case No. 2007-07/AA280), Award, 26 November 2009, **Exh RLA-49**, ¶¶ 226-227 (the tribunal found “the duration of Romak’s wheat deliveries does not reflect a commitment on the part of Romak beyond a one-off transaction”); *RECOFI SA v. Vietnam* (UNCITRAL), Judgment of the Federal Supreme Court of Switzerland, 20 September 2016, **Exh RLA-81**, ¶¶ 3.2.3-3.2.4; *Doutremepuich v. The Republic of Mauritius* (UNCITRAL), Award on Jurisdiction, 23 August 2019, **Exh RLA-92**, ¶¶ 141, 143. The investment in *KT Asia* was also a one-off transaction, which involved the transfer of shares to the claimant, to hold for a period of weeks prior to being sold to third parties. See *KT Asia Investment Group B.V. v. Republic of Kazakhstan* (ICSID Case no ARB/09/8) Award, 17 October 2013, **Exh RLA-72**, ¶¶ 210-212.

13. As to the intended duration of the Claimant's investment, based on the single, slender reed of the trading plan guidelines prepared at an early stage of the Claimant's investment in SC&T to facilitate day-to-day share purchase decisions, the ROK asserts that "[t]he Claimant intended a quick exit from its short-term investment".²⁴ If proof were needed of the aphorism that labelling is no substitute for analysis, this argument would furnish it. There are at least four problems with the position the ROK puts forward.
14. *First*, shorn of any context, adjectives such as "quick" and "short-term" are unhelpfully relative and therefore uninformative. In the event:
- a. The Claimant committed hundreds of millions of dollars of investment capital to SC&T over a period of longer than a year, based on its careful review of the company's assets, business, and growth potential.²⁵
 - b. During that time, the Claimant's advisors within the Elliott Group deployed the Group's own and external expertise to assist the Claimant in developing a proposal for a multi-phase, strategic restructuring that would, over the course of up to a year,²⁶ address the █████ Family's succession concerns, avoid the ruinous losses that the Merger was poised to inflict, and unlock greater value for shareholders.²⁷
 - c. As a shareholder in SC&T, the Claimant engaged with SC&T management over merger rumors, restructuring proposals, and the eventual Merger proposal. The Claimant also engaged directly with other SC&T shareholders, including the NPS, and publicly campaigned to convince SC&T shareholders to vote against the Merger.²⁸
 - d. The Claimant exited its investment in SC&T only after the unfair Merger caused by the ROK's measures in breach of the Treaty inflicted significant and

²⁴ Rejoinder, Section II.C.2.a.

²⁵ See Reply, ¶¶ 553-554.

²⁶ Third Smith Statement, ¶ 24; Elliott, Samsung Group restructuring proposal, **Exh C-380**, slide 17 (referring to a total of 36 weeks or 9 months).

²⁷ Third Smith Statement, ¶ 19; Second Smith Statement, ¶¶ 39, 54.

²⁸ See, e.g., Third Smith Statement, ¶ 7(v); Second Smith Statement, ¶¶ 43, 47-48; First Statement, ¶¶ 28-29, 31-32, 40; Elliott Press Release, 4 June 2015, **Exh C-20**.

irrevocable losses on the Claimant and rendered its restructuring proposals moot.²⁹

Those facts do not bear the hallmarks of a “quick”, “short-term” investment, whatever those subjective adjectives might mean.

15. *Second*, the ROK’s argument misunderstands or misrepresents the trading plans, given Mr. James Smith’s existing evidence about what these guidelines were, and were not, prepared and used for. In the Rejoinder, the ROK readily cites Mr. Smith’s evidence to the effect that trading plan guidelines were developed in November 2014 and March 2015 “that governed [the Claimant’s] purchases of Samsung C&T shares.”³⁰ But the ROK goes on to assert in the very next sentence, by reference to *no evidence at all*, that the guidelines show the Claimant’s intention “to exit its investment at the soonest possible moment that it could achieve the targeted return on the investment, which it considered could happen within weeks.”³¹
16. The ROK cites no evidence to support that assertion because there is none. In fact, Mr. Smith has expressly stated that the trading plans *did not* guide decision-making concerning exit from this investment.³² Mr. Smith has further clarified that the guidelines were “not created specifically for our investment in SC&T” but were prepared from “a generic spreadsheet that we used as a template”.³³ Mr. Smith also explained that, where these guidelines were used, they “would often change based upon our investment strategy and they *cannot* be viewed as the driver of more strategic investment decisions that were taken”.³⁴ The ROK therefore errs in suggesting that the trading plan guidelines were somehow fossilized and unchangeable. Specifically, as Mr. Smith notes, the “guidelines ceased to be relevant whenever we adopted a more ‘active’ approach to an investment”, which was precisely what happened when the

²⁹ See First Smith Statement, ¶¶ 61-65.

³⁰ Rejoinder, ¶ 117, citing Second Smith Statement, ¶¶ 25, 37.

³¹ Rejoinder, ¶ 117.

³² Second Smith Statement, ¶ 22. See also Third Smith Statement, ¶ 15 (“such departures [from the trading plans] were particularly commonplace where we were unwinding our investment because we would only fully exit an investment after considering a number of factors including, for example, whether there was any further opportunity to unlock the value of the investment”).

³³ Third Smith Statement, ¶ 16.

³⁴ Second Smith Statement, ¶ 20 (emphasis added).

Claimant decided to take a more active role in unlocking the value of SC&T shares from March 2015.³⁵ Circumstances changed again, dramatically, in May 2015 when the Merger was proposed. By this time, the trading plan guidelines had long ceased to apply, and they are in fact entirely irrelevant to the intended duration of the Claimant’s investment.

17. Tellingly, the ROK cites no support for its speculative assertion that the Claimant expected to achieve the hoped-for return on its investment “within weeks,” and the Tribunal would scour the record for any in vain. Moreover, because of the ROK’s measures in breach of the Treaty, it cannot now be known how long the Claimant would have in fact held its shares in SC&T before fully realizing the return on its investment, and it is misleading for the ROK to suggest otherwise.
18. *Third*, the ROK’s argument ignores the evidence of the Claimant’s longer-term investment strategy vis-à-vis SC&T. The evidence shows that:
 - a. Based on its analysis, the Claimant identified in late 2014 an opportunity to profit from investing in swaps that had as their reference assets undervalued SC&T shares, expecting to realize gains over time when the SC&T share price corrected as a result of market forces.³⁶
 - b. As Mr. Smith has repeatedly explained, from January 2015, the Claimant decided to purchase shares in addition to swaps referencing SC&T shares because of its “desire to be able to pivot, if necessary, to a more active approach towards [its] investment in SC&T”.³⁷ The shares came with “important shareholder rights,” “including the opportunity to speak to and make proposals to the board, the right to call an EGM, and the right to make and vote on proposals at either an EGM or the yearly AGM” which were “a necessary precondition to any activist strategy to unlock value in SC&T.”³⁸

³⁵ Third Smith Statement, ¶ 18, noting that the trading plan guidelines were not updated after 27 March 2015.

³⁶ Third Smith Statement, ¶ 7(i); Second Smith Statement, ¶¶ 17-18, 25-26; First Smith Statement, ¶¶ 16-17. *See also* ASOC, ¶ 21.

³⁷ Second Smith Statement, ¶ 34. *See also* First Smith Statement, ¶ 23(i).

³⁸ Second Smith Statement, ¶ 35. *See also* Third Smith Statement, ¶ 7(ii).

- c. To that end, via its advisors the Claimant initiated its engagement with key stakeholders in SC&T immediately after it purchased shares in SC&T. In particular, the Claimant set up meetings with both the management of SC&T and the largest shareholder in SC&T, the NPS, to assess *inter alia* their appetite for working with the Claimant on a potential restructuring of SC&T.³⁹ The Claimant also conducted detailed due diligence into the Board of SC&T and the NPS to better understand the key stakeholders in SC&T.⁴⁰
- d. By 23 February 2015, the Claimant had developed a first iteration of the restructuring proposal which it intended to present to the management of SC&T and the █████ Family in a consensual manner.⁴¹
- e. The Claimant continued to commit significant effort and resources to improving and optimizing this proposal in the subsequent months, up until the surprise announcement of the Merger vote.⁴² In particular, following its meeting with SC&T's management in April 2015, at which the SC&T representatives directly confirmed that no merger with Cheil was being planned and “appeared to be receptive” to collaborating with the Claimant on its restructuring proposal,⁴³ the Claimant “intensified” its efforts to put this proposal together.⁴⁴
- f. The Claimant's restructuring proposal had four stages,⁴⁵ which Mr. Smith describes as “reasonably complex” and likely to take “up to a year for the various steps in the restructuring to be completed”.⁴⁶ The Claimant intended to

³⁹ Letter from Elliott to the directors of SC&T, 4 February 2015, **Exh C-11**. *See also* First Smith Statement, ¶¶ 23(ii), 28; Third Smith Statement, ¶ 7(ii).

⁴⁰ First Smith Statement, ¶ 23(iii); Third Smith Statement, ¶ 7(ii). *See also* IRC, “Korea National Pension Service & Samsung” (draft), 1 March 2015, **Exh C-151**; IRC, “Korea National Pension Fund Updated Interim Report”, 8 April 2015, **Exh C-160**; IRC, “Korea National Pension Fund Final Report”, 20 April 2015, **Exh C-166**; Spectrum Asia Report on Samsung C&T and Cheil Industries, Prepared For Elliott Management, 19 March 2015, **Exh R-255**.

⁴¹ Second Smith Statement, ¶¶ 39-40; Third Smith Statement, ¶ 7(ii). *See also* Elliott, Samsung Group restructuring scenarios, 23 February 2015, **Exh C-371**.

⁴² Second Smith Statement, ¶¶ 56, 61; Third Smith Statement, ¶ 7(vi)-(vii).

⁴³ Second Smith Statement, ¶ 49. *See also* Letter from Elliott to SC&T, 16 April 2015, **Exh C-163**; Letter from SC&T to Elliott, 21 April 2015, **Exh C-168**.

⁴⁴ Second Smith Statement, ¶ 61.

⁴⁵ Second Smith Statement, ¶¶ 57-61.

⁴⁶ Third Smith Statement, ¶ 24. *See also* Elliott, Samsung Group restructuring proposal, 29 May 2015, **Exh C-380**, slide 17.

assist the Samsung Group with implementing the proposed restructuring (if the Samsung Group so desired).⁴⁷

- g. The announcement of the Merger proposal presented both a challenge and an opportunity for the Claimant's longer-term investment strategy. The challenge is obvious: the proposed Merger would permanently transfer to Cheil shareholders a significant proportion of the value of the Claimant's investment in SC&T shares. Accordingly, the Claimant marshalled its resources to oppose the proposed Merger. Active opposition to the Merger also crystallized an opportunity to make progress towards unlocking that value. Given that the NPS was the largest shareholder in SC&T, the Merger would only be defeated if the NPS did not vote in favor. And if that happened, the Claimant's advisors, including Mr. Smith, considered that would send an important signal to the Korean market that the NPS would continue to oppose abusive and predatory transactions such as the Merger and the consequent observable discount between SC&T's share price and its true value would reduce to 10% or less.⁴⁸ Indeed, this was explained to the NPS directly in a letter that Mr. Smith sent to the NPS on behalf of the Claimant on 3 June 2015, just days after the Merger proposal was announced,⁴⁹ and again in a public interview on 11 July 2015, where Mr. Smith explained that "[t]here is no need to insist upon an unfair merger. *If the unfairness is resolved the enterprise value of Samsung C&T will rise, so we will take our time*".⁵⁰
- h. The announcement of the Merger proposal did not immediately forestall the Claimant's efforts to develop a consensual restructuring plan. Indeed, although the Claimant was surprised by the announcement, it nonetheless swiftly proceeded to complete its restructuring proposal and the accompanying materials. Three days after the announcement of the Merger proposal, the Claimant passed its restructuring recommendations on to the intermediary it had engaged to present the Claimant's proposals to the █████ Family.⁵¹ Defeating the

⁴⁷ Second Smith Statement, ¶ 67; Third Smith Statement, ¶ 24.

⁴⁸ Third Smith Statement, ¶ 23.

⁴⁹ Letter from Elliott to NPS (*redacted*), 3 June 2015 **Exh C-187**, p. 4.

⁵⁰ Letter from Elliott to NPS, 13 July 2015, **Exh C-232** (updated), p. 9.

⁵¹ Second Smith Statement, ¶ 62.

Merger at the EGM would be a clear sign that the minority shareholders in SC&T would only approve any restructuring if it were not significantly damaging to their interests, which would tend to increase management's interest in the restructuring proposal that the Claimant had put forward.⁵² As Mr. Smith explained, if the Merger had been successfully defeated, the Claimant "fully intended to implement these plans" to unlock the value of SC&T.⁵³

19. The evidence thus belies the ROK's effort to minimize the significance of the Claimant's investment in SC&T by labelling it "quick" and "short-term".
20. A *fourth* fatal flaw in the ROK's duration-of-investment objection to jurisdiction is that, ultimately—stripped of the uninformative labels and unsupported assertions—the ROK's argument turns out not to be about duration at all, but rather about the mere fact that the Claimant invested in SC&T with an intention later to exit the investment at a profit. The ROK specifically alleges—as if this fact somehow distinguishes the Claimant from other investors—that the Claimant "expressly planned to exit its investment at the soonest possible moment that it could realize what it considered to be a satisfactory profit."⁵⁴ That, of course, is a mischaracterization of the Claimant's investment strategy which, as the evidence summarized at paragraph 18 makes abundantly clear, was open-ended and longer term than the ROK seeks to represent. However, investing with an "expectation of gain or profit" is what investors do and, as the Tribunal will immediately realize, is itself one of the "characteristics of an investment" expressly identified in the Treaty definition of a protected investment.

⁵² Second Smith Statement, ¶¶ 64, 67; Third Smith Statement, ¶¶ 22-24.

⁵³ Second Smith Statement, ¶ 67. The Claimant's desire for enduring structural reform of the Samsung Group was frequently repeated even after the Merger was announced. *See, e.g.*, Elliott's Perspectives on SC&T and the Proposed Takeover by Cheil, June 2015, **Exh C-185**, p. 27 ("Rather than attempting to hastily railroad Samsung C&T shareholders into an unfair takeover, Elliott would like to see Samsung C&T adopt a suite of long-term corporate governance improvements, in order to facilitate a fair and balanced assessment of options for maximizing long-term shareholder value for the benefit of all shareholders"); Elliott Press Release, 3 July 2015, **Exh C-29**, pp. 4-5 ("Elliott remains supportive of efforts to reorganize the Samsung Group in connection with the succession of control over it, but also continues to firmly believe that the Proposed Takeover has no place in any restructuring of the Samsung Group which complies with applicable corporate governance standards and therefore properly recognises the value attributable to Samsung C&T's shareholders"); and Letter from Elliott to the NPS, 13 July 2015, **Exh C-232** (updated), p. 2 ("The Samsung Group succession-related reorganisation: Elliott supports that reorganization, but transactions which are wholly unfair to shareholders and ride roughshod over shareholders' rights to proper corporate governance cannot be permitted as part of such a reorganization.").

⁵⁴ Rejoinder, ¶ 116.

21. It is, moreover, well-established in case law that a profit motive does not deprive an investment of investment treaty protection. *Saluka Investments BV v. the Czech Republic* concerned shares in a Czech bank, IPB, initially purchased by Nomura Europe plc and later transferred to a special purpose vehicle, Saluka Investments BV. Nomura’s investment strategy was as “a portfolio investor acquiring a considerable block of shares with a view to selling it once IPB had improved and the value of its shares had appreciated.”⁵⁵ The *Saluka* tribunal expressly confirmed that this fact did not take the shareholding outside of the treaty’s scope of protection:

The Tribunal does not believe that it would be correct to interpret Article 1 [of the Czech Republic-Netherlands BIT] as excluding from the definition of “investor” those who purchase shares as part of what might be termed bare profit-making or profit-taking transactions. *Most purchases of shares are made with the hope that, in one way or another, the result will in due course be a degree of profit on the transaction.*⁵⁶

22. Similarly, in *Mason Capital LP and Mason Management LLC v. Republic of Korea*—a case arising out of the same measures by the ROK, in breach of the same Treaty at issue in this arbitration and also involving an investment in SC&T and other Samsung shares—the tribunal credited testimony that the claimants’ investment strategy was “hold[ing] the Shares until [they] could make money selling them in the market”,⁵⁷ and that the precise intended duration of the investment was “impossible to tell”,⁵⁸ in part because it depended on the open-ended “prospect that the transition to the next generation of leadership would require a significant restructuring of the Samsung Group . . . [which] would be a catalyst to unlock value in the business for shareholders”.⁵⁹

⁵⁵ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶ 334.

⁵⁶ *Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, **Exh CLA-159**, ¶ 209 (emphasis added).

⁵⁷ *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent’s Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶ 233 (referring to the cross examination of the claimants’ fact witness, Mr. Garschina, who did not dispute this characterization by the ROK of the claimants’ investment).

⁵⁸ *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent’s Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶ 232 (referring to the cross examination of the claimants’ fact witness, Mr. Garschina).

⁵⁹ *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent’s Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶ 230.

Weighing many of the exact same arguments that the ROK has raised here against another investor in SC&T,⁶⁰ the *Mason* tribunal, without ruling on the existence of a duration requirement, concluded that any such requirement would in any event have been satisfied.⁶¹

23. To conclude with respect to the putative “duration” requirement:
- a. The Claimant’s arguments concerning the irrelevance of the duration of an investment to a proper analysis of the Tribunal’s jurisdiction under this Treaty are set out in the Reply.⁶²
 - b. It is less than immaterial to a proper analysis of the Tribunal’s jurisdiction that the Claimant had an intention eventually to exit from the investment at a profit—an expectation of profit being a cardinal characteristic of an investment, not a disqualifying feature.
 - c. Moreover, in the light of the factual record, it is inaccurate to suggest that the Claimant’s investment was either actually or intended to be of insufficient duration. In fact, the Claimant held the investment for a period of more than fifteen months; the intended duration of the investment was open-ended; the restructuring strategy would have entailed holding the investment for a further period of months or possibly longer; and the investment only came to an end because the ROK’s measures in breach of the Treaty caused the Merger to be approved and the Claimant to suffer irrevocable losses on its investment.
 - d. Accordingly, the Claimant’s investment in SC&T cannot fairly be characterized as the type of “one-off” transactions that have been found to be insufficiently substantial to constitute treaty-protected investments, and this preliminary objection should be dismissed.

⁶⁰ In words that repeat almost verbatim the ROK’s objections in this arbitration, the ROK asserted in *Mason* that the claimant “intended to make ‘a short-term speculative bet’ and that it has failed to introduce concrete evidence of its intent to hold the Samsung Shares for a sufficiently long duration”. See *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent’s Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶ 108. See also Rejoinder, ¶ 122.

⁶¹ *Mason Capital L.P. and Mason Management LLC v. Republic of Korea*, PCA Case No. 2018-55, UNCITRAL, Decision on Respondent’s Preliminary Objections, 22 December 2019, **Exh CLA-144**, ¶¶ 248-249.

⁶² Reply, ¶¶ 224-231.

B. THE ROK’S OBJECTION THAT THE CLAIMANT HAS FAILED TO MAKE “THE REQUIRED CONTRIBUTION” LACKS ANY BASIS IN FACT OR IN THE TEXT OF THE TREATY

24. Although the ROK accepts that the Claimant owned the shares on which this Tribunal’s jurisdiction is founded,⁶³ the ROK’s second argument on qualifying investment in the Rejoinder asserts that “more than half of the [SC&T] shares [the Claimant] held were bought with funds belonging to another Elliott Group entity, not EALP.”⁶⁴ That factual assertion is again entirely incorrect. It is, moreover, irrelevant to the question of the Tribunal’s jurisdiction under the Treaty.

1. The ROK has the facts wrong

25. The only evidence cited for the ROK’s assertion as to the source of funds used for (some of) EALP’s share purchases is Mr. Smith’s Second Statement, which notably does not “reveal” anything like what the ROK contends. Mr. Smith’s Second Statement indicates only that (i) a proportion of the swaps referencing SC&T shares were held by a different Elliott fund, EILP; and (ii) at the end of February 2015, swaps referencing approximately 2.35 million shares were sold, and EALP bought approximately 2.46 million shares.⁶⁵ Mr. Smith’s Second Statement says nothing about the source of funds used for EALP’s share purchases in February 2015. It says nothing about the source of funds for EALP’s later share purchases. The ROK has simply made up the story about the origin of the funds EALP used to purchase some of its SC&T shares out of whole cloth.

26. In any event, Mr. Smith explained in clear terms in his First Statement that the Elliott Group—including its two primary funds, EALP and EILP—invests on behalf of “pension plans (such as those for teachers, firemen and police, and other municipal and state workers as well as private employees), sovereign wealth funds, university endowments, foundations, funds-of-funds . . . high net-worth individuals and families, and Elliott employees”.⁶⁶ If it mattered for any purpose, which it does not, these investors are the ultimate “source” of the funds the Claimant invests.

⁶³ See ASOC, ¶¶ 153-154 (and the evidence referred to therein); Defence ¶¶ 318, 336 and 357; Reply, ¶¶ 201-211 (and the evidence referred to therein); Rejoinder ¶ 109.

⁶⁴ Rejoinder, ¶ 123.

⁶⁵ Second Smith Statement, ¶ 36. *See also* Second Smith Statement, Appendix A.

⁶⁶ First Smith Statement, ¶ 2.

27. Pursuing the fiction that EILP paid for a portion of the Claimant's shares also requires the ROK to disregard the evidence that the Claimant has previously put forward confirming that all of the SC&T shares were acquired with the Claimant's funds.⁶⁷ The ROK's allegations also ignore the fact that there is no necessary correlation between EILP exiting swap positions and EALP purchasing shares. For example: from late January until late February 2015, the Claimant purchased more than 2.2 million shares in SC&T without EILP exiting *any* swap positions;⁶⁸ in March, April and May 2015, separately, the Claimant purchased many more shares than the number of swap positions that EILP exited over the same period. Accordingly, even if the Tribunal were to take the ROK's argument seriously, testing the same against elementary arithmetical principles easily reveals its weakness.
28. The ROK's "contribution of capital" argument simply has no basis in fact. That should be the end of this spurious aspect of the ROK's argument that the Claimant's 7.12% shareholding in SC&T did not constitute a Treaty-protected investment.
- 2. The ROK also has the law wrong**
29. In any event, as a matter of law, the *source* of funds that an investor uses to finance an investment is irrelevant to jurisdiction under an investment treaty.
30. The ROK tries to argue that the Treaty's reference to a "commitment of capital" implies an enquiry into the source of funds used for an investment, and more particularly means that a claimant cannot qualify as an investor if it uses funds that it receives from another person or entity to pay for an investment.⁶⁹
31. Just stating that proposition reveals its falsity. An investor loses treaty protection if it partly or wholly funds an investment with income or revenue received from any external source? Or if its very business is to invest money on behalf of a range of stakeholders? Or if it finances an investment partly or wholly with a loan, or a mortgage, or funds

⁶⁷ DART filing titled "Report on Stocks, etc. Held in Bulk", 4 June 2015, **Exh R-3**, pp. 3, 10-11; Response provided to the FSS by EALP (attaching trade confirmations), 18 September 2015, **Exh C-442**. *See also* Reply, ¶ 221. In addition, even a cursory review of the trade confirmations that the Claimant has disclosed in relation to each share purchase indicates that none of these was conducted by or in the name of EILP. *See Exh C-442*.

⁶⁸ Second Smith Statement, Appendix A.

⁶⁹ Rejoinder, ¶ 123.

from shareholders? There is no support for such a principle in investment treaty jurisprudence—and certainly none in the cases cited by the ROK.⁷⁰ On the contrary, the case law flatly rejects this proposition. As the tribunal in *Gavrilovic and Gavrilovic v. Croatia* observed:

[T]he source of funds is irrelevant for the purposes of determining whether there was an ‘investment’ under the BIT. The BIT contains no requirement that funds used to purchase an investment come from the personal assets or accounts of an investor, and the Tribunal sees no reason to impose one.⁷¹

32. Here, in fact, the ROK’s speculations that the funds the Claimant used to purchase SC&T shares did not come from its accounts are wholly unfounded. But the argument is also legally misconceived, and the ROK’s preliminary objection on this basis should accordingly be dismissed.

⁷⁰ See *Caratube International Oil Company LLP v. The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Award, 5 June 2012, **Exh RLA-60**, ¶ 435 (referring in *obiter* that an investment must, *inter alia*, be made “by an entrepreneur using its own financial means”. But this does not preclude the possibility that a claimant can obtain those financial means from a variety of sources); *Alapli Elektrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Excerpts of Award, 16 July 2012, **Exh RLA-62**, ¶¶ 340-350 (the *Alapli* tribunal was concerned that the claimant was a mere “conduit” through which third parties “funneled financial contributions” to pay for shares. *Alapli* does not rule out the possibility that a claimant can use its own funds—regardless of where or from whom the claimant sourced those funds—for the purposes of making an investment); *Jin Hae Seo v. Republic of Korea* (HKIAC Case No. HKIAC/18117), Final Award, 27 September 2019, **Exh CLA-138**, ¶ 104 (addressing the entirely distinct proposition that a tribunal will consider whether the *amount* paid for an investment is sufficient for the purposes of establishing jurisdiction); *Joy Mining Machinery Limited v. Arab Republic of Egypt* (ICSID Case No. ARB/03/11), Award on Jurisdiction, 6 August 2004, **Exh RLA-26**, ¶ 53 (also addressing the *amount* paid for an investment, rather than the source of funds).

⁷¹ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **Exh CLA-120**, ¶ 209. Multiple tribunals have similarly refused to depart from the express treaty language for the purposes of determining whether a qualifying investment has been made. See *e.g. Invesmart, B.V. v. Czech Republic*, UNCITRAL, Award, 26 June, **Exh CLA-132**, ¶¶ 188-189 (the tribunal found that the word “investment” in the BIT “should be given its plain and literal meaning and that the express inclusion of ‘shares’ as an investment means that the acquisition of shares constitutes an investment without further inquiry”); *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, 30 November 2009, **Exh CLA-184**, ¶ 431 (“the definition of investment in Article 1(6) of the ECT does not include any additional requirement with regard to the origin of capital or the necessity of an injection of foreign capital.” The tribunal further cited with approval the *Saluka* tribunal’s finding that “the predominant factor which must guide the Tribunal’s exercise of its functions is the terms in which the parties to the Treaty now in question have agreed to establish the Tribunal’s jurisdiction” and concluded that “[t]he Tribunal cannot in effect impose upon the parties a definition of ‘Investment’ other than that which the parties to the ECT, including the Respondent, have agreed”).

III. THE ROK'S CONDUCT CONSTITUTES "MEASURES"

33. The ROK next raises an objection that its conduct does not fall within the meaning of "measures" in the Treaty. The Claimant's complaint in this case concerns the ROK's illegal intervention in the Merger. There can be no serious doubt that the *governmental* acts and omissions comprising that illegal intervention constitute "measures" that attract the international law standards and protections of the Treaty.
34. The ROK's attempt to mischaracterize the Claimant's complaint as limited only to the NPS vote in favor of the Merger alone does not address the case that is put against it. Its further attempt to limit the scope of "measures" that attract the standards and protections of the treaty to "some kind of legislative, regulatory or administrative rule-making or action"⁷² and a "a final decision"⁷³, would allow any State to evade the standards of conduct required by international law simply by restricting itself to exercises of governmental power that it did not go to the trouble of reflecting in legislation, regulation or other forms of administrative decision. Such an approach would blow a hole in the standards of conduct expected of states for their conduct under international law and finds no support in the Treaty or otherwise.

A. THE TREATY PROVIDES PROTECTION FOR A BROAD RANGE OF "MEASURES"

35. The Claimant's position has consistently been that the term "measure" is to be read broadly and inclusively. Article 1.4 of the Treaty broadly defines the term "measure" to include "any law, regulation, procedure, requirement, or practice".⁷⁴ The term thus includes procedures, practices, actions or omissions, whatever their form. Indeed, the ordinary meaning of the term includes any action, step or omission,⁷⁵ which the ROK does not contest. Furthermore, the measure must be carried out by an entity whose acts are attributable to the State according to the separate test for attribution.
36. The ROK asks the Tribunal to disregard the Treaty definition and ordinary meaning of "measure". While conceding "that the term 'measure' is defined broadly for purposes

⁷² Rejoinder, ¶ 20; SOD, ¶ 213.

⁷³ Rejoinder, ¶ 27(a).

⁷⁴ Reply, ¶ 261.

⁷⁵ Reply, ¶¶ 264-265.

of the Treaty”,⁷⁶ it contends that the term should nevertheless be limited to “some kind of legislative, regulatory or administrative rule-making or action”⁷⁷ and cover only “a final decision”.⁷⁸ Neither the language of the Treaty nor the existing jurisprudence support the ROK’s interpretation.⁷⁹ The Treaty aims to create a “stable and predictable environment for investment”, to “establish clear and mutually advantageous rules governing [the Parties’] . . . investment” and to “liberaliz[e] and expand[] . . . investment between their territories”.⁸⁰ Nowhere is there any suggestion in its preambular paragraphs that the protections accorded to foreign investors by Chapter 11 are to be interpreted in the restrictive sense for which the ROK advocates.

37. Moreover, other uses of the term “measure” in the Treaty cannot override its expressly inclusive definition. In any case, they do not support the ROK’s argument that “measure” is restricted to “final” legislative, regulatory or administrative acts only:⁸¹
- a. Article 11.5 recognizes that “measures” include conduct that would not fall within the ROK’s definition, such as “requisitioning” or “destruction” of investments by the armed forces or authorities of the host State, which may not require formal legislative, regulatory or administrative action.⁸²
 - b. Chapter 20 references “laws, regulations, and *all other measures*”.⁸³ That Chapter 20 concerns the fulfilment of the parties’ obligations under multilateral

⁷⁶ Rejoinder, ¶¶ 20-21.

⁷⁷ Rejoinder, ¶ 20; SOD, ¶ 213.

⁷⁸ Rejoinder, ¶ 27(a).

⁷⁹ Rejoinder, ¶ 19.

⁸⁰ Treaty, **Exh C-1**, Preamble.

⁸¹ Rejoinder, ¶ 22.

⁸² Treaty, **Exh C-1**, Articles 11.4 (“ . . . each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to war or other armed conflict, or revolt, insurrection, riot, or other civil strife.”) and Articles 11.5 (“Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from: (a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or (b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation, the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss.”).

⁸³ Treaty, **Exh C-1**, Article 20.2 (ENVIRONMENTAL AGREEMENTS: “A Party shall adopt, maintain, and implement laws, regulations, and all other measures to fulfill its obligations under the multilateral environmental agreements listed in Annex 20A (“covered agreements”)”).

environmental agreements does not change the fact that the term “measures” is here used as a catch-all.⁸⁴

- c. Similarly, Article 1.3 requires States to ensure “*all necessary measures*” are taken, without restriction, to ensure compliance with the Agreement, including by regional levels of government. On the ROK’s definition of “measures”, this Article would require the ROK to give effect to the Treaty only by taking necessary legislative, regulatory or administrative acts. But this gloss finds no support in the Treaty language and is immediately contradicted by the inclusive definition of “measure” that follows in Article 1.4.
- d. The term “measure” is used countless times throughout the Treaty as a catch-all term for governmental acts or omissions without specification as to its form. For example, the term “measure” captures: “indirect[] . . . measures equivalent to expropriation or nationalization”;⁸⁵ “conformity assessment procedures”;⁸⁶ ensuring that new technical regulations comply with international standards;⁸⁷ and prescribing “special formalities in connection with covered investments”.⁸⁸ The ROK’s attempt to confine the definition simply cannot accommodate all of these different types of State conduct, including those listed in Sections D and E of Chapter 2. It is compelled to argue that licensing procedures, import restrictions, and even the mere “recognition” by Korea of Bourbon Whiskey and Tennessee Whiskey as distinctive American products must constitute a legislative, regulatory or administrative act within its definition (although it cannot specify which).⁸⁹ No such limitation is evident from the use of the term in the Treaty.

38. The narrow interpretation proposed by the ROK is also contradicted by the case-law, as the Claimant has already detailed in its Reply.⁹⁰ The ROK’s characterization of the

⁸⁴ Compare Rejoinder, ¶ 22(a).

⁸⁵ Treaty, **Exh C-1**, Article 11.6(1).

⁸⁶ Treaty, **Exh C-1**, Article 9.6(1).

⁸⁷ Treaty, **Exh C-1**, Article 9.6(4).

⁸⁸ Treaty, **Exh C-1**, Article 11.3(1).

⁸⁹ Rejoinder, ¶ 22(c); compare Reply, ¶ 270(c).

⁹⁰ Reply, ¶¶ 272-276.

relevant cases is once again unreliable and misleading. But the ROK is unable to avoid their central conclusions: that the term “measure” is broad,⁹¹ covers both “direct and indirect measures”,⁹² and is “non-exhaustive”.⁹³ Instead, the ROK now argues—as if it would be decisive—that all of the relevant cases fall within its newly-confected definition of “measures”.⁹⁴ That hopeful submission is not made out in the case-law:

- a. *Canfor v. United States*: The ROK says this case involved “official ‘determinations’ . . . [that] arose from the passage of legislation regarding countervailing and antidumping duties.”⁹⁵ To be clear, the case did not involve a challenge to anti-dumping and countervailing legislation, nor to final regulatory rule-making or action that would fall within the ROK’s definition. Instead, it involved politically-motivated abuses of process by American officials in determining the terms on which the claimants could import their softwood lumber to the United States.⁹⁶ The relevant measures included the actions “leading up to, including and following the determinations and the requirement that deposits be posted on imported softwood lumber.”⁹⁷ The Tribunal was not required finally to decide whether these were “measures” at the preliminary objections phase, but it concluded that the Claimants had particularized conduct comprising “measures” within the meaning of NAFTA.⁹⁸ Like the Treaty, NAFTA’s definition of “measures” in Article 201 “includes any law, regulation, procedure, requirement or practice”.

⁹¹ Rejoinder, ¶ 24(a); *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, **Exh CLA-161**, ¶ 364.

⁹² Rejoinder, ¶ 24(a); *SAUR International v. Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012, **Exh CLA-161**, ¶ 364. *See also Fisheries Jurisdiction Case (Spain v. Canada)* (Jurisdiction of the Court) [1998] ICJ Reports 432, **Exh RLA-14**, ¶ 66; Reply, ¶ 274(b).

⁹³ *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, **Exh CLA-95**, ¶¶ 148-149; *see* Rejoinder ¶ 23(a).

⁹⁴ Rejoinder, ¶ 23.

⁹⁵ Rejoinder, ¶ 23(a).

⁹⁶ *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, **Exh CLA-95**, ¶ 151.

⁹⁷ *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, **Exh CLA-95**, ¶ 148.

⁹⁸ *Canfor Corporation v. United States of America; Terminal Forest Products Ltd. v. United States of America*, UNCITRAL, Decision on Preliminary Question, 6 June 2006, **Exh CLA-95**, ¶ 149 (emphasis added).

- b. *Ethyl Corporation v. Canada*: As the ROK correctly describes, the measure at issue was a law that was subject to royal assent at the time that the Notice of Arbitration was filed and had thus not yet been formally adopted.⁹⁹ The ROK describes this case as “in line with the ROK’s understanding of ‘measure’”.¹⁰⁰ Yet the ROK’s definition requires an action that “must have been adopted”.¹⁰¹ By contrast, the Tribunal in *Ethyl Corporation* explained that “something other than a law, even something in the nature of a ‘practice’, which may not even amount to a legal stricture may qualify”.¹⁰²
- c. *Bilcon v. Canada*: the relevant measure was the fundamental departure by a statutory Joint Review Panel from the methodology required under domestic law when considering an environmental permit.¹⁰³ Unable to explain how this would fall within its restrictive definition, the ROK simply omits to address this case in its Rejoinder at all (although it is cited with approval elsewhere in its submissions).¹⁰⁴
39. Accepting the ROK’s restrictive definition of “measures” would make it nearly if not entirely impossible to challenge improper governmental omissions. To recall a few such examples of cases falling outside the ROK’s definition of “measure”:
- a. *Pac Rim Cayman LLC v. El Salvador*: The ROK says this case “dealt with ‘measures’ in the form of *decisions* related to the issuance of permits and concessions for mining rights”, which it says (without specification) constitute “legislative, regulatory or administrative actions”.¹⁰⁵ This is at best a partial account. The measures in that case constituted a *de facto* ban on mining which culminated in the El Salvadoran President’s stating publicly that he opposed the

⁹⁹ Rejoinder, ¶ 23(d).

¹⁰⁰ Rejoinder, ¶ 23(d).

¹⁰¹ Rejoinder, ¶ 27(b).

¹⁰² *Ethyl Corporation v. The Government of Canada* (UNCITRAL), Award on Jurisdiction, 24 June 1998, **Exh RLA-15**, ¶ 66 (emphasis added).

¹⁰³ *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 594, 600; *see also* Reply, ¶ 282.

¹⁰⁴ Rejoinder, ¶ 432-433.

¹⁰⁵ Rejoinder, ¶ 24(b).

granting of any new mining permits.¹⁰⁶ Contrary to the ROK’s submission, the relevant measure was not a piece of legislation, nor only the failure to issue the requested licenses. It was the continuing *practice* of the State—as carried out by multiple Government officials at the surreptitious behest of the President—to omit to grant (or even reject the application for) Pac Rim’s mining permits.¹⁰⁷

- b. Tribunals have repeatedly held that non-formal acts or omissions are capable of breaching a Treaty. In *Mitchell v. Congo*, the tribunal held that the conduct of military forces in searching the claimant’s law firm’s premises, putting it under seal and putting two of his employees in prison was an event tantamount to an expropriation which culminated in the loss of his firm.¹⁰⁸ It held that “the *notion of an expropriation is not a formal one*, which would imply that a decision of an authority of the State would be needed in order to qualify a taking of title as an expropriation . . . it covers *any measure which is, directly or indirectly, tantamount to an expropriation.*”¹⁰⁹
- c. Similarly, in *Biloune v. Ghana*, the Tribunal held that a series of measures in relation to a construction project, including a “stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr. Biloune without possibility of re-entry”, together constituted an indirect expropriation of the investor’s interest in the project.¹¹⁰ Indirect expropriations are not readily captured by the ROK’s interpretation of formal “legislative, regulatory or administrative rule-making or action”.

¹⁰⁶ *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **Exh CLA-150**, ¶ 2.27.

¹⁰⁷ *Pac Rim Cayman LLC. v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **Exh CLA-150**, ¶¶ 2.91, 2.94.

¹⁰⁸ *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award, 9 February 2004, **Exh CLA-185**, ¶¶ 61-62, *see* ¶ 65. While the Award was subsequently annulled on the basis that Mr. Mitchell’s law firm did not constitute an investment, the Annulment Committee rejected the challenge to the Tribunal’s finding on expropriation. *See also, Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, **Exh CLA-107**, ¶ 76.

¹⁰⁹ *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award, 9 February 2004, **Exh CLA-185**, ¶ 65.

¹¹⁰ *Antoine Biloune and Marine Drive Complex Ltd. v. Ghana Investments Centre and Government of Ghana*, UNCITRAL, Award on Jurisdiction and Liability, 27 October 1989, **Exh CLA-86**, ¶ 81.

- d. In *Bernhard von Pezold v. Zimbabwe*, the Tribunal held that the Full Protection and Security standard had been breached by the failure of the Zimbabwean police to protect foreign-owned farms from “occupation or to remove Settlers/War Veterans” or to respond to certain violent incidents.¹¹¹ Again, such an omission by the police would appear not to fall within the ROK’s narrow interpretation of “measures”.
40. The ROK cannot deny the clear jurisprudence to the effect that an omission can constitute a measure.¹¹² The ROK repeats its argument that the terms “adopted or maintained” restrict the meaning of the term measure by requiring that it must be adopted *and* maintained,¹¹³ while continuing to ignore the word “or” which makes these alternatives.¹¹⁴ According to its circular reasoning: an omission can constitute a “measure” only if “legislative, regulatory or administrative *action* [] resulted in the omission” and was first “adopted”.¹¹⁵ On the ROK’s case, therefore, an omission can only give rise to a Treaty breach if there is first an action. That is nonsense. It is orthodox treaty law that an omission, as such, can constitute a breach of a treaty. Furthermore, as already explained, a measure does not first have to be formally adopted.¹¹⁶
41. Unable to find support for its position in the case-law on “measures”, the ROK instead attempts to misconstrue *Azinian v. Mexico*.¹¹⁷ The ROK contends that the case stands for the proposition that a commercial act cannot constitute a “measure”. But the ROK

¹¹¹ *Bernhard von Pezold et ors v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, **Exh CLA-179**, ¶¶ 597, 599. *See also*, *Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **Exh CLA-23**, ¶ 290 (“failure by the Egyptian authorities to take any concrete steps to protect the Claimants’ investment from damage in reaction to third party attacks on the upstream pipeline system . . . constitutes a breach of . . . full protection and security.”).

¹¹² *Fireman’s Fund Insurance Co v. Mexico*, **Exh RLA-32**, ¶ 176, fn. 155; *CME v. Czech Republic*, **Exh CLA-101**, ¶ 605; Rejoinder, ¶ 27(b).

¹¹³ Rejoinder, ¶ 27.

¹¹⁴ Rejoinder, ¶ 27(a).

¹¹⁵ Rejoinder, ¶ 27(b).

¹¹⁶ *Mr. Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Award, 9 February 2004, **Exh CLA-185**, ¶¶ 61-62; *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, **Exh CLA-107**, ¶ 76 (“there is a wide spectrum of measures that a state may take in asserting control over property . . . It is clear, however, that a measure or series of measures can still eventually amount to a taking, though the individual steps in the process do not formally purport to amount to a taking or to a transfer of title.”).

¹¹⁷ Rejoinder, ¶ 30; SOD, ¶ 215; citing *Robert Azinian and others v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **Exh RLA-16**, ¶ 87.

itself concedes that the case “*did not mention ‘measures’*” at all, instead concerning the quite different question as to whether a mere contractual breach suffices for a Treaty claim.¹¹⁸ The ROK’s attempt to add yet another gloss on the clear Treaty definition of “measure” must be rejected. The Treaty nowhere requires that a measure must be an exercise of sovereign power. Furthermore, as the Claimant explains below, the ROK’s purported sovereign power requirement has recently been rejected yet again in *Strabag v. Libya*.¹¹⁹

42. The Tribunal should pay no heed to the ROK’s last-ditch suggestion that the Claimant’s definition of “measures” is “limitless in scope”,¹²⁰ and would “paralys[e] the State’s ability to act”.¹²¹ The case-law traversed above and in the Claimant’s Reply reveals no such trend. Instead, the question as to whether an act or omission constitutes a “measure” is to be determined on a case-by-case basis having regard to its broad and inclusive definition. Indeed, it is striking that the ROK has been unable to identify even a *single* case where the Tribunal has struck-out a claim for a failure to identify a measure.
43. The broad definition of “measure” in Article 1.4 of the Treaty includes “any law, regulation, procedure, requirement, or practice”, without prescribing its form.¹²² That definition should not be substituted with the restrictive definition for which the ROK contends.

¹¹⁸ Rejoinder, ¶ 30 (emphasis added); SOD, ¶ 215; citing *Robert Azinian and others v. The United Mexican States* (ICSID Case No. ARB(AF)/97/2), Award, 1 November 1999, **Exh RLA-16**, ¶ 87.

¹¹⁹ See below Section V, in particular ¶ 123; *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, **Exh CLA-189**, ¶ 164 (“Respondent argues that Article 8(1) of the Treaty [the umbrella clause] can operate only where the State acts in a sovereign capacity involving some exercise of sovereign authority - puissance publique . . . Hence, Article 8(1) of the Treaty cannot apply to ordinary commercial acts. The difficulty is that such arguments in effect call for the Tribunal to introduce limits or conditions to Article 8(1) that do not appear in its language or necessarily follow from its ordinary meaning. Respondent’s contention that Article 8(1) of the Treaty only covers contractual disputes involving some exercise of puissance publique . . . has no foundation in the text of the article.” (emphasis added)). See also Reply, ¶¶ 359-361.

¹²⁰ Rejoinder, ¶ 10(a). See also ¶ 21.

¹²¹ Rejoinder, ¶ 21.

¹²² Reply, ¶ 261.

B. THE ROK’S CONDUCT CONSTITUTES “MEASURES” WITHIN THE MEANING OF THE TREATY

44. In pressing its “measures” objection in the Rejoinder, the ROK deals only cursorily with the multiple acts of governmental misconduct by Blue House and Ministry officials and it mentions not at all any of the acts by the NPS of its officials of which the Claimant complains other than its eventual vote on the Merger. Plainly, the ROK prefers to argue about whether the NPS Merger vote alone—which it erroneously suggests is the sole “basis for the Claimant’s claims”¹²³—constitutes a “measure” within the meaning of the Treaty.

45. In truth, the conduct at issue in this case consists of a series of governmental actions and omissions which illegally subverted the integrity of the NPS’s internal processes as guaranteed under Korean and international law to reach a pre-ordained result.¹²⁴ They culminated in, but are certainly not limited to, the NPS’s vote itself in favor of the Merger. Either the Claimant is right that this conduct occurred and that it breached the Treaty, or it is wrong. But it is not open to the ROK to say that none of its conduct is subject to the international law standards and protections under the Treaty. Whether taken individually or together, there can be no question that the ROK’s governmental acts and omissions as identified by the Claimant all fall within the broad meaning of the term “measure” as defined in the Treaty.

1. The President’s instructions that the NPS should vote in favor of the Merger

46. The ROK says that the President merely requested “that the status of a particular situation be ‘monitored’”,¹²⁵ and while it concedes that this could show that the NPS vote was “*somehow influenced*” by the Blue House, or that the President had expressed a “preference”, it says this Blue House influence does not amount to a “measure”.¹²⁶

47. To recall, the specific conduct of President █████—which ultimately led to her impeachment, conviction and imprisonment—goes far beyond mere diligent “monitoring” or expressing “preferences”. The Seoul High Court found them, correctly,

¹²³ Rejoinder, ¶ 28(a).

¹²⁴ Reply, ¶ 361.

¹²⁵ Rejoinder, ¶ 25(a).

¹²⁶ Rejoinder, ¶ 28.

to be “instructions”.¹²⁷ In fulfilment of the corrupt deal she had entered into with ■■■■■ to assist the ■■■■■ Family’s succession plans for the Samsung Group, President ■■■■■ gave instructions to Government officials to intervene in the NPS’s internal processes on the Merger.¹²⁸ In particular, the Seoul High Court itself held that she had directed or approved Blue House officials “actively interven[ing] in the exercise of voting rights by NPS related to the Merger”,¹²⁹ thus providing “*decisive* assistance for the Merger.”¹³⁰ The NPS was to be “*actively utilized*” against Elliott.¹³¹ Surely President ■■■■■ herself was the best judge of how those instructions needed to be communicated in order to be effective, and we see from the outcome that they were effective. As her subordinates confirmed in evidence to the Special Prosecutor, they were left in no doubt that her instructions were to ensure the Merger would be approved.¹³²

48. Other than its attempts to minimize this conduct, the ROK cannot seriously contend that an instruction from the Head of State would not constitute a measure. The jurisprudence is replete with examples in which precisely such conduct has been found to constitute at least part of a measure.¹³³

2. Intervention in and subversion of the NPS’s processes by the ROK’s Presidential Blue House and Ministry of Health and Welfare

49. Following President ■■■■■’s instructions, Blue House officials, the Minister of Health and Welfare and other Ministry officials intervened in and subverted the NPS’s internal

¹²⁷ Reply, ¶ 108(a); Seoul High Court, ■■■■■ Decision, **Exh C-79**, pp. 37-38, 67. *See also* Second Suspect Examination Report of ■■■■■ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 24.

¹²⁸ Reply, ¶ 5(i), Section II.C.1, and ¶¶ 88-107.

¹²⁹ Seoul High Court, ■■■■■, **Exh C-286**, p. 90.

¹³⁰ Seoul High Court, ■■■■■, **Exh C-286**, pp. 103-104 (emphasis added).

¹³¹ *See* [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587** (emphasis added); ASOC, ¶ 98, Reply, ¶ 357.

¹³² Second Suspect Examination Report of ■■■■■ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 6. *See also*, p. 7 (testifying that he was told “per the President’s orders, the NPS with its significant shareholdings in Samsung should exercise its voting power wisely and enable the merger to proceed.” (emphasis added)).

¹³³ *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on the Respondent’s Jurisdictional Objections, 1 June 2012, **Exh CLA-150**. *See also* *Gold Reserve Inc v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, **Exh CLA-122**, ¶ 580-583 (where the President’s statements indicated a “change of policy by the Venezuelan Administration . . . this change at the Presidential level had a decisive bearing on the process of progressive cancellation of Claimant’s mining rights.” The relevant measure was identified as “President Chavez’s commanding the decision of whether the Initiation Act would be signed and whether the Brisas Project allowed to proceed.”).

processes, including its structural mechanism for independent decision-making, the Experts Voting Committee, to ensure that the NPS voted in favor of the Merger in accordance with those instructions.¹³⁴ The ROK seeks to minimize this intervention and subversion of the NPS’s internal processes as being merely preliminary “discussions” about “options” and “comments . . . that they favour a particular action”.¹³⁵

50. Again, this characterization is contradicted by judicial findings by the ROK’s own courts, and the overwhelming evidence of illegality that those findings are based on, which resulted in the conviction and imprisonment of President [REDACTED], Minister [REDACTED] and CIO [REDACTED].¹³⁶ The Claimant has set out the full extent of the Blue House and the Ministry’s intervention in the NPS’s decision-making process in its Reply.¹³⁷ In summary, the Ministry and the Blue House directed the NPS that this decision should be made by the Investment Committee after concluding that the independent Experts Voting Committee would not achieve the President’s directed outcome.¹³⁸ For instance, Ministry Director General [REDACTED] directly instructed NPS CIO [REDACTED] “to handle [the Merger vote] in the Investment Committee”,¹³⁹ and to ensure that the Investment

¹³⁴ See Reply, Section II.C and the evidence therein cited; see also “[Exclusive] We release the indictment against Jae-yong Lee in full”, Ohmy News, 10 September 2020, **Exh R-316**, pp. 56-57 (“*Unfair intervention* by the President, the Blue House, and the Minister of Health and Welfare in the exercise of voting rights by the NPS.” (emphasis added)).

¹³⁵ Rejoinder, ¶ 25(b) and (c); see also ¶ 28(a).

¹³⁶ This conduct has been alleged by the ROK’s own prosecutors and confirmed by the ROK’s own courts. Although some of those convictions are subject to final appeals, those appeals are on narrow points of law that will not result in any overturning of the existing judicial findings of fact. Indeed, that some of those narrow outstanding points of appeal have not been concluded has been connected by some in the ROK to the further impact they may have on the claims brought against the ROK in these proceedings. See, “[Exclusive] Court on influence peddling case should take into account Elliott proceedings” MK News, 21 December 2020, **Exh C-700** (“ . . . Moon and Hong requested the Supreme Court to “take into account in its decision process the Investor-State Dispute Settlement (“ISD”) proceedings by a United States private equity fund Elliott.” Accordingly, *there are suspicions that the Supreme Court is delaying its decision in view of adverse impact on the ‘Elliott ISD’.*” (emphasis added)).

¹³⁷ Reply, Section II.C.

¹³⁸ Reply, ¶ 355(h) and (i); “[Exclusive] We release the indictment against Jae-yong Lee in full”, Ohmy News, 10 September 2020, **Exh R-316**, p. 57 (“Upon receiving the report on the analysis of the propensity and the assenting or dissenting position of each Special Committee member as above, Hyung-pyo Moon determined that the vote 100% in favor of the merger could not be ensured if the agenda were referred to the Special Committee, and on 8 July 2015, instructed Wan-seon Hong, through Nam-kwon Jo, etc., to the effect that the merger should not be referred to the Special Committee but *should be approved* by the Investment Committee.”).

¹³⁹ See Seoul Central District Court, [REDACTED] / [REDACTED], **Exh C-69**, p. 47; Seoul High Court, [REDACTED] / [REDACTED] Decision, **Exh C-79**, p. 18 (the translation of the High Court judgment records the evidence very slightly differently: “In response, [REDACTED] excused the other employees and clearly told [REDACTED] that it was the [Minister’s] intention to have the voting rights turned over to the Investment Committee.”); Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 32. See also Rejoinder, ¶ 355(j).

Committee would “approve[.]” the Merger,¹⁴⁰ without letting anyone know that the Ministry had intervened, since the decision should have been made by the NPS “independently”.¹⁴¹ There can be no serious question that such a governmental intervention, involving orders to circumvent the NPS’s usual due process in order to achieve an outcome demanded by the President, constitutes a “measure” falling within the meaning of the Treaty.

3. The frauds and fabrications within the NPS in order to comply with Presidential and Ministerial Orders

51. The Presidential and Ministerial orders detailed above were carried out by NPS officials to the letter, in violation of the NPS’s own due process and its own regulatory governance safeguards. Thus, NPS officials ensured the circumvention of the Ministry’s independent Experts Voting Committee, which existed precisely to ensure the integrity of decisions on “difficult” and controversial matters such as this;¹⁴² thereby thwarting a binding request by the Chair of that Committee, ██████████, that the matter be referred to his Committee.¹⁴³ Removing any doubt as to the correct process that should have been followed, the NPS itself repeatedly made clear to the intervening Ministry officials that the Experts Voting Committee was the correct entity to make the

¹⁴⁰ See ASOC, fn. 241; see also, SOD, ¶ 432(b) (not denying that an instruction to approve the Merger was made by the Ministry); Rejoinder, ¶ 28(a) (accepting that meetings were held in which [the Government] “voic[ed] a preference in favour of the Merger’s being approved”; and that the “NPS vote was somehow influenced”).

¹⁴¹ Reply, ¶ 108(c)(ii); Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15 (Director General ██████████ to CIO ██████████: “even a mere child would know that, but you shouldn’t say that the [Ministry] was involved”); Transcript of Court Testimony of ██████████ (██████████ Seoul Central District Court), 22 March 2017, **Exh C-497**, p. 15.

¹⁴² Reply, ¶ 114; National Pension Fund Operational Guidelines, 9 June 2015, **Exh C-194**, Articles 17(5) and 5(5); Second Expert Report of Professor Choong-Kee Lee (*Second CK Lee Expert Report*), **CER-4**, ¶ 57. The ROK now accepts that it is mandatory for “difficult” matters to be referred to the Experts Voting Committee: Rejoinder, ¶ 201.

¹⁴³ Reply, ¶ 116; see in particular, Email from ██████████ (Experts Voting Committee) to various Ministry and NPS officials, 10 July 2015, **Exh C-427**; Statement Report of ██████████ in the Public Prosecutor’s Office, 25 November 2016, **Exh C-457**, p. 16.

decision,¹⁴⁴ but was over-ruled by its Ministerial superiors following a report that the Experts Voting Committee could not be trusted to approve the Merger.¹⁴⁵

52. To further ensure the President and Minister's orders were carried out, NPS officials then proceeded to produce a manipulated merger ratio based on false valuations and fabricated a so-called "synergy" effect calculation so as to ensure that the Investment Committee approved the Merger. These were fraudulent acts that were criminally designed to conceal the significant losses that the NPS would inflict on the ROK's National Pension Fund by allowing the Merger to proceed.¹⁴⁶ It was these fabricated materials that were presented to the Investment Committee to induce its decision to approve the Merger in accordance with Presidential and Ministerial instruction.
53. Taken together with the NPS's culminating decision to vote in favour of the Merger in a manner that violated the Investment Principles of Independence and Profitability that were to govern its management of the National Pension Fund, this amounts to governmental conduct that is undoubtedly subject to the investment standards of protection in the Treaty.

C. THE ROK'S MEASURES RELATED TO THE CLAIMANT AND ITS INVESTMENT IN SC&T

54. The ROK contends further that even if its conduct constituted "measures" that would be subject to the standards of protection in the Treaty, these were too remote to engage the Treaty because they were not "relating to (a) investors of the other Party; and (b) covered investments" for the purposes of Article 11.1.1. It argues that the measures "did

¹⁴⁴ Reply, ¶¶ 114, 424(a); *see for instance*, Transcript of phone calls between Team Leader ██████████ and [Ministry's] Deputy Director ██████████, 18 April 2017, **Exh C-333**, p. 12 ("the Merger [is] the sort of matter which really should be discussed in the [Experts Voting Committee], . . . the Experts Voting Committee was *created for this reason*." (emphasis added)); Seoul High Court, ██████████/█████████ Decision, **Exh C-79**, p. 15; Seoul Central District Court, ██████████/█████████, **Exh C-69**, p. 7. *See also*, Transcript of Court Testimony of ██████████ (█████████/█████████ Seoul Central District Court), 26 April 2017, **Exh C-508**, p. 12 ("I set forth an opinion that it would be appropriate to refer the matter to the Experts Voting Committee").

¹⁴⁵ Reply, ¶ 114(d)(iii); [Ministry of Health and Welfare, Draft], "Analysis of Pros and Cons of Exercising Voting Rights at Each Level", [undated, the final Report was sent to the Blue House on 8 July 2015], **Exh C-583**.

¹⁴⁶ Reply, Section II.C, Steps 4 and 5, *see for instance*, Seoul High Court, ██████████/█████████ Decision, **Exh C-79**, p. 33; Second Statement Report of ██████████, ██████████ and ██████████ to the Special Prosecutor, 25 December 2016, **Exh C-462**, pp. 18-19 ("[i]f you look at just the merger ratio, it was clear that Samsung C&T shareholders would suffer losses no matter what, so I think it was *an attempt to offset the losses by calculating synergy*.").

not have a ‘legally significant connection’ to EALP and its alleged harm.”¹⁴⁷ But the ROK was well aware that its interference on the Merger would directly impact Elliott, as a prominent and significant shareholder in SC&T; the impact was deliberate. It even anticipated that Elliott might invoke its protections under international law to challenge the ROK’s improper subversion of the NPS’s decision-making processes.¹⁴⁸ Its denials in this arbitration are belied by the contemporaneous evidence as the Merger was playing out. There can thus be no question but that the ROK’s measures were adopted and maintained “in relation” to the Claimant or its investment in SC&T.

55. The differences between the parties on the applicable legal test are relatively limited. Both parties agree that *Methanex Corporation v. United States of America* provides the applicable test for “relating to”: whether there is a “legally significant connection” between the impugned measures and the Claimant or its investment.¹⁴⁹ Moreover, the ROK does not take issue as a matter of principle with the Claimant’s submissions that:
- a. The ‘relating to’ requirement will be of particular significance when an investor is bringing a claim in relation to a measure of generic application like a regulatory change.¹⁵⁰
 - b. Such general measures do not have to be “targeted at the claimant or the investment” to satisfy the “relating to” test.¹⁵¹
 - c. Conversely, where the measures are specifically targeted at an investor or specific class of investors, the “relating to” test is of little significance since an obvious factual nexus exists between the measure and the investor or the investment. The ROK does not—and cannot—dispute the relevance of *S.D.*

¹⁴⁷ Rejoinder, ¶ 32.

¹⁴⁸ Reply, ¶¶ 5(h), 121; *see, for instance*, Transcript of Court Testimony of ██████████ (██████/██████ Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55 (“[i]f the Investment Committee decided to approve the merger, the NPS would [suffer] from an ISD (investor-state dispute) claim initiated by foreign hedge funds like Elliott.”); Statement Report of ██████████ to the Special Prosecutor, 5 January 2017, **Exh C-483**, pp. 39-40; *see also*, Transcript of Court Testimony of ██████████ (██████/██████ Seoul High Court), 26 September 2017, **Exh C-525**, p. 12 (noting that the Blue House was concerned “about the issue of ISD problems if the matter didn’t go through the Experts Voting Committee.”).

¹⁴⁹ Rejoinder, ¶¶ 32-34; citing *Methanex Corporation v. United States of America* (UNCITRAL), Partial Award, 7 August 2002, **Exh RLA-22**, ¶ 147.

¹⁵⁰ Reply, ¶ 289. *See* Rejoinder, ¶ 33(b).

¹⁵¹ Reply, ¶ 291.

Myers v. Canada, in which the “relating to” requirement was “easily satisfied” since the measures specifically targeted SDMI and its investment.¹⁵²

56. However, there are two important differences in the parties’ positions on the law:
- a. The ROK’s pleadings mistakenly state that the “relating to” test requires a connection between the measures pleaded and “the Claimant’s claims”,¹⁵³ or alternatively, between the measures and the *harm* caused.¹⁵⁴ Article 11.1.1 imposes no such requirement. Whether the “relating to” test is satisfied turns on the particular nature of the measures and the nexus between those measures and the *investment or investor* in question.¹⁵⁵ Consideration of the relationship between the loss suffered by the Claimant and the measures is instead a question of causation, which is analytically distinct from any threshold “relating to” requirement.¹⁵⁶
 - b. Neither must the Claimant show that the harm it was alleged to have suffered was not “tangential or merely consequential”.¹⁵⁷ The ROK has taken this quote out of context. The Tribunal in *Resolute Forest Products Inc v. Government of Canada* held that the “relating to” requirement is satisfied even if the measures are not targeted at the claimant or its investment; explaining that *even* a mere secondary effect will suffice unless it is “tangential or merely consequential.”¹⁵⁸ In that case, protectionist measures in favor of a paper mill in Nova Scotia were

¹⁵² Reply, ¶ 292; *S.D. Myers, Inc. v. Government of Canada* (UNCITRAL), Partial Award, 13 November 2000, **Exh RLA-19**, ¶ 234.

¹⁵³ Rejoinder, ¶ 32 (Heading 3: “The alleged ‘measures’ lack a legally significant connection to, and thus are too remote to support, the Claimant’s claims.”).

¹⁵⁴ Rejoinder, ¶ 32 (“the Tribunal . . . should dismiss the Claimant’s claims on the basis that those acts did not have a ‘legally significant connection’ to EALP and its alleged harm.”).

¹⁵⁵ *Methanex Corporation v. United States of America* (UNCITRAL), Partial Award, 7 August 2002, **Exh RLA-22**, ¶ 147.

¹⁵⁶ Reply, ¶ 288; *Resolute Forest Products Inc v. Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 242; *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, 25 August 2014, **Exh CLA-1**, ¶¶ 6.20, 6.26 (“[I]t [is] inappropriate to introduce within NAFTA Article 1101(1) a legal test of causation applicable under Chapter Eleven’s substantive provisions for the merits of the Claimants’ claims . . . there is no reason for requiring NAFTA Article 1101(1) to be so narrowly interpreted as to require only a claimant with a successful case on causation to pass through its threshold gateway.”).

¹⁵⁷ Rejoinder, ¶¶ 33(c), 34, 35, 38.

¹⁵⁸ *Resolute Forest Products Inc v. Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 242. *See also* Reply, ¶ 291.

held to be sufficiently “proximate” to the investor-claimant, a paper mill in Nova Scotia. The Tribunal emphasized that “it was to be *expected* that competitors would be *affected*.”¹⁵⁹

57. In this case, the measures at issue manifestly “relate to” the Claimant and/or its investment in SC&T.
- a. Importantly, the measures at issue were not generally applicable regulations like those in *Methanex*. Instead, they involved a specific intervention by the Government that directly impacted a limited and identifiable class of investors: shareholders in SC&T.¹⁶⁰ The ROK’s argument that the Claimant was one of a number of minority shareholders in SC&T is to no avail.¹⁶¹ Elliott was one of only a handful of shareholders holding a significant stake in SC&T of 7.12% at the time of the Merger.¹⁶²
 - b. This conclusion is only confirmed by the evidence that the ROK’s measures to secure the Merger were specifically intended to discriminate against the Claimant and to favor the █████ Family.¹⁶³ As the documentary record repeatedly confirms, the Claimant was repeatedly singled out as one of the “foreign investors” problematic to the ROK’s plan to provide assistance to Samsung’s succession plan.¹⁶⁴ Those measures were specifically targeted at the Claimant, in response to the perceived “attack” of the so-called “foreign vulture fund”¹⁶⁵ on the ROK’s national champion Samsung.¹⁶⁶ Multiple internal Government documents refer specifically to the Claimant by name.¹⁶⁷ The Claimant was thus

¹⁵⁹ *Resolute Forest Products Inc v. Government of Canada* (PCA Case No. 2016-13), Decision on Jurisdiction and Admissibility, 30 January 2018, **Exh RLA-86**, ¶ 248 (emphasis added). *See also* Reply, ¶ 291.

¹⁶⁰ Reply, ¶ 294.

¹⁶¹ Rejoinder, ¶ 35.

¹⁶² Reply, ¶ 294. *See* DART filing titled “Report on Stocks, etc. Held in Bulk”, 4 June 2015, **Exh R-3**, p. 4.

¹⁶³ Reply, ¶ 295.

¹⁶⁴ *See, e.g.*, [██████████]’s Handwritten Memo, undated, **Exh C-585**, p. 4.

¹⁶⁵ Transcript of Court Testimony of █████ (██████ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 43-46; “[██████████]”, “Issues in Case the Investment Committee Votes on the SC&T Merger”, [7 or 8 July 2015], **Exh C-420**, p. 3.

¹⁶⁶ “Transcript of President Park Geun-hye’s New Year Press Conference”, Hankyoreh, 1 January 2017, **Exh C-60**, pp. 5-6.

¹⁶⁷ [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587**; Statement Report of █████ to the Special Prosecutor, 26

specifically targeted by the ROK as a central obstacle to its scheme to favor the [REDACTED] Family through the Merger.¹⁶⁸

- c. As for the ROK's argument that the NPS did not consider the position of the Claimant expressly when voting in favor of the Merger,¹⁶⁹ even if correct, this would not detract from the existence of the necessary nexus between the measures and the Claimant and its shareholding in SC&T. And it is not correct. The ROK was only too aware of the impact on the Claimant if the NPS were to approve the Merger by exercising the National Pension Fund's casting vote in favor. For instance, CIO [REDACTED] expressly discussed with the Blue House's Senior Presidential Secretary [REDACTED], his concerns about whether "if the Investment Committee decided to approve the merger, the NPS would suffer from an ISD (investor-State dispute) claim initiated by foreign hedge funds like Elliott".¹⁷⁰

58. Any Treaty requirement that the measures must "relate to" the Claimant or its investment is thus easily satisfied.

December 2016, **Exh C-463**, p. 8; "Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)", YTN, 20 July 2017, **Exh C-72**, p. 1.

¹⁶⁸ See, e.g., Work diary of [REDACTED], entry dated [25 June 2015], **Exh C-367**, p. 3 (recording, in a diary entry by Senior Secretary [REDACTED] from late June 2015, that the Blue House considered the SC&T-Cheil Merger as being about "the Samsung-Elliott dispute").

¹⁶⁹ Rejoinder, ¶ 39, 41(a).

¹⁷⁰ Transcript of Court Testimony of [REDACTED] ([REDACTED] / [REDACTED] Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55; Transcript of Court Testimony of [REDACTED] ([REDACTED] Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 32-33. See also Reply, ¶ 121.

IV. THE MEASURES ARE ATTRIBUTABLE TO THE ROK

59. The ROK cannot deny that the acts of President █████, the Presidential Blue House, and Minister █████ and officials of the Ministry of Health and Welfare are attributable to the ROK.¹⁷¹ Its next objection, pertaining to matters of attribution, does not therefore apply at all to much of the conduct of which the Claimant complains, and that emanates from the ROK’s Presidency and Ministry. But the ROK continues to deny its responsibility for the NPS—a public institution and administrative agency that forms part of the Korean administrative branch of Government.¹⁷² This is a cynical shift from the period in which the events giving rise to this arbitration were unfolding. Then, as we have just seen, the NPS’s CIO openly discussed with Blue House officials precisely the risk that “*the NPS would suffer from an ISD claim*”¹⁷³—a concern that notably was not dismissed in this or any of several other similar conversations on the basis that the NPS somehow was not part of the ROK Government for purposes of attracting liability under an investment treaty.
60. Contrary to the ROK’s current denial, the NPS is a “State organ” for the purposes of Article 4 of the ILC Articles and Article 11.1.3(a) of the Treaty (*Section II.A*); it exercises delegated governmental powers for the purposes of Article 5 of the ILC Articles and Article 11.1.3(b) of the Treaty (*Section II.B*); and acts under the “direction or control” of the Blue House and the Ministry of Health and Welfare in relation to the Merger for the purposes of Article 8 of the ILC Articles (*Section II.C*). The conduct of the NPS is therefore also attributable to the ROK.
- A. THE CONDUCT OF THE NPS IS ATTRIBUTABLE TO THE ROK UNDER THE TREATY AND CUSTOMARY INTERNATIONAL LAW**
61. The ROK contends that Article 11.1.3 of the Treaty “supplants” the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (*ILC Articles*), while at the same time acknowledging that the principles reflected in Articles 4 and 5 of the ILC

¹⁷¹ Reply, ¶ 298; Rejoinder, fn. 69; *see also*, above ¶¶ 4650.

¹⁷² Rejoinder, ¶ 44.

¹⁷³ Transcript of Court Testimony of █████ (█████/█████ Seoul Central District Court), 17 May 2017, **Exh C-511**, p. 55; Transcript of Court Testimony of █████ (█████ Seoul Central District Court), 4 July 2017, **Exh C-520**, pp. 32-33.

Articles remain “the applicable rules of international law”.¹⁷⁴ For the reasons explained further below, the claim that the Treaty is *lex specialis* of Article 8 of the ILC Articles cannot succeed.¹⁷⁵ Article 11.1.3 reflects the applicable customary international law rules in part, but it does not displace them.¹⁷⁶

B. THE NPS IS A STATE ORGAN UNDER ARTICLE 11.1.3(A) OF THE TREATY AND ARTICLE 4 OF THE ILC ARTICLES

62. The Claimant submits that the NPS is a State organ pursuant to the customary international law rules in Article 4 of the ILC Articles and Article 11.1.3(a) of the Treaty.

63. To recall, Article 11.1.3(a) of the Treaty provides:

For purposes of this Chapter, measures adopted or maintained by a Party means measures adopted or maintained by:

(a) central, regional, or local governments and authorities.

64. It is necessary to look to customary international law to determine how the term “central . . . governments and authorities” should be identified, as both Parties agree.¹⁷⁷ ILC Article 4 provides:

¹⁷⁴ Rejoinder, ¶¶ 45, 67, 92 (“The applicable rules of international law with respect to Article 11.1.3 of the Treaty are ILC Articles 4 and 5, which accord with the specific attribution rules the State parties chose to include in the Agreement. ILC Article 8 simply is not applicable here.”).

¹⁷⁵ See below Section IV.D.1.

¹⁷⁶ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016, **Exh CLA-176**, ¶ 1200 (“The BIT has to be construed in harmony with other rules of international law, of which it forms part.”); *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 12 September 2017, **Exh CLA-90**, ¶ 41 (“ . . . the operation of a *lex specialis* in a BIT does not have the effect (unless the BIT explicitly provides otherwise) of precluding the operation of Article 25 [of the ILC Articles on State Responsibility], which continues to function as a “secondary rule of international law” operating even when an exception under the *lex specialis* is not available.”); see also, *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **Exh CLA-103**, ¶¶ 133-134; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, **Exh CLA-163**, ¶¶ 203-204, 208-209.

¹⁷⁷ Rejoinder, ¶ 45 (“Article 11.1.3(a) of the Treaty . . . can be understood by reference to, ILC Article 4.”); SOD, ¶ 249.

Article 4

Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or *any other functions*, whatever position it holds in the *organization of the State*, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ *includes* any person or entity which has that status in accordance with the internal law of the State.

65. Three points bear emphasis. First, the words “any other functions” confirm that the function (whether an exercise of *puissance publique* or not) performed by the entity is not important in determining whether it is a State organ. Instead, the State organ test is a structural one, which asks whether the entity is part of the “organization of the State”, i.e., the State apparatus. Second, the word “includes” in Article 4(2) confirms that it is not necessary that those entities must have the characterization of an organ under internal law in order to so qualify under international law. As the Parties agree, an organ may be identified from internal law or from practice.¹⁷⁸ Third, Article 4 does not make any distinction between *de jure* and *de facto* State organs. Both categories fall within the meaning of Article 4 and the same structural test applies in each case. It is therefore not necessary for the Tribunal to try to pigeonhole the NPS as a *de jure* or *de facto* State organ.
66. It is straightforward for the Tribunal in this case to find that the NPS is a “State organ”. The same conclusion was reached in *Dayyani v. Korea*, in respect of the Korean Asset Management Company (**KAMCO**), a Korean public institution with an identical legal designation to the NPS.¹⁷⁹ Like the NPS, the KAMCO has independent legal personality; like the NPS, it carries out public functions on behalf of the Korean public under a specific statutory delegation; and, like the NPS, it is designated as a fund-

¹⁷⁸ SOD, ¶ 250.

¹⁷⁹ See Alison Ross and Tom Jones, “Bruising loss for South Korea at hands of Iranian investors”, *Global Arbitration Review*, 8 June 2018, **Exh C-282**; Jarrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IAReporter*, 22 January 2019, **Exh C-299** (referring to *Mohammad Reza Dayyani et ors v. Republic of Korea*, PCA Case No. 2015-38, (unpublished Award), dated June 2018); ASOC, ¶ 185.

management type, quasi-Governmental institution under Korean law. Although the ROK contends that these factors do not make the NPS a “State organ”, the *Dayyani* tribunal had no hesitation in concluding otherwise: that on the same facts, the KAMCO was a State organ. In its Rejoinder, the ROK admits that even KAMCO *itself* had taken the position that it was a State organ in pleading sovereign immunity before US Courts,¹⁸⁰ a factor that the Tribunal unsurprisingly took into account in its decision. That is not a factor that assists the ROK here. Rather, it reveals why its suggestion that a functionally identical body should be treated differently here is unsustainable.

67. Notwithstanding *Dayyani*, the ROK continues to deny that the NPS is a State organ. There appear to be two main differences between the parties in terms of the law:
- a. the applicable test for a “State organ” under the internal law of a State that does not contain a cognate general concept of a “State organ”;¹⁸¹ and
 - b. whether the separate legal personality of an entity prevents the NPS from constituting a State organ as a matter of international law.¹⁸²
68. The Claimant responds on each issue, explaining the applicable law and why it establishes that the NPS is a State organ.

1. The NPS is part of the ROK Government

(i) The State apparatus test

69. The first point in dispute between the parties is the applicable test for a “State organ” in circumstances in which the internal law of a State does not contain a cognate general concept or definition of a “State organ”.¹⁸³ While Korean law does not use and has no need for this omnibus concept, its designation as a public institution under Korean law is one consideration in determining whether it can be characterized as a State organ for

¹⁸⁰ Rejoinder, ¶ 66(a).

¹⁸¹ Rejoinder, ¶¶ 55-57.

¹⁸² Rejoinder, ¶ 53.

¹⁸³ Rejoinder, ¶¶ 55-57.

the purposes of international law.¹⁸⁴ The ROK’s assertion that the Claimant concedes that the NPS is not a *de jure* State organ is therefore a mischaracterization.¹⁸⁵

70. In reality, it is the ROK that now accepts that the Tribunal need not look to a definition of a State organ under Korean law. The central plank of its ILC Article 4 attribution argument in its Statement of Defence was that “the identity of State organs under Korean administrative law is determined by the Korean Constitution and legislation based on the Constitution”.¹⁸⁶ By comparison, in its Rejoinder the ROK admits that “whether Korean law uses the term ‘State organ’ is irrelevant”, and its pleadings and Expert’s Report instead pivot towards answering the question whether the NPS is part of the “organic structure of the State”.¹⁸⁷
71. Nevertheless, the ROK’s new “organic structure” test appears to come closer to the correct test for a State organ articulated by the Claimant: whether as a matter of “domestic law and practice” the NPS “is part of the State apparatus” of Korea.¹⁸⁸ The Claimant’s position is that this test applies whether or not the State itself has a concept of “State organs” within its own internal law. Indeed, while internal law is one possible indicator of a State organ, it is not exhaustive.¹⁸⁹ By contrast, the ROK seeks to argue for a more difficult test based on the allegation that its internal law exhaustively defines a State’s constitutive parts.
72. Relying almost exclusively on the International Court of Justice (*ICJ*)’s judgment in *Bosnian Genocide*, the ROK contends that an entity that is not formally designated as

¹⁸⁴ ASOC, ¶ 181; Reply, ¶ 331.

¹⁸⁵ Rejoinder, ¶ 46.

¹⁸⁶ SOD, ¶ 254.

¹⁸⁷ Rejoinder, ¶¶ 47-48. The literal translation of the Korean term (*jeong-bu-jo-jik*) used by Professor Sungsoo Kim for “organic structure of the Korean government” is “government organization”. This term is an abstract one with no express definition in Korean statutes, but is used in the title of the Government Organization Act, 19 November 2014, **Exh C-258**. It is to be distinguished from the term “national administrative agency” in Article 1 of that Act.

¹⁸⁸ Reply, ¶ 318; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Separate Opinion of Judge Ago to Judgement, ICJ Reports 1986, 27 June 1986, **Exh CLA-96**, p. 188 (defining an organ as “persons or groups directly belonging to the State apparatus and acting as such”); *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 305-324 (finding that the Joint Review Panel (JRP) was a State organ under Article 4 as it was an “integral part of the government apparatus of Canada” without reference to any “complete dependence” test); *see also*, SOD, ¶ 250.

¹⁸⁹ ILC Commentary, **Exh CLA-38**, Art 4, p. 42, ¶ 11.

part of the State under its internal law can constitute a “State organ” *only* where there is “a particularly great degree of State control” over the entity, which must “act in ‘complete dependence’ on the State.”¹⁹⁰ It also relies on the *de jure* and *de facto* distinction in that case. But these isolated quotes do not constitute the general “international law test for identifying a *de facto* State organ” as the ROK contends.¹⁹¹ While the ICJ did not hesitate to affirm the Article 4 test,¹⁹² it was asked to apply it in a particular and “exceptional” context: that of acts of genocide by an irregular, paramilitary body based in the territory that became Bosnia and Herzegovina following the break-up of Yugoslavia. But that irregular body had no legal personality or formal status in the Former Republic of Yugoslavia (*FRY*).¹⁹³ Its members were not members of the FRY armed force and nor did they carry rank within the FRY army.¹⁹⁴ Moreover, the Court recognized that a finding of attribution in the context of a charge of “exceptional gravity” such as genocide requires evidence that is “fully conclusive”.¹⁹⁵

73. The same considerations do not apply in the context of investment arbitration.¹⁹⁶ The majority of investment tribunals do not make any reference to *Bosnian Genocide* as

¹⁹⁰ SOD, ¶ 251; Rejoinder, ¶ 55, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Reports 43, **Exh CLA-24**, ¶ 393.

¹⁹¹ Rejoinder, ¶ 56(a).

¹⁹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, [2007] ICJ Reports 43, **Exh CLA-24**, ¶ 385.

¹⁹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, [2007] ICJ Reports 43, **Exh CLA-24**, ¶ 386.

¹⁹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, [2007] ICJ Reports 43, **Exh CLA-24**, ¶ 388. The Court also noted that the officers were appointed to their commands by the President of the Republika Srpska (not the FRY) and “were subordinated to the political leadership of the Republika Srpska.”

¹⁹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, [2007] ICJ Reports 43, **Exh CLA-24**, ¶ 209 (“ . . . claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive . . . The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.”); ¶ 393 (“so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them”).

¹⁹⁶ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 130 (“the approach developed in such areas of international law [such as foreign armed intervention or international criminal responsibility] is not always adapted to the realities of international economic law and . . . should not prevent a finding of attribution if the specific facts of an investment dispute so warrant”).

pronouncing the quintessential test for a *de facto* organ under Article 4,¹⁹⁷ including authorities on which the ROK itself relies.¹⁹⁸ The ROK can point to only one investment tribunal that has referenced the *Bosnian Genocide* case in the context of “State organs”.¹⁹⁹ The jurisprudence instead confirms the test for a State organ set out by the Claimant: the degree of incorporation of the entity into the State apparatus.²⁰⁰ But even if the *Bosnian Genocide* test were held to be applicable, it would be easily satisfied in this case for the reasons explained below in the context of Article 8 of the ILC Articles.²⁰¹

(ii) *The NPS forms part of the Korean administrative branch*

74. We address below the ROK’s arguments as to why the NPS is not part of the Korean “State apparatus” (or “organic structure of the State” in its terminology) as a matter of Korean law.

¹⁹⁷ Reply, ¶ 321; *see e.g., Ampal-American Israel Corp. and ors v. Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, **Exh CLA-23**, ¶¶ 132-147 (finding that “EGPC is an Egyptian State organ” without reference to any “complete dependence” test); *Flemingo DutyFree Shop Private Limited v. Republic of Poland* (UNCITRAL), Award, 12 August 2016, **Exh CLA-5**, ¶ 425 (“Whether PPL is a State organ under the principle, formulated by Article 4 of the ILC Articles, requires a more detailed analysis of PPL’s status, structure, and operations.”); *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶¶ 305-324 (finding that the Joint Review Panel (JRP) was a State organ under Article 4 as it was an “integral part of the government apparatus of Canada” without reference to any “complete dependence” test). *See also Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016, **Exh RLA-80**, ¶ 80 (“Internal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way.” Strikingly, the case—which is relied on the ROK—cites *Bosnian Genocide* in the context of Article 8, but not Article 4 of the ILC Articles. It instead emphasised the degree of “autonomous management and financial status” in determining that the ANR was not a *de facto* State organ. *Id.*, ¶ 213). The ROK itself acknowledges that *Almås v. Poland* does not apply its proposed “State control” test, highlighting the “irrelevance of elements of State control to the question of *de facto* State organs” in that case. *See*: Rejoinder, ¶ 64.

¹⁹⁸ *See also Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, 27 June 2016, **Exh RLA-80**, ¶ 80 (“Internal status does not necessarily imply that an entity is not a State organ if other factors, such as the performance of core governmental functions, direct day-to-day subordination to central government, or lack of all operational autonomy, point the other way.” Strikingly, the case—which is relied on the ROK—cites *Bosnian Genocide* in the context of Article 8, but not Article 4 of the ILC Articles. It instead emphasised the degree of “autonomous management and financial status” in determining that the ANR was not a *de facto* State organ. *Ibid.*, ¶ 213).

¹⁹⁹ Rejoinder, ¶ 56(b); citing *Union Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **Exh RLA-88**, ¶ 9.96.

²⁰⁰ *See above*, ¶¶ 6971.

²⁰¹ *See below*, Section IV.D.

75. *First*, the ROK contends that the acts of the NPS are not attributable to the ROK under Article 11.13(a) of the Treaty because the NPS does not “fall[] within the concept of a State organ pursuant to Korean law.”²⁰² Specifically, the ROK again argues that “the Korean Constitution and the Government Organization Act comprehensively catalogue the entities or persons comprising the *organic structure of the State*”, amongst which the NPS is not included.²⁰³ However, the Government Organization Act and the Constitution do not comprehensively delineate the scope of the ROK Government, providing only an “outline” of “national administrative agencies”.²⁰⁴ The Act itself further recognizes that there exist other “administrative agencies” which are empowered by other Acts to deal with delegated administrative duties.²⁰⁵ One feature of Korean law is the variety of different terminology used to describe State entities.²⁰⁶
76. In his Second Expert Report, Professor Sung-Soo Kim claims that only central administrative agencies listed in the Government Organization Act and the Constitution constitute the “organic structure” of the Korean State.²⁰⁷ The flaw in Professor Sung-soo Kim’s approach is that he fails to recognize that administrative agencies may form part of the ROK Government for the purposes of Korean law, whether or not designated as a “central administrative agency”.²⁰⁸ For the purposes of Korean law, one

²⁰² Rejoinder, ¶ 47.

²⁰³ Rejoinder, ¶ 48 (emphasis added).

²⁰⁴ Government Organization Act, 19 November 2014, **Exh C-258**, Article 1 (“The purpose of this Act is to prescribe the outline for the establishment and organization of national administrative agencies and the scope of functions thereof in order to perform national administrative affairs systematically and efficiently.”)

²⁰⁵ Government Organization Act, 19 November 2014, **Exh C-258**, Article 6(1) (“Administrative agencies may delegate some duties to subsidiary organs or subordinate administrative agencies, or entrust or delegate them to other administrative agencies, local governments, or subsidiary organs or subordinate administrative agencies thereof, as prescribed by Acts and subordinate statutes.” (emphasis added)); *see also* First Expert Report of Professor Choong-Kee Lee (*First CK Lee Expert Report*), **CER-1**, ¶ 31(ii).

²⁰⁶ *See* Second CK Lee Expert Report, ¶ 14; *see also* Official Information Disclosure Act, **Exh C-136**, which is applicable to “public institutions”, including central administrative agencies and local Government; similarly, the Special Act on Management of Public Funds, **Exh C-687**, Article 3(3) referring to “institutions related to public funds, such as the Government, the Financial Services Commission.”

²⁰⁷ Second Expert Report of Professor Sung-soo Kim (*Second Kim Expert Report*), **RER-4**, ¶ 15(c); 18(b). He supports this argument by reference to a version of the Government Organization Act that was not yet in force at the time of the Merger. *See* Government Organization Act, 12 September 2020, **Exh SSK-53**, Art 2(2) (emphasis added). *Compare*: First Expert Report of Professor Sung-soo Kim (*First Kim Expert Report*), **RER-2**, ¶ 11(b) (recognizing so called “State organs that are established under . . . other Acts enacted pursuant to the ROK’s Constitution”).

²⁰⁸ Second CK Lee Expert Report, ¶ 19; *see also*, Rejoinder, ¶ 48. *Compare*, S Kim, “Governance, Democratic Legitimacy and Administrative Accountability under the Administrative Organization Law” (2017) 2 (58) Pusan National University Law Review 1, **Exh C-699**, p. 5 (of PDF) (“because *administrative organizations exist in various forms*, such as national administrative organizations, local

consideration in determining whether an entity forms part of the administrative branch of Government is whether it is empowered to exercise administrative power.²⁰⁹ In this regard, the parties agree that the NPS is an administrative agency under Korean law, carrying out administrative functions under specific Government delegation.²¹⁰

77. *Second*, although the ROK accepts that the NPS carries out administrative functions and is thus an administrative agency under Korean law,²¹¹ it seeks to belittle this by contending that the NPS is merely “an indirect administrative agency . . . [which] does not form part of the vertical hierarchy of the State”.²¹² But this purported direct/indirect distinction is not relevant to the categorization of the administrative agency since all administrative agencies form part of the State’s administrative branch and have the rights and obligations assigned under public (administrative) law.²¹³ Its only possible relevance is to describe whether the administrative power has been directly delegated by the State, or is first delegated by a central administrative organ (such as the Minister of Health and Welfare), as is the case for public institutions with separate legal personality (like the NPS).²¹⁴ Even the Constitutional Court decisions on which the ROK relies do not use the term “indirect administrative agency” or otherwise rule that such are not part of the national administrative organization.²¹⁵ Moreover, they recognize that “indirect *administration*” would constitute an act of public power by a *guk-ga-gi-gwan*, the same Korean term that Professor Sung-Soo Kim uses as his equivalent for a State organ.²¹⁶

administrative organizations, *public institutions etc.*, and each organization’s organizational and operational principles differ significantly from one another, *providing a singular definition of the administrative organization law applicable to all these organizations would be difficult.*” (emphasis added)).

²⁰⁹ Second CK Lee Expert Report, ¶ 19.

²¹⁰ SOD, ¶ 266; Rejoinder, ¶ 52; Reply ¶ 331(c); Second CK Lee Expert Report, ¶ 30.

²¹¹ SOD, ¶ 266.

²¹² Rejoinder, ¶ 52; *see also* SOD, ¶ 266.

²¹³ Second CK Lee Expert Report, ¶ 28; *see also* Hyun-Ho Kang, “Understanding Administrative Law”, (1st ed., 2018), **Exh C-690** pp. 92, 94 and 95; Nam-Jin Kim, Yeon-Tae Kim, “Administrative Law II”, (24th ed., 2020), **Exh C-696**, pp. 44, 60; Yuh-Wan Kim, “Modern Administrative Law Lecture”, (5th ed., 2020), **Exh C-694**, pp. 341, 355-356; Jung-Sun Hong, “Principles of Administrative Law (II)”, (28th ed., 2020), **Exh C-693**, pp.6-7.

²¹⁴ Nam-Jin Kim, Yeon-Tae Kim, “Administrative Law II”, (24th ed., 2020), **Exh C-696**, pp. 44, 60.

²¹⁵ Rejoinder, ¶ 52.

²¹⁶ Second Kim Expert Report, fn. 72.

78. As Professor Choong-Kee Lee explained, given the diversity of entities that have been entrusted with administrative functions in Korea, the Korean legal system does not attempt to exhaustively to define the administrative branch of Government.²¹⁷ Instead, administrative agencies include those that exercise a delegated administrative function.²¹⁸ The ROK has no response to the fact that the NPS is part of the administrative branch of the ROK’s government, performing as it does delegated administrative and constitutional functions, namely through the provision of a national pension to Korean pension-holders.²¹⁹
79. The ROK does not contest a number of the other features of Korean law that confirm that the NPS is a part of the ROK Government:²²⁰
- a. There is no dispute that the NPS is formally designated as a “public institution”, specifically a “fund-management-type quasi-governmental institution”.²²¹ It

²¹⁷ Second CK Lee Expert Report, ¶¶ 10-12. On the non-exhaustiveness of the Government Organization Act, *see* **Exh SSK-38** (updated excerpt) pp. 115-116 (“administrative organization legalism does not necessarily mean that administration shall be organized by a single Act such as the Government Organization Act and that the National Assembly must prescribe every administrative organization by way of formalistic Acts.”); Hyunho Kang, “Understanding Administrative Law”, (1st ed., 2018) **Exh C-690**, p. 92 (“Article 1 of the Government Organization Act stipulates that the purpose of the Act is to prescribe an outline for the establishment and organization of *national administrative agencies* and the scope of duties thereof in order to uniformly and efficiently perform national administrative affairs. As the Act prescribes an outline, the *Act’s prescription cannot be taken as a complete definition of national administrative organizations.*” (emphasis added)). Professor Sung-soo Kim criticizes Professor Choong-Kee Lee for relying on textbooks to support his reliance on the deduction and active theories of defining the administrative law branch in Korean law: Second Kim Expert Report, ¶ 11-12. In fact, these theories are well established in defining administrative organizations, and appear even to have been applied by Professor Sung-soo Kim himself. *See*: Sung-Soo Kim, “General Administrative Law: Constitutional Principles of Administrative Law Theory” (8th ed, Hongmunsa, 2018), **Exh C-689**, pp. 8-11 (“It is difficult, however, to define what administration, which is the subject of administrative law, precisely means . . . the concepts and characteristics of administration as a subject of administrative law would become clearer if it is compared to other State actions, such as legislative and judicial functions, given the principle of the division of powers.”); *see also*, Myung-Ho Ha, “Administrative Law”, (2nd ed., 2020), **Exh C-695**, p. 3; Nam-Jin Kim, Yeon-Tae Kim, “Administrative Law II”, (24th ed., 2020), **Exh C-696**, p. 4; Jung-Sun Hong, “Principles of Administrative Law (I)”, (28th ed., 2020), **Exh C-693**, pp. 4-5.

²¹⁸ Second CK Lee Expert Report, ¶¶ 12; Framework Act on Administrative Regulations, 18 October 2018 **Exh C-691**, Article 2(1)(4); Framework Act on Administrative Investigations, **Exh C-688**, Article 2(3) (defining the term “Administrative agencies” as “agencies that have administrative authority according to Acts and subordinate statutes . . . and juristic persons, organizations, institutions and individuals delegated or entrusted with the said authority.”).

²¹⁹ Second CK Lee Expert Report, ¶¶ 30, 35 (the NPS carries out “the administrative affairs of the Minister”), ¶ 46 (fulfilling a constitutional mandate to provide for the welfare of Korean citizens) ¶ 48 (“the NPS is invested with ‘administrative power’”); *see also*, Second Kim Expert Report, ¶ 38 (the NPS performs “certain administrative duties”) and ¶ 45 (it exercises “administrative authority”).

²²⁰ ASOC, ¶ 180; Reply, ¶ 331.

²²¹ ASOC, ¶ 184(a); SOD, ¶ 268. The ROK ignores this designation altogether in its Rejoinder.

falls within the definition of a “public institution” because all of its revenue comes solely from funds transferred from the Government, either by subsidies or from the National Pension Fund.²²² The NPS’s classification under Korean law is relevant because it indicates that the NPS is “public”, and moreover “quasi-governmental”, not private. The NPS’s status as a “public institution” also means it is also treated as part of the ROK Government for a number of other purposes in Korean law, as detailed further below.

- b. The NPS is recognized as an “administrative agency” and its decisions are susceptible to both administrative and constitutional review under Korean law.²²³ Tribunals have confirmed that susceptibility to administrative review is a factor that identifies a State organ.²²⁴ The ROK does not dispute this in its SOD,²²⁵ and does not mention it at all in its Rejoinder.
- c. The NPS is a statutory corporation established under a specific Korean regime to ensure that statutory funds can be established and managed separately from the national general budget.²²⁶ The independence of the NPS does not prevent it

²²² Act on the Management of Public Institutions, **Exh C-56**, Article 4(1)(ii) (“[a]n institution for which the amount of the Government grants . . . exceeds one-half of the amount of its total revenue”).

²²³ ASOC, ¶ 183; SOD, ¶ 293(c); Reply, ¶ 331; First CK Lee Expert Report, ¶¶ 69-74; Administrative Appeals Act, 28 May 2014, **Exh C-128**, Article 2(4); Administrative Litigation Act, 19 November 2014, **Exh C-135**, Article 2(2); Second CK Lee Expert Report, ¶ 48; *see also*, First Kim Expert Report, ¶ 67(b), Second Kim Expert Report, ¶ 33, fn. 72; Constitutional Court Decision No. 2018HeonMa515, 29 May 2018, **Exh SSK-45**, p 2 (“An act subject to constitutional complaints under Article 68(1) of the Constitutional Court Act shall fall within the category of exercises of a state agency’s public authority. A state agency for the purposes of the aforementioned Article includes all agencies (organs) of the legislature, the administration, the judiciary, etc. . . . the actions . . . of public institutions such as national universities (*see* Constitutional Court Decision 92HeonMa68 dated 1 October 1992, etc.), may also be the subject-matter of constitutional complaints.” (emphasis added)).

²²⁴ *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, **Exh CLA-173**, ¶ 804 (“[T]he nature of the Regulator as a State organ as understood under Article 4 of the ILC Articles may be inferred from . . . a number of relevant indications . . . the Regulator’s individual decisions are in the nature of administrative acts ‘binding upon specific providers and users of public utilities’; and both an administrative act or an actual action of the Regulator may be challenged before an Administrative Regional [court].”).

²²⁵ SOD, ¶ 293(c).

²²⁶ First CK Lee Expert Report, ¶ 40; NFA, **Exh C-211**, Article 5.

from being characterized as a State organ,²²⁷ nor does the fact that it has its own legal personality, as explained further below.²²⁸

- d. As a public institution, the NPS is not financially autonomous.²²⁹ Its operational expenses are funded from the national State budget, which is in turn funded from national tax revenue and other Government funds.²³⁰ The NPS's budget proposal each fiscal year is set by the Board of Directors and it must also be approved by the Minister of Health and Welfare.²³¹ The ROK observes merely that the NPS is “managed by its own board of directors”,²³² without acknowledging the reality that these directors are appointed by the President of the ROK and the Minister of Health and Welfare.²³³
- e. Officials of the NPS are subject to many of the restrictions applicable to Government officials, including in respect of bribery and corruption offences.²³⁴ Furthermore, the NPS is also subject to the Official Information Disclosure Act, which requires all public institutions *performing State affairs*, such as the NPS, to make freedom of information disclosures that are requested by members of the Korean public, subject to limited exceptions.²³⁵

²²⁷ *UAB E energija (Lithuania) v. Republic of Latvia*, ICSID Case No. ARB/12/33, Award, 22 December 2017, **Exh CLA-173**, ¶ 804; *Clayton and Bilcon of Delaware Inc. v. Government of Canada*, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, **Exh CLA-3**, ¶ 308 (“A body that exercises impartial judgement, however, can well be an organ of the state”); Commentary on the ILC Articles, **Exh CLA-38** (confirming that the judiciary and other independent entities constitute State Organs under Article 4).

²²⁸ See below, Section IV.B.2.

²²⁹ Compare SOD, ¶ 274.

²³⁰ First CK Lee Expert Report, ¶ 56. Its other revenue sources include “government subsidies”: NPA, **Exh C-77**, Articles 25, 43.

²³¹ First CK Lee Expert Report, ¶ 44(iii); NPA, **Exh C-77**, Article 41(1).

²³² Rejoinder, ¶ 58(b).

²³³ First CK Lee Expert Report, ¶ 53; NPA, **Exh C-77**, Articles 30(2) and 38(1).

²³⁴ ASOC, ¶ 184(d); see First Kim Expert Report, ¶ 48, fn. 58; Second CK Lee Expert Report, ¶ 33; NPA, **Exh C-77**, Article 40. Professor CK Lee also considers that NPS officers and employees could also be subject to claims under the State Compensation Act, although this possibility has not yet been tested before Korean courts, see C. Lee, *The Legal Nature of the National Pension Service and the National Pension Fund and the Compensation System*, BFL Issue 77, May 2016, **Exh C-264**, pp. 10, 17-21.

²³⁵ The ROK does not dispute this. See Letter from Respondent to Tribunal, 10 June 2020, fn. 40, noting that the NPS had withheld documents “on the basis of Korean law, including the Official Information Disclosure Act”. See also ASOC, ¶ 184(c); First CK Lee Expert Report, ¶ 65(ii); Official Information Disclosure Act, 19 November 2014, **Exh C-136**, Articles 1-3, 5. The Act is not referred to in the SOD or Rejoinder.

- f. The ROK cannot deny the degree and breadth of oversight by the President and Minister over the NPS,²³⁶ indeed, in the course of argument it seems to acknowledge that the NPS is subject to “various elements of State control—such as the appointment and replacement of board members, close oversight and control, or exercise of powers that are important to the national economy”.²³⁷
 - g. As a public institution, the NPS is also subject to annual audits by the National Assembly.²³⁸
 - h. The NPS is the equivalent of a “State agency” and thus a “Petition-Accepting Institution” under the Petition Act.²³⁹ As such, the NPS is considered as equivalent to a “governmental agency” for the purposes of Article 26(1) of the Korean Constitution.²⁴⁰
80. None of these points is disputed. Moreover, there are three other features which confirm that the NPS is part of the State:
- a. The NPS acts on behalf of the State in acquiring and disposing of shares, as well as exercising the voting rights of those shares, which are *legally owned by the National Pension Fund* (the State), not by the NPS. As the Korean District and

²³⁶ Reply, ¶ 331(k); First CK Lee Expert Report, ¶ 44(ii); NPA, **Exh C-77**, Article 30(2); First CK Lee Expert Report, ¶¶ 44, 80. The ROK does not deny these supervisory powers, *see* Letter from Respondent to Tribunal, 10 June 2020, p. 9 (“[T]hese powers are for the purpose of satisfying the Minister’s duties in relation to the NPS” and acknowledging that the Minister exercises “oversight duties”); *see also*, First Kim Expert Report, ¶ 69 (“With respect to Ministerial oversight, it is true that the government has oversight authority over public institutions such as the NPS under law.” (emphasis omitted)). *Compare* Rules of Delegation and Entrustment of Administrative Authority, **Exh SSK-55** (updated excerpt), Articles 6 and 14(3), which confirm that the Minister could suspend or cancel the NPS’s unlawful or unjust conduct of its duties, contrary to Professor Sung-soo Kim’s conclusion in his First Kim Expert Report, ¶ 70.

²³⁷ Rejoinder, ¶ 63.

²³⁸ ASOC, ¶ 184(b); First CK Lee Expert Report, ¶ 65(i); Second CK Lee Expert Report, ¶ 33; Act on the Inspection and Investigation of State Administration, 18 March 2014, **Exh C-124**, Articles 2, 3 and 7; SOD, ¶ 275(b).

²³⁹ SOD, ¶ 270; First Kim Expert Report, ¶ 51 (Noting that the Petition Act “applies to an institution that has ‘administrative authority’ . . . [t]he NPS, . . . is one such institution.”); *see also* Petition Act, 31 March 2015, **Exh C-157**, Article 3 (“Petition-Accepting Institutions: Any of the following institutions may accept a petition under this Act: 1. State agencies; 2. Local governments and their subordinate agencies; 3. Juristic persons, organizations, institutions or individuals that have, or are delegated or entrusted with, administrative authority under Acts and subordinate statutes”).

²⁴⁰ ASOC, ¶ 184(e); First CK Lee Expert Report, ¶ 74; Second CK Lee Expert Report, ¶ 39; Constitution of the Republic of Korea, 25 February 1988 (*Constitution*), **Exh C-88**, Article 26(1) (“All citizens shall have the right to petition in writing to any governmental agency under the conditions as prescribed by Act.”).

High Court have held, the NPS’s acquisition of shares for the Fund entails an acquisition *on the part of the State*,²⁴¹ and the NPS’s role is merely to exercise the governmental function of managing and operating the Fund by Ministerial delegation. The Courts specifically rejected the argument that the NPS’s actions were independent from the State. Unable to deny these decisions of its own courts, the ROK has instead simply ignored it in both its SOD and Rejoinder.

Professor Sung-Soo Kim does address these decisions, attempting to distinguish them on the basis that the NPS must pay securities transaction taxes,²⁴² but this argument is unavailing. As is clear from Article 6(1) of the Securities Transaction Tax Act on which the Professor relies, “State or local government” is exempt from securities transaction tax, with the exception of certain stipulated funds, *including* the National Pension Fund.²⁴³ That Act therefore confirms that both the Fund and the NPS are considered as falling within the term “State or local government”.

- b. Furthermore, as the NPS has itself confirmed, the Fund’s investments are exempt from corporate taxes (e.g., capital gains taxes) because it is “*operated by the State*”.²⁴⁴
- c. The ROK does not deny that the NPS is entitled to claim sovereign immunity in foreign courts,²⁴⁵ claiming only that NPS “acts in the capacity of an independent

²⁴¹ Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, pp. 3-4; Seoul High Court Case No. 2015Nu59343, 9 March 2016, **Exh C-262**; *see also*, ASOC, ¶ 184(e); First CK Lee Expert Report, ¶¶ 78-79; Second CK Lee Expert Report, ¶¶ 49-51.

²⁴² Second Kim Expert Report, ¶ 61.

²⁴³ Second Kim Expert Report, ¶ 61. *See also*, Securities Transaction Tax Act, **Exh SSK-31**, Article 6(1). The National Pension Fund is a fund “established pursuant to Acts prescribed in attached Table 2 of the National Finance Act”, “whose management entity is the head of a central administrative agency”, namely, the Minister of Health and Welfare. *See further* NPA, **Exh C-77**, Article 102, confirming that the Fund “shall be managed and operated by the Minister of Health and Welfare” who in turn “may entrust the [NPS] with part of the affairs concerning the management and operation of the Fund”.

²⁴⁴ NPS, “Press Release: Corporate Tax Exemption”, 26 May 2020, **Exh C-697** (“In connection with its Fund investment, the NPS is exempt from corporate tax such as capital gains tax under Article 3 of the Corporate Tax Act and Article 102(1) of the National Pension Act because *such investment constitutes a business operated by the State*” (emphasis added)), *citing* the Corporate Tax Act, 1 January 2019, **Exh C-692**, Article 3(2)(2) (“The State and local governments (including local government associations; hereinafter the same shall apply) among domestic corporations are not liable to pay corporate tax on any income.”).

²⁴⁵ SOD, ¶ 265, fn. 397 (“The Claimant’s argument is misplaced: this Tribunal must determine for itself whether the NPS is a State organ under international law, and whether the NPS may successfully claim sovereign immunity (a question on which the ROK makes no comment here) under a different legal order is irrelevant.”); Rejoinder, ¶ 66(b).

party in various litigations”.²⁴⁶ An entity cannot claim State immunity without express permission from the State, so if the NPS were *not* so entitled the ROK could have affirmed this to the Tribunal. It is therefore appropriate to draw adverse inferences in favour of the Claimant that the NPS *would* be entitled to claim sovereign immunity.²⁴⁷ According to the ROK (which has a copy of this award which it has not shared with the Tribunal), this was a significant factor in the Tribunal’s decision in *Dayyani v. Korea*.²⁴⁸

2. Separate legal personality does not preclude the NPS from constituting a State organ

81. The ROK accepts that an entity with separate legal personality can still be recognized as a (*de facto*) State organ.²⁴⁹ This is unsurprising, since the ILC Commentary is clear that “a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law”.²⁵⁰ Nevertheless, the ROK contends that “separate legal personality *has* been considered a ‘decisive criterion’” with respect to *de jure* State organs, although it is quick to add the caveat that it “does not rely solely on this argument”.²⁵¹

²⁴⁶ Rejoinder, ¶ 58(d).

²⁴⁷ Reply, ¶ 331(l).

²⁴⁸ ASOC, ¶ 186 (citing *Mohammad Reza Dayyani et ors v. Republic of Korea*, PCA Case No. 2015-38, (unpublished Award), dated June 2018); *see also*, *Murphy v. Korea Asset Management Corp.* 421 F.Supp.2d 627 (S.D.N.Y. 2005), **Exh C-98** (in which the KAMCO, also a public institution like the NPS, claimed sovereign immunity before the U.S. Courts); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405(b) (citing the fact that “CPC . . . benefits from the protection of immunity from suit” as one of the factors supporting the conclusion that the acts of the CPC were attributable to the State).

²⁴⁹ Rejoinder, ¶ 53.

²⁵⁰ Commentary on the ILC Articles, **Exh CLA-38**, Article 4, ¶ 11, p. 42; *see also id.*, General Commentary, ¶ 7, p. 39 (“In internal law, it is common for the “State” to be subdivided into a series of distinct legal entities. For example, ministries, departments, component units of all kinds, State commissions or corporations *may have separate legal personality under internal law*, with separate accounts and separate liabilities. But international law does not permit a State to escape its international responsibilities by a mere process of internal subdivision. The State as a subject of international law is held responsible for the conduct of all the organs, instrumentalities and officials *which form part of its organization* and act in that capacity, *whether or not they have separate legal personality under its internal law.*” (emphasis added)).

²⁵¹ Rejoinder, ¶ 53 (emphasis in original). While the ROK puts citation marks around the words “decisive criterion”, it provides no reference for it.

82. As the Claimant set out in its Reply, there are multiple cases in which entities with separate legal personality have been found to be State organs.²⁵² These cases notably include *Dayyani v. Korea*, in which the Korean Asset Management Company, a statutory corporation sharing an identical status as the NPS under Korean law, was reportedly held to be a State organ notwithstanding its separate legal personality.²⁵³ There is thus nothing “unusual” about a separate legal entity being considered a State organ, except where that entity is completely independent from the State.²⁵⁴
83. Conversely, there are a few cases in which tribunals have identified the separate legal personality of an entity as one of several relevant factors in determining that the entity is not a State organ. But what is decisive in all of these cases is the extent to which the entity concerned was operating autonomously and in furtherance of its own objectives,

²⁵² Reply, ¶ 324; *see, for instance, Eureka B.V. v. Republic of Poland*, Partial Award, 19 August 2005, **Exh CLA-34**, ¶ 134 (confirming in substance that the State Treasury was a de facto State organ: “whatever may be the status of the State Treasury in Polish law, in the perspective of international law, which this Tribunal is bound to apply, the Republic of Poland is responsible to Eureka for the actions of the State Treasury. . . . These actions . . . are clearly attributable to the Respondent.”); *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶¶ 378, 402, 405(f); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil v. Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 25 June 2001, **Exh CLA-83**; ¶ 327 (While the tribunal did not use the language of “State organ”, this was plainly its intent: “The Bank of Estonia is an agency of a Contracting State. . . . The Republic of Estonia is therefore the appropriate Respondent to a complaint relating to the conduct of the Bank of Estonia.”). *See also Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 31 July 2001, **Exh CLA-188**, ¶ 35 (“[T]he fact that a State may act through the medium of a company having its own legal personality is no longer unusual if one considers the extraordinary expansion of public authority activity. . . . Thus, since ADM is an entity, from a structural as well as a functional point of view, which is distinguishable from the State solely on account of its legal personality, the Tribunal, . . . concludes that the Italian companies have shown that ADM is a State company, acting in the name of the Kingdom of Morocco.”); *Nykomb Synergetics Technology Holding AB v. Republic of Latvia*, SCC Case No. 118/2001, Arbitral Award, 16 December 2003, **Exh CLA-186**, p 31 (“Latvenergo cannot be considered to be, or to have been, an independent commercial enterprise, but clearly a constituent part of the Republic’s organization of the electricity market and a vehicle to implement the Republic’s decisions concerning the price setting for electric power. For this reason, . . . Latvenergo’s . . . actions concerning the purchase price are attributable to the Republic.” (emphasis added)); *Fleming Duty Free Shop Private Limited (India) v. Poland*, UNCITRAL, Award, 12 August 2016, **Exh CLA-5**, ¶¶ 434-435 (confirming that the PPL was a de facto State organ that “functioned within the structure of the Ministry of Transport”).

²⁵³ *See* Alison Ross and Tom Jones, “Bruising loss for South Korea at hands of Iranian investors”, *Global Arbitration Review*, 8 June 2018, **Exh C-282**; Jarrod Hepburn, “Full Details of Iranians’ Arbitral Victory over Korea Finally Come Into View”, *IAReporter*, 22 January 2019, **Exh C-299** (referring to *Mohammad Reza Dayyani et ors v. Republic of Korea*, PCA Case No. 2015-38, (unpublished Award), dated June 2018); ASOC, ¶ 185; Reply, ¶ 331(b).

²⁵⁴ Rejoinder, ¶ 54(b); the ROK’s reliance on it being “unusual” is not referenced, but is presumably a quote—taken out of context—from *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405 (“While it may be unusual for a state enterprise to be considered an organ of the State, this is only the case where the state enterprise is genuinely independent—the fact that it takes the form of a separate legal entity is not decisive.” (emphasis added)).

versus the extent to which it was incorporated into the State apparatus.²⁵⁵ For instance, in *Almas v. Poland*, the tribunal emphasized that “where an entity . . . this inference (that it is a State organ) will not be drawn.”²⁵⁶ None of the cases on which the ROK relies support its argument that separate legal personality precludes an entity from being recognized as a State organ *per se*.²⁵⁷

84. Turning to the case at hand, the NPS is not financially or commercially autonomous and neither is it “genuinely independent” from the State.²⁵⁸ The operational expenses of the NPS are funded from the national State budget; its revenue streams also include “government subsidies” and other monies transferred from the State (through the National Pension Fund).²⁵⁹ The NPS’s sole function is to manage and operate the National Pension Fund on behalf of all Korean pension-holders.²⁶⁰ It is undisputed that the NPS carries this function out pursuant to a specific delegation by the Minister of Health and Welfare.²⁶¹ The ROK is thus incorrect to contend that the NPS “carries out private commercial activities”.²⁶² The NPS has no independent commercial objectives. It was established as a statutory corporation for the purpose of ensuring that the Fund

²⁵⁵ *Kristian Almås and Geir Almås v. The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **Exh RLA-80**, ¶ 209, 213 (the ANR exercised operational, financial and management autonomy, it was statutorily authorized to act “on its own behalf”); *Ulysseas, Inc. v The Republic of Ecuador* (UNCITRAL), Interim Award, 28 September 2010, **Exh RLA-52**, ¶ 154, (the National Electricity Council was a separate legal entity which had financial and commercial autonomy).

²⁵⁶ *Kristian Almås and Geir Almås v. The Republic of Poland* (UNCITRAL), Award, 27 June 2016, **Exh RLA-80**, ¶ 210; *see also* SOD, ¶ 274.

²⁵⁷ *See also, Limited Liability Company Amtó v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, 26 March 2008, **Exh CLA-43**, ¶ 101 (the tribunal did not discuss the law of State responsibility, but seemed to be influenced by the fact that Ukrainian law expressly recognized that the State did not bear responsibility for the acts of the private entity in that case); *La Générale des Carrières et des Mines v. FG Hemisphere Associates* [2012] UKPC 27, **Exh RLA-129**, ¶¶ 25, 29 (This case dealt not with attribution under international law, but with sovereign immunity under English law. The Court recognized that “a body may in the present context fall to be regarded as an organ of the state, rather than a separate or distinct entity, even though it has a separate juridical personality.” And that “[s]eparate juridical status is not however conclusive. An entity’s constitution, control and functions remain relevant.”).

²⁵⁸ *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/02, Award, 31 October 2012, **Exh CLA-29**, ¶ 405 (“While it may be unusual for a state enterprise to be considered an organ of the State, this is only the case where the state enterprise is genuinely independent—the fact that it takes the form of a separate legal entity is not decisive.” (emphasis added)).

²⁵⁹ NPA, **Exh C-77**, Article 25, 43; First CK Lee Expert Report, ¶ 56. *See* Reply, ¶ 331(h).

²⁶⁰ Reply, ¶ 331(i).

²⁶¹ NPA, **Exh C-77**, Articles 24-25, 102(1) and 102(5); Enforcement Decree of the NPA, **Exh C-164**, Article 76; ASOC, ¶ 184(g); First CK Lee Expert Report, ¶¶ 54, 76-77; Second CK Lee Expert Report, ¶¶ 25, 28-30, 45; SOD, ¶ 268.

²⁶² SOD, ¶¶ 275(a), 279.

would operate independently from political influence (although in the event this structure did not protect it from the President’s corrupt schemes or the undue influence from the President, the Blue House and the Ministry).²⁶³ Furthermore, the NPS is also subject to control by the Ministry under Korean law, as the ROK is compelled to accept.²⁶⁴

85. The conduct of the NPS is accordingly attributable to the ROK under the principles of customary international law reflected in Article 4 of the ILC Articles and Article 11.1.3(a) of the Treaty. However, that is only one of three ways in which the conduct of the NPS is attributable to the ROK.

C. THE NPS’S CONDUCT WAS IN EXERCISE OF DELEGATED GOVERNMENTAL POWER UNDER ARTICLE 11.1.3(B) OF THE TREATY AND ARTICLE 5 OF THE ILC ARTICLES

86. In the alternative, the Claimant also submits that the conduct of the NPS is attributable to the ROK under Article 11.1.3(b) of the Treaty as read by reference to customary international law, as measures adopted or maintained by a “non-governmental bod[y] in the exercise of powers delegated by central . . . government[.]”. The NPS was exercising a governmental function—that is to say, a function that the State reserves to itself—in determining how to exercise the National Pension Fund’s shareholder rights as part of its delegated function of managing and operating the Fund.²⁶⁵ The ROK also disputes this ground of attribution, but that attempt fails.

1. The NPS’s measures were adopted or maintained in the exercise of delegated powers

87. The touchstone in determining attribution under Article 11.1.3(b) is the *delegation* of powers by the central Government or authorities.²⁶⁶ In this regard, there is no dispute between the parties that the NPS exercises delegated powers on behalf of the ROK

²⁶³ First CK Lee Expert Report, ¶¶ 32(ii), 50, 113 (noting the “procedures established, inter alia, by the NPA and the Fund Operational Guidelines to ensure that the Fund was independent from such political influence”); National Finance Act, **Exh C-211**, Article 5(2); Fund Operational Guidelines, **Exh C-194**, Article 4(5); Seoul High Court Case No. 2017 No1886, 14 November 2017, **Exh C-79** (“[T]he Fund must not be used to serve as a tool to achieve certain policy goals or promote political agenda or serve certain interest groups, in a way contrary to the interests of the pensioners. In short, it should not serve certain interest groups or serve as a channel for policy goals or political objectives.”).

²⁶⁴ See above, ¶ 79.f.

²⁶⁵ Reply, ¶ 332.

²⁶⁶ SOD, ¶ 285.

Government.²⁶⁷ Specifically, the Minister is put “in charge” of the National Pension Fund and entrusted with its management and operation, which power is then delegated to the National Pension Service.²⁶⁸

88. The ROK’s main attempt to avoid attribution under Article 11.1.3(b) of the Treaty and Article 5 of the ILC Articles is to seek to introduce a requirement that the “specific impugned act must have a ‘governmental’ quality.”²⁶⁹ But there is no such “independent requirement under the Treaty” as the ROK says.²⁷⁰ The ROK relies on the words “in the exercise of” in Article 11.1.3, contending that the ordinary meaning of those words makes clear that the “specific act” must have a governmental quality. But the words “in the exercise of” plainly do not themselves connote that the power must be governmental (merely that the delegated power must be exercised).²⁷¹ Furthermore, the ROK relies on the *travaux* to the Treaty to contend that the term “powers” means “regulatory, administrative or other governmental powers”, without providing explanation in terms of the Vienna Convention on the Law of Treaties as to why it is necessary to resort to the *travaux* in this case.²⁷² Neither does the United States’ Non-Disputing Submission support the ROK’s position that the *travaux* alone provides the meaning of “powers”.²⁷³ The United States makes no reference to the *travaux*, and its submission is instead expressly based on the customary international law rules.²⁷⁴
89. Accordingly, any “governmental” requirement may be relevant only by reference to Article 5 of the ILC Articles.

²⁶⁷ SOD, ¶ 293(b) (“[I]t is true that the National Pension Fund was established by the Minister of Health and Welfare and the National Pension Act provides that the Minister of Health and Welfare shall manage and operate the Fund, [and] the management and operation of the Fund is, by Presidential Decree, specifically entrusted to the NPS.”); Reply, ¶ 337.

²⁶⁸ NPA, **Exh C-77**, Articles 2, 24 and 102.

²⁶⁹ Rejoinder, Section II.B.2.a.ii, ¶ 72.

²⁷⁰ Rejoinder, ¶ 74.

²⁷¹ Rejoinder, ¶ 74.

²⁷² Rejoinder, ¶¶ 67, 69; *see* Reply, ¶ 334.

²⁷³ Rejoinder, ¶¶ 67, *citing* United States’ Non-Disputing Party Submission, ¶ 5 (“A non-governmental body such as a state enterprise may exercise regulatory, administrative, or other governmental authority that the Party has delegated to it, such as the power to expropriate, grant licenses, approve commercial transactions, or impose quotas, fees or other charges.”).

²⁷⁴ United States’ Non-Disputing Party Submission, ¶ 4, fn. 4.

2. The NPS’s measures were adopted or maintained in the exercise of delegated governmental powers

90. The customary international law principles reflected in Article 5 of the ILC Articles provide that the State is responsible for conduct by a non-State entity “which is empowered by the law of that State to exercise *elements of the governmental authority* . . . provided the person or entity is acting in that capacity in the particular instance.”²⁷⁵

91. The ROK misrepresents the Claimant as saying that mere delegation is sufficient to satisfy customary international law.²⁷⁶ That is not the Claimant’s position.²⁷⁷ Instead, the central dispute between the parties is whether the “elements of the governmental authority” test requires an analysis of the nature of the *power* delegated to the non-State entity as the Claimant says; or whether, as the ROK contends, it depends on the nature of the *conduct*, so that if “[a]ny private contract partner could have acted in a similar manner’: . . . the *conduct* is not governmental.”²⁷⁸

92. As the Claimant has already established, the jurisprudence is clear that the correct analysis is to focus on whether the measures involved the exercise of a delegated power that is governmental:

a. Flemingo v. Poland: the relevant measures were the termination of the claimant’s lease agreements and the imposition of customs closures on its stores in Warsaw Chopin Airport, so that a modernization project could proceed. The Tribunal held that this conduct was attributable pursuant to ILC Article 5 since the Polish Airports State Enterprise (*PPL*) was “entrusted [] expressly with the modernisation of airport terminals”, over which the Ministry of Transport ultimately had responsibility.²⁷⁹

b. Noble Ventures Inc v. Romania: the relevant measures involved the failure of the State privatization agency to meet certain obligations, such as failing to negotiate debt rescheduling with State budgetary creditors, under agreements

²⁷⁵ ILC Articles, **Exh CLA-17**, p. 3, Article 5.

²⁷⁶ Rejoinder, ¶ 78.

²⁷⁷ Reply, ¶ 337.

²⁷⁸ Rejoinder, ¶ 80; SOD, ¶ 287, fn. 449.

²⁷⁹ *Flemingo Duty Free Shop Private Limited (India) v. Poland*, UNCITRAL, Award, 12 August 2016, **Exh CLA-5**, ¶¶ 379, 436-437, 445.

for the Claimant’s purchase of a newly privatized steel mill. The Tribunal held that the agency was expressly empowered to carry out the privatization and its implementation, specifically including the “granting of advantageous conditions for the payment of budgetary obligations and negotiations of proposals.”²⁸⁰ The tribunal concluded that the conduct was attributable, holding that “no relevant legal distinction is to be drawn between [the privatization agency] on the one hand, and a government ministry, on the other hand, when the one or the other acted as the empowered public institution under the Privatization Law.”²⁸¹

- c. *Maffezini v. Spain*: the relevant measures concerned the making of a loan by the SODIGA (a State-owned regional development bank). The tribunal held that this act was “performed in the exercise of SODIGA’s public or government functions” because the SODIGA was “an entity charged with the implementation of governmental policies relating to industrial promotion”, a function “not normally open to commercial companies.”²⁸² The Tribunal emphasized that the question was whether the *functions* being carried out were governmental; since the loan was made pursuant to those functions it was therefore attributable to Spain.²⁸³
- d. *Gavrilovic v. Croatia*: the relevant measures concerned the decision of a subsidiary company to the Croatian Fund (a State privatization agency) to put the Claimant’s companies into bankruptcy and the issuance by the Fund of a legal opinion used to justify the courts’ expropriation of the assets.²⁸⁴ The tribunal held that these acts of “an entity empowered by Croatian law to exercise elements of governmental authority” fell within the ambit of ILC Article 5 since the Fund was established precisely to “organise, supervise and assist in the

²⁸⁰ *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, **Exh CLA-50**, ¶¶ 72-80.

²⁸¹ *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, **Exh CLA-50**, ¶ 79 (emphasis added).

²⁸² *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **Exh CLA-33**, ¶¶ 77-78.

²⁸³ *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, **Exh CLA-33**, ¶ 83.

²⁸⁴ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **Exh CLA-120**, ¶¶ 147, 811.

privatisation process.”²⁸⁵ It thus affirmed again that the correct enquiry is whether the entity was acting pursuant to its delegated governmental authority in carrying out the impugned conduct, not the (hypothetical) governmental power delegated thereto.

- e. *Staur v. Latvia*: the relevant measures concerned the entry of the SJSC Airport (a State-owned enterprise) into leases for the development of land adjacent to an airport. These acts were held not to be attributable under ILC Article 5 because the enterprise’s founding statute did not specifically delegate *any* governmental authority to SJSC Airport, but merely provided for its establishment and governance.²⁸⁶ The ROK points to the tribunal’s further *obiter* (and entirely hypothetical) statement that, even if the SJSC Airport had been empowered to exercise elements of governmental authority, the act in question would not be attributable because it would not fall within that authority.²⁸⁷ But this merely reinforced the tribunal’s decision that the act in question involved the exercise of independent, corporate objectives by the enterprise, not the (hypothetical) governmental power delegated thereto.
- f. *Bayindir v. Pakistan*: in essence, the relevant measures involved conduct relating to the decision by the Pakistan National Highways Authority (*NHA*) to terminate the claimant’s contract to build a motorway.²⁸⁸ While the NHA, was recognized by the tribunal as exercising governmental authority (including to impose tolls on certain roads and to develop and maintain Pakistan’s highways and strategic roads), the tribunal held that the specific acts in question were not

²⁸⁵ *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, **Exh CLA-120**, ¶¶ 805-811.

²⁸⁶ *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, **Exh CLA-165**, ¶¶ 337-343.

²⁸⁷ Rejoinder, ¶ 79; *Staur Eiendom AS, EBO Invest AS and Rox Holding AS v. Republic of Latvia*, ICSID Case No. ARB/16/38, Award, 28 February 2020, **Exh CLA-165**, ¶¶ 343.

²⁸⁸ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶¶ 96, 112 (“the Claimant refers to (i) the expulsion of Bayindir, (ii) following the expulsion, the failure by NHA to proceed to a number of actions under the Contract (such as the evaluation of the works completed, the certification of certain IPAs (Interim Payment Application), the payment of certain IPCs, or the refusal to acknowledge and certify extensions of time granted by the Engineer) and NHA’s claim for approximately US\$ 1 billion in the Pakistani arbitration, and (iii) the actions taken in connection with the encashment of the Mobilisation Advance Guarantees.”).

carried out pursuant to that authority.²⁸⁹ It therefore did not attribute the conduct on this basis.²⁹⁰ Like *Staur*, this decision merely confirms that the disputed conduct itself must be an exercise of the delegated governmental authority in order to be attributable. It does not support the ROK's submission that it is the nature of the conduct itself that must be governmental.

g. This is also the understanding of the other Treaty Party, the United States, which notes that "if the conduct of a non-governmental body *falls outside the scope of the relevant delegation of authority*" then it is not attributable to the ROK for the purposes of Article 11.1.3(b).²⁹¹

93. The ROK says if the particular conduct was capable of being performed by a private company without any government delegation then it necessarily cannot be attributable. But that is not correct. As set out above, even the cases on which the ROK relies (such as *Gavrilovic* and *Bayindir*) confirm the Claimant's case that the focus must be the nature of the delegated governmental authority being exercised.²⁹²

94. The exception is *Jan de Nul N.V. v. Egypt*, and the cases that follow it,²⁹³ which applies the wrong legal test and should not be applied by this Tribunal.²⁹⁴ In that case, the Suez Canal Agency was held to be an entity exercising elements of governmental authority, including maintaining and improving the Suez Canal.²⁹⁵ But the tribunal held this was "irrelevant" since the particular measures alleged—fraud in respect of a tender process

²⁸⁹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 123.

²⁹⁰ In particular, the tribunal considered that the NHA was acting pursuant to its contractual relationship with the claimant, finding that it was significant that the NHA's conduct was not governed by "procedural requirements other than those contractually agreed". As we shall see, this distinguishes the case from that of the NPS, for which the very procedure governing the decision-making and exercise of the shareholder vote was a matter closely regulated by public law. See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶ 346.

²⁹¹ United States' Non-Disputing Party Submission, ¶ 4.

²⁹² Rejoinder, ¶¶ 78-79.

²⁹³ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exh CLA-7**, ¶ 171.

²⁹⁴ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exh CLA-7**, ¶¶ 166, 169.

²⁹⁵ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exh CLA-7**, ¶¶ 166, 169.

for works to improve the canal—did not constitute an exercise of those powers.²⁹⁶ That was because the tribunal applied the incorrect test now advanced by the ROK: that if a private company had been in charge of the canal, it could have carried out the same conduct.²⁹⁷

95. *Jan de Nul* is not good law. If such a test were applied, it would gut the customary international law rule reflected in ILC Article 5, since few acts, viewed in isolation, are the exclusive reserve of the State. Conversely, different States may reserve different functions as “governmental”. In each case, it will be a question of the particular context, as the ILC Commentary recognizes:²⁹⁸

Article 5 does not attempt to identify precisely the scope of “governmental authority” for the purpose of attribution of the conduct of an entity to the State. Beyond a certain limit, *what is regarded as “governmental” depends on the particular society, its history and traditions*. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances.

96. It is now common ground that the NPS is an entity that exercises governmental authority.²⁹⁹ Under the correct test described above, therefore, the only question is whether the measures at issue here were an exercise of that authority. There are multiple Korean statutes that recognize that, in operating the Fund, the NPS is carrying out “State affairs”³⁰⁰ and exercising “delegated . . . administrative authority”.³⁰¹ Nevertheless, the

²⁹⁶ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exh CLA-7**, ¶¶ 169-170.

²⁹⁷ *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, 6 November 2008, **Exh CLA-7**, ¶ 170: holding that the conduct cannot be governmental if “[a]ny private contract partner could have acted in a similar manner”.

²⁹⁸ Commentary to the ILC Articles, **Exh CLA-38**, p. 43, Article 5, ¶ 6.

²⁹⁹ Rejoinder, ¶ 83.

³⁰⁰ *See above*, ¶ 79.e; Information Disclosure Act, 19 November 2014, **Exh C-136**, Articles 1 (“The purpose of this Act is to ensure people’s rights to know and to secure people’s participation in state affairs *and the transparency of the operation of state affairs* by prescribing matters necessary for people’s requests for the disclosure of information kept and controlled by public institutions and the obligations of public institutions to disclose such information.” (emphasis added)); First CK Lee Expert Report, ¶ 65(ii).

³⁰¹ Petition Act, 31 March 2015, **Exh C-157**, Article 3; First CK Lee Expert Report, ¶ 74.

ROK continues to contest that the measures of the NPS were an exercise of that authority. The key features that establish that the conduct of the NPS in deciding on and exercising the Fund’s vote on the Merger was pursuant to this governmental authority are summarized as follows:³⁰²

- a. The function to manage and operate Korea’s National Pension Fund (including by exercising the Fund’s shareholder voting decisions) is a statutory power vested in the Minister of Health and Welfare,³⁰³ under a specific statutory scheme for the management of Government funds.³⁰⁴ All of the rights and obligations of the NPS derive *directly* from powers delegated to it by the ROK Government.³⁰⁵ As a purely statutory body, the NPS has no independent mandate to carry out any other private, or commercial conduct.
- b. As is undisputed, these management powers vested in the NPS are governmental. They arise from a specific Constitutional mandate whereby the State must provide welfare to Korean citizens.³⁰⁶ Furthermore, the Fund is also subject to oversight from the Minister of Health and Welfare who—as in *Flemingo v. Poland*—is ultimately responsible for the Fund.³⁰⁷
- c. The NPS itself did not *own* the shares in respect of which it exercised the voting rights. It is the State which is the legal owner of the shares, since they were

³⁰² Reply, ¶ 339.

³⁰³ See NPA, **Exh C-77**, Articles 24-25, 102(1) and 102(5); Enforcement Decree of the NPA, **Exh C-164**, Article 76; First CK Lee Expert Report, ¶¶ 54, 76-77; Second CK Lee Expert Report, ¶¶ 25, 28-30, 37, 45; see also, First Kim Expert Report, ¶¶ 28-30; SOD, ¶ 293(b).

³⁰⁴ National Finance Act, **Exh C-211**, Article 5.

³⁰⁵ Reply, ¶ 337.

³⁰⁶ ASOC, ¶ 197; First CK Lee Expert Report, ¶¶ 31, 36 and 77; Second CK Lee Expert Report, ¶¶ 40, 46; NPA, **Exh C-77**, Article 1 (“The purpose of this Act is to contribute to the promotion of the stable livelihood and welfare of the public by providing pension benefits for the old-age, disability, or death.”); Constitution, Articles 34(2) and (4) (“(2) The State shall have the duty to endeavor to promote social security and welfare. . . (4) The State shall have the duty to implement policies for enhancing the welfare of senior citizens and the young.”).

³⁰⁷ See above, ¶ 96.a; see also, NPA, **Exh C-77**, Articles 2, 24, 30(2), 41 and 102; CK Lee Expert Report, ¶¶ 80, 83 (“The Minister retains specific oversight in respect of the NPS’s fund management functions . . . this oversight may be exercised by the Minister appointing or dismissing . . . the NPS CEO and approving the annual business operations plans developed by the NPS. The Minister also exercises oversight over the NPS as Chairperson of the Fund Operation Committee, which promulgates Fund Operational Guidelines that are legally binding on the NPS.”).

acquired using the Fund, which belongs to the State.³⁰⁸ The NPS had the right to exercise the voting rights on these shares only by dint of the delegation by the Minister of Health and Welfare. The ROK is therefore mistaken to contend that “the NPS did not exercise its shareholder vote *on behalf of the Korean government*, but did so in its capacity as a shareholder in a listed company”.³⁰⁹ The legal effects of the administration and management of the Fund by the NPS vest in the State. The vote is merely *exercised* by the NPS, in accordance with specific statutory regulations that do not apply to private shareholders.³¹⁰

- d. The ROK’s attempt to distinguish between the NPS’s vote on the Merger (as a so-called commercial act) and its management of the Fund³¹¹ is a false dichotomy. Decisions on National Pension Fund shareholdings, including how to exercise voting rights in relation to those shareholdings, lie at the very heart of the “management” function delegated to the NPS. It is irrelevant that the same voting rights might constitute a commercial act if carried out by another shareholder.³¹² No other private entity could exercise the ROK’s vote on the Merger unless expressly empowered to do so.
- e. The NPS’s decision-making on shareholder votes by the Fund is subject to specific regulation by the Government that sets it apart from other private shareholders.³¹³ As a matter of law, those decisions must be taken in a manner

³⁰⁸ Euijeongboo District Court Case No. 2014Guhap9658, 25 August 2015, **Exh C-252**, pp. 3-4; Seoul High Court Case No. 2015Nu59343, 9 March 2016, **Exh C-262**; *see also*, ASOC, ¶ 184(e); First CK Lee Expert Report, ¶¶ 76-77; Second CK Lee Expert Report, ¶¶ 45, 49-51.

³⁰⁹ Rejoinder, ¶ 84(a).

³¹⁰ *See* ASOC, ¶¶ 57-61; *see, e.g.*, National Pension Fund Operational Guidelines, 9 June 2015 (**Fund Operational Guidelines**), **Exh C-194**; Guidelines on the Exercise of the National Pension Fund Voting Rights, 28 February 2014 (**Voting Guidelines**), **Exh C-309**; First CK Lee Expert Report, ¶¶ 96-103.

³¹¹ Rejoinder, ¶ 82 (“there is a clear division between the NPS’s exercise of voting rights in support of the Merger, and the NPS’s administrative services regarding the National Pension Fund.”).

³¹² *Compare* Rejoinder, ¶ 80, where the ROK wrongly alleges that “[s]ince the Claimant concedes that the shareholder vote is a commercial act, it cannot be governmental, even where the NPS is the shareholder casting the vote”. Of course, the Claimant has made no such concession, emphasizing only that the act of voting on a Merger “may have been a commercial act for any other shareholder.” Reply, ¶ 342 (emphasis added).

³¹³ ASOC, ¶ 198; Reply, ¶ 342.

that accords with the investment principles set out in the Fund Operational Guidelines.³¹⁴

97. Furthermore, the NPS' exercise of voting rights is also subject to the Expert Voting Committee which is part of the Ministry of Health and Welfare, and which decides on "difficult" voting items.³¹⁵ No other private shareholder has its decisions subjected to such scrutiny.
98. To recall, the specific measures of the NPS in this case include its unlawful failure to direct the Merger decision to the Experts Voting Committee; its preparation of the false Merger Ratio and a forged "synergy" effect; the presentation of those materials to the Investment Committee; CIO ██████'s hand-picking and unduly influencing members of that Committee; and the irrational and unlawful decision by the Investment Committee to vote in favor; all of which culminated in the NPS's exercise of the casting vote to approve the Merger.³¹⁶ Each of these acts and omissions can only have been carried out in exercise of the NPS's specific and delegated constitutional function to manage the National Pension Fund's investments. This conclusion is confirmed by the United States' Non-Disputing Party Submission, which makes clear that a non-governmental body may exercise delegated governmental authority by approving "commercial transactions".³¹⁷
99. Accordingly, the NPS's measures were carried out in exercise of its delegated power to manage the Fund. They are therefore attributable to the ROK pursuant to Article 11.1.3(b) of the Treaty and the customary international law principles reflected in ILC Article 5.

³¹⁴ First CK Lee Expert Report, ¶ 100; Fund Operational Guidelines, **Exh C-194**, Article 4.

³¹⁵ First CK Lee Expert Report, ¶ 51; Fund Operational Guidelines, **Exh C-194**, Article 5, sub-paragraph 5 and Article 17, sub-paragraph 5 (Principles of Fund Management).

³¹⁶ *See above*, ¶¶ 51-53.

³¹⁷ United States Non-Disputing Party Submission, ¶ 5.

D. THE NPS’S CONDUCT WAS UNDER THE DIRECTION OR CONTROL OF THE ROK PURSUANT TO ARTICLE 8 OF THE ILC ARTICLES

100. In the further alternative, the Claimant submits that the conduct of the NPS is attributable under the customary international law principles reflected in Article 8 of the ILC Articles, which provides:

The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons *is in fact* acting on the instructions of, or under the direction or control of, that State in carrying out that conduct.³¹⁸

The Treaty cannot be interpreted or applied in isolation from customary international law. To suggest that the Treaty Parties agreed entirely to exclude these customary international law principles is as astonishing as it is wrong.

101. The test for attribution under Article 8 is a factual one.³¹⁹ The ROK cannot contest as a matter of fact that the decision, taken at the very highest echelons of the ROK Government, to intervene and subvert due process in the NPS’s decision-making on the Merger, was implemented by Blue House, Ministry and NPS officials pursuant to the President’s instructions. Either the Claimant is right on the facts, in which case there can be no doubt that the conduct of the NPS is attributable to the ROK; or it is wrong, in which case the conduct is not attributable. But there is no additional requirement for the Claimant to establish at a level of granularity that every official was given a binding instruction directly by the President or her staff; or even that every officials understood that he or she was acting at the direction of the President and the Ministry. All that matters to establish “direction and control” is that the Korean President mandated the result that was to be achieved; and that that result was in fact achieved.

1. Article 11.1.3 of the Treaty is not *lex specialis* of international law

102. Both parties agree that Articles 4 and 5 of the ILC Articles are “the applicable rules of international law” in relation to Article 11.1.3 of the Treaty.³²⁰ Article 11.1.3 of the

³¹⁸ ILC Articles, **Exh CLA-17**, Article 8 (emphasis added).

³¹⁹ Reply, ¶ 353; Commentary on the ILC Articles, **Exh CLA-38**, Article 8, ¶ 1, p. 47. *See also*, *Union Fenosa Gas, S.A. v. Arab Republic of Egypt* (ICSID Case No. ARB/14/4), Award, 31 August 2018, **Exh RLA-88**, ¶ 9.116 (“[Article 8’s] application, as the ILC Commentary states, depends upon ‘a specific factual relationship’ between the person engaging in the conduct and the State.”).

³²⁰ Rejoinder, ¶ 92.

Treaty is not intended as a stand-alone provision, and the ROK also accepts that it must be interpreted “by reference to” customary international law. Nevertheless, the ROK seeks to evade attribution under Article 8 of the ILC Articles by arguing, inconsistently, that Article 11.1.3 of the Treaty acts as a *lex specialis* and thus excludes attribution under the customary international law principle codified in ILC Article 8.³²¹

103. To this end the ROK seeks to ignore the language of the Treaty, and general international law on *lex specialis*, in favor of a single *obiter* statement in *Al Tamimi v. Oman* that it says supports its position.³²² Despite being unable to point to any indication in the Treaty or the *travaux* that the parties intended to displace the established international rules on attribution, the ROK argues that the Treaty Parties had a “discernible intention” to exclude attribution under Article 8 from the Treaty merely because it does not contain a parallel treaty provision.³²³ The ROK’s *lex specialis* argument ultimately rests on the theory that an unarticulated “discernible intention” to exclude general international law principles of attribution can be gleaned from the affirmative decision to reflect aspects of two other bases of attribution—without any mention of their exhaustiveness. As the Claimant has already set out at length in its ASOC and Reply, this theory is incorrect as a matter of treaty interpretation and as a matter of international law.
104. In its Rejoinder, the ROK once again fails to identify any provision of the Treaty that indicates that these States Parties, in negotiating a sophisticated trade agreement, intended for the Treaty to be interpreted without reference to general international law principles of attribution. All the ROK can point to as evidence that the parties did not consider Article 8 to be an “applicable rule[] of international law” within the meaning of Article 11.22 is the fact that no directly corresponding provision to Article 8 is included in Article 11.1.3.³²⁴ But the ROK’s argument is illogical on its face. Had the parties intended for Article 11.22 only to incorporate those rules of international law already explicitly incorporated the Treaty, the provision would be meaningless. The

³²¹ Rejoinder, ¶¶ 86, 92.

³²² *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 3 November 2015, **Exh CLA-21**, ¶¶ 314-323.

³²³ Rejoinder, ¶¶ 90-91.

³²⁴ Rejoinder, ¶¶ 90, 92.

more logical interpretation of Article 11.22—one which gives effect to the provision³²⁵—is that the Treaty must be interpreted and applied by reference to those general principles of international law except to the extent that it *displaces* the general law.

105. Such an interpretation would also comport with the United States’ apparent understanding of the Treaty. While the United States did not explicitly state that Article 8 was applicable to the Treaty (nor did the Claimant allege that it had), it made clear that the Treaty must be read “consistent with the principles of attribution under customary international law.”³²⁶ While this statement was made in the immediate context of Article 11.1.3(a)³²⁷ —the United States’ comment is *unqualified* in confirming that principles of attribution under customary international law are relevant in interpreting the Treaty.
106. The United States’ submission also comports with the *travaux* of the Treaty, from which no evidence of an intent to exclude general international law principles of attribution can be found.³²⁸ Rather, as the Claimant already sets out at length in its pleadings, and as to which the ROK offers no rebuttal, the only conclusions that can be drawn from the *travaux* on this subject are that:
- a. Article 11.1.3 is modelled on Article 2(2) of the 2004 United States Model Bilateral Investment Treaty and was not the subject of any discussion between the States Parties in the negotiations over the Treaty.
 - b. The States Parties were aware that the Treaty would operate within the rules of general international law.
 - c. The States Parties intended the notion of “powers” to be understood consistent with general international law.

³²⁵ Vienna Convention on the Law of Treaties (*VCLT*), **Exh RLA-5**, Article 31(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.”).

³²⁶ United States’ Non-Disputing Party Submission, 7 February 2020, ¶ 3.

³²⁷ *See* Rejoinder, ¶ 89(a).

³²⁸ *See* Reply, ¶¶ 310-314.

- d. The States Parties were capable of excluding the general international law of attribution if they so desired, but chose not to do so.³²⁹
107. Indeed, commentators have explained that the parallel provision in the US Model BIT was intended to be read in light of the customary international law rules of attribution reflected in the ILC Articles, not to exclude them.³³⁰
108. Investment treaty jurisprudence is no more helpful to the ROK. The case law establishes that “[p]rinciples imported from general international custom apply [to an investment Treaty] unless expressly derogated from.”³³¹ In response, the ROK contends only that the *CMS v. Argentina* case is not factually analogous.³³² But the principle the Tribunal applied is universal: general international law forms the backdrop against which all treaties, including the KORUS FTA, must be interpreted, and treaty silence should not be interpreted as precluding the operation of such principles.³³³
109. As the ROK itself observes, the Claimant has always accepted that a *lex specialis* may be inferred where the parties have made their intention clear.³³⁴ There is nothing “extreme” about this position.³³⁵ In reality, it is the ROK which is inviting the Tribunal to accept a remarkable proposition, that customary international law principles have no application unless explicitly incorporated into the Treaty.³³⁶ The ROK seeks to make

³²⁹ Reply, ¶ 313.

³³⁰ K. J. Vandeveld, U.S. International Investment Agreements (2009), **Exh CLA-41**, p. 192 (“[t]he 2004 model does not include rules of attribution, and thus customary international law rules would govern the determination of those measures that are measures by a party.”).

³³¹ *Manuel García Armas and Others v. Republic of Venezuela*, PCA Case No. 2016-08, Award on Jurisdiction, 13 December 2019, **Exh CLA-143**, ¶ 704.

³³² Rejoinder, ¶ 86(b).

³³³ *CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, **Exh CLA-102**, ¶¶ 359-360. *See also Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Professor Philippe Sands QC, 12 September 2017, **Exh CLA-90**, ¶ 41 (“As the Annulment Committees in CMS and Sempra made clear, the operation of a *lex specialis* in a BIT does not have the effect (unless the BIT explicitly provides otherwise) of precluding the operation of Article 25 [of the ILC Articles on State Responsibility], which continues to function as a “secondary rule of international law” operating even when an exception under the *lex specialis* is not available.”); *see also CMS Gas Transmission Company v. Argentine Republic*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the Application for Annulment of the Argentine Republic, 25 September 2007, **Exh CLA-103**, ¶¶ 133-134; *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic’s Application for Annulment of the Award, 29 June 2010, **Exh CLA-163**, ¶¶ 203-204, 208-209.

³³⁴ ASOC, ¶ 161; Reply, ¶ 305.

³³⁵ Rejoinder, ¶ 89(d).

³³⁶ *See* Rejoinder, ¶ 90.

its position more palatable by arguing that international law is excluded only where the Treaty “specifically identified the limits of when Treaty obligations are triggered . . . leaving no room for adding additional grounds”.³³⁷ But this argument fares no better. At a minimum, the ROK’s logic would require the Tribunal not to have regard to *any* other of the customary international law rules concerning State responsibility—including the other rules on attribution (including Article 4 and 5). Indeed, it is difficult to reconcile the ROK’s case on ILC Article 8 with its invocation elsewhere in its pleadings of the customary requirement of causation incorporated in ILC Article 31,³³⁸ the international law principle of full compensation³³⁹; and indeed, even the very rule on *lex specialis* in ILC Article 55.³⁴⁰ None of these rules is expressly incorporated into the Treaty. If the parties intended to exclude the whole corpus of international law reflected in the ILC Articles, they would have discussed this in negotiating the Treaty. They did not.

110. As the Claimant has established, the ROK’s position is unsupported by the Treaty and in direct contradiction to the well-established jurisprudence. The Claimant therefore respectfully requests the Tribunal to uphold the relevance and application of customary international law in interpreting and applying the Treaty and to reject the ROK’s unfounded *lex specialis* argument. The ROK’s misguided legal argument on ILC Article 8 should be viewed for what it is: a failed attempt to avoid the irrefutable evidence that the NPS was directed and controlled by President █████ and other Government officials in exercising the vote on the Merger.

2. The NPS’s Measures were carried out under the direction or control of the ROK

111. The ROK contends that, even if ILC Article 8 were applicable in this case, the NPS’s exercise of the vote on the Merger would not be attributable to the ROK because the NPS was not subject to the specific direction or control of the ROK.³⁴¹ Both parties agree that the “effective control” test applies to determine attribution under Article 8, which requires both general and specific control.³⁴² The ROK does not dispute the

³³⁷ Rejoinder, ¶ 91.

³³⁸ SOD, ¶ 624; Rejoinder, ¶ 468.

³³⁹ SOD, ¶ 609; Rejoinder, ¶ 524.

³⁴⁰ Reply, ¶ 301.

³⁴¹ Rejoinder, ¶ 93; Reply, ¶ 351; SOD, ¶ 307.

³⁴² Rejoinder, ¶¶ 94, 96.

general control of the Government over the NPS in this case. The dispute concerns only whether the specific control requirement has been met.³⁴³

112. Furthermore, the Claimant has explained that attribution under Article 8 is a fact-specific inquiry.³⁴⁴ There is nothing “liberal” (to use the ROK’s term) about this requirement.³⁴⁵ Article 8 itself provides that attribution will attach where “the person or group of persons is *in fact* acting on the instructions of . . . that State”.³⁴⁶
113. The ROK’s application of this test to the facts here departs from the law. The ROK wrongly contends that the Claimant is required to establish that the ROK gave specific, binding instructions to each individual member of the NPS Investment Committee to approve the Merger.³⁴⁷ But this ignores the specific factual context of the control that the ROK exerted over the NPS in this case.³⁴⁸ The “effective control” test does not require that the non-State entity was acting under “binding” State instructions, but merely that the entity was “*in fact* acting on the instructions of . . . that State.”³⁴⁹ If there were no such instructions, and the entity was merely acting of its own volition, then this would not give rise to attributable conduct of course.³⁵⁰ But where such instructions exist, it is no defense to attribution to argue as the ROK does that the entity would have

³⁴³ See above, ¶ 79.f; Rejoinder, ¶ 97 (contending only that “the Claimant has failed to show ‘specific instructions’ were given by the ROK to the NPS Investment Committee”).

³⁴⁴ Reply, ¶ 353.

³⁴⁵ Rejoinder, ¶ 95.

³⁴⁶ Reply, ¶ 352; ILC Articles, **Exh CLA-17**, Article 8.

³⁴⁷ Rejoinder, ¶ 97.

³⁴⁸ See *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶¶ 125, 130 (noting the importance of the specific factual content for a finding of attribution in the context of an investment dispute under Article 8).

³⁴⁹ ILC Articles, **Exh CLA-17**, Article 8 (emphasis added). See also Reply, ¶ 352. For instance, in *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, **Exh CLA-26**, ¶¶ 125, 128 what was relevant for the tribunal’s finding of attribution for direction or control was that “each specific act allegedly in breach of the Treaty was a direct consequence of the decision of the [National Highway Authority] to terminate the Contract, which decision received express clearance from the Pakistani Government”, in particular “guidance from higher levels of the Pakistani Government”, specifically from General Musharraf, its President. There was no suggestion that these directions need be legally binding.

³⁵⁰ Rejoinder, ¶ 98.

acted in the same way even without those instructions.³⁵¹ Neither does the fact that other cases may have involved binding instructions transform this into a legal requirement.³⁵²

114. Here, the ROK exerted control over the NPS's vote on the Merger in contravention of its own law. Because of the illegality of their conduct with respect to the NPS, numerous Korean officials have been imprisoned and/or lost their jobs.³⁵³ The "effective control" test may be a "demanding" test,³⁵⁴ but it is not an absurd test. In this case, the instructions could not have been "binding" upon the NPS, as the ROK contends, *for the simple reason that they were illegal*.³⁵⁵ And international law does not permit a State to escape responsibility for its conduct on the basis of the illegality,³⁵⁶ neither is it a defense to attribution.³⁵⁷ Since the Claimant already raised this in its Reply submission³⁵⁸ the ROK's silence on this point is telling indeed.
115. Furthermore, as has been demonstrated with unprecedented evidence that has been uncovered by the Respondent's own domestic criminal prosecutions, a comprehensive plan was orchestrated and *successfully executed* by the highest levels of the ROK Government through various senior officials' directing and controlling the NPS's Merger vote. It is thus an unprecedented and inimitable case; there can be no risk that

³⁵¹ Rejoinder, ¶ 99.

³⁵² Rejoinder, ¶ 98, fn. 264; citing *EDF (Services) Limited v. Romania*, ICSID Case No. ARB/05/113, Award, 8 October 2009, **Exh CLA-30**, ¶¶ 203-206. In fact, the tribunal rejected the Respondent's argument that the instructions (mandates) could not be understood as an order from the Ministry to the Company for the purposes of attribution because they were not legally binding, finding both *de jure* and *de facto* that the directions were "compelling".

³⁵³ See Seoul High Court, [REDACTED] Decision, **Exh C-79**, p. 2; "NPS drifting without chief fund manager", The Korea Times, 4 July 2018, **Exh C-284** (referring to dismissal of [REDACTED]); see also Reply, ¶¶ 170, 355(j); ASOC, ¶ 142.

³⁵⁴ Rejoinder, ¶ 98.

³⁵⁵ Reply, ¶ 351.

³⁵⁶ See ILC Articles, **Exh CLA-38**, Article 3 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

³⁵⁷ See ILC Articles, **Exh CLA-38**, Article 7, comment 2 ("The State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form. This is so even where the organ or entity in question has overtly committed unlawful acts under the cover of its official status or has manifestly exceeded its competence."); see also *Tethyan Copper Company v. Pakistan*, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, 10 November 2017, **Exh CLA-170**, ¶ 729.

³⁵⁸ Reply, ¶ 351.

finding attribution under Article 8 in this case will open the floodgates as the ROK contends.³⁵⁹

116. The evidence that confirms that the NPS was in fact acting on the specific instructions of the ROK in approving the Merger vote and voting on the Merger has already been laid out in detail.³⁶⁰ While the ROK makes some marginal objections of the precise meaning of some of this evidence, it is hard to see how it can credibly deny that these instructions were issued. After all, the ROK has itself (through its Special Prosecutors) only recently stated outside of these proceedings that it was “*due to the instructions of the President delivered via [the Minister of Health and Welfare] ██████████*”, *inter alia*, that CIO ██████████ “decided to cast an affirmative decision on the said merger through the internal Investment Committee under his influence instead of submitting the agenda to the Special Committee”.³⁶¹
117. A summary of the relevant evidence set out in the Claimant’s Reply is set out further below:
- a. Following months of monitoring the Merger, the Blue House expressly contemplated “[w]hether to intervene in the NPS’s exercise of [its casting] voting rights” in the SC&T-Cheil Merger.³⁶² After the Experts Voting Committee vote against the SK Merger in late June 2015, President ██████████ made her directions clear, instructing her subordinates euphemistically to “take care”

³⁵⁹ Rejoinder, ¶ 98.

³⁶⁰ Reply, Section II.C, Steps 1-3 and ¶ 355.

³⁶¹ “[Exclusive] We release the indictment against Jae-yong Lee in full”, Ohmy News, 10 September 2020, **Exh R-316**, pp 56-59; Rejoinder, ¶ 174(iii), fn. 400. The ROK’s attempts to argue that it is not bound by the “yet to be proved” allegations made by its own Special Prosecutors (a State organ) fall flat. Under the general international law principle of good faith, the ROK cannot take a position before the Tribunal that is inconsistent with the findings of its own domestic courts or prosecutors. *See Chevron Corporation et ors v. Republic of Ecuador*, PCA Case No. 2009-23, Second Partial Award on Track II, 30 August 2018, **Exh CLA-183**, ¶¶ 7.106, 7.112 (“[The] . . . duty of good faith precludes clearly inconsistent statements, deliberately made for one party’s material advantage or to the other’s material prejudice, that adversely affect the legitimacy of the arbitral process. In other words, no party to this arbitration can ‘have it both ways’ or ‘blow hot and cold’, to affirm a thing at one time and to deny that same thing at another time according to the mere exigencies of the moment.”).

³⁶² *See* [Blue House], “Direction of the National Pension Service’s Exercise of Voting Rights regarding the Samsung C&T Merger”, undated, **Exh C-588**, p. 4. *See also* Reply, ¶ 355(a).

of the Merger.³⁶³ The NPS was to be “*actively utilized*” against the Claimant.³⁶⁴ As the Seoul High Court—an organ of the ROK—described, President █████ directed that the Blue House should “actively interven[e] in the exercise of voting rights by NPS related to the Merger”,³⁶⁵ and provide “*decisive* assistance for the Merger.”³⁶⁶ The ROK does not deny any of this. The most it can say is that these clear findings of its own Courts are “ambiguous”.³⁶⁷

- b. As President █████’s subordinates confirmed to the Special Prosecutor, they had no doubt that her instructions were to ensure the Merger would be approved.³⁶⁸ Blue House Executive Official Mr. █████ testified that the President’s order to “*take care*” of the Merger meant “*to ensure that the merger was accomplished, and we understood it to be such an order.*”³⁶⁹ This, and other evidence further traversed in the Claimant’s Reply,³⁷⁰ squarely rebuts the ROK’s contention that “there is *no evidence* to support the Claimant’s argument that [the] ‘Presidential direction was fully understood and applied by her subordinates’”.³⁷¹

³⁶³ Second Suspect Examination Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 5-6. As is now clear from the Special Prosecutor’s Indictment of █████, the President’s instructions came following an intervention by Samsung making clear it intended to pay the promised bribes. See OhmyNews, “[Exclusive] We release the indictment against Jae-yong Lee in full”, 10 September 2020, **Exh R-316** (“On the same day [that the Experts Voting Committee voted against the SK Merger], in order to *elicit [or induce] cooperation from the President*, Defendant JY Lee . . . reiterated their intention to provide active equestrian support for Yoo-ra Chung by giving a progress update to be conveyed to the President . . . to the effect that ‘although Samsung has not been able to provide support for equestrian training to Yoo-ra Chung of late due to her childbirth, *the financial support will resume immediately* once her physical condition improves.” (emphasis added)).

³⁶⁴ See [Blue House], “Review of Domestic Companies’ Measures to Defend Management Rights Against Foreign Hedge Funds”, undated, **Exh C-587** (emphasis added); ASOC, ¶ 98, Reply, ¶ 357.

³⁶⁵ Seoul High Court, █████, **Exh C-286**, p. 90.

³⁶⁶ Seoul High Court, █████, **Exh C-286**, p. 103-104 (emphasis added).

³⁶⁷ Rejoinder, fn. 402.

³⁶⁸ Second Suspect Examination Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 6-8, in particular p. 6 (“per the President’s orders, the NPS with its significant shareholding in Samsung should exercise its voting power wisely and enable the merger to proceed”); see also, Fourth Suspect Examination Report of █████ to the Special Prosecutor, 5 January 2017, **Exh C-482**, p. 9 (confirming that, in his view, the Senior Presidential Secretaries at the Blue House must have received instructions from President █████ concerning the Merger: “[s]ince the two Offices of Senior Presidential Secretaries were working on this together, it is likely that someone superior—the President or the Chief Presidential Secretary—had instructed them to do so.”).

³⁶⁹ Second Suspect Examination Report of █████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 6.

³⁷⁰ Reply, ¶ 105.

³⁷¹ Rejoinder, ¶ 101(a)(iii).

- c. Instructions were then provided by the Blue House to Ministry officials—including Minister ██████ himself³⁷²—to intervene as necessary to ensure that the Merger would be approved by the NPS.³⁷³ As the ROK has publicly admitted, Minister ██████ then “abus[ed] his authority to force an approval vote for the [M]erger of Samsung C&T and Cheil Industries *at the behest of the Blue House*”.³⁷⁴
- d. The Blue House’s close oversight and control over the Ministry’s implementation of its instructions was effected through almost daily text messages and regular conversations between Blue House Executive Official Mr. ██████ and his Ministry of Health and Welfare counterpart, Deputy Director ██████, to ensure that the NPS voted as directed.³⁷⁵ Far from being merely “passive” receiving of reports as the ROK contends,³⁷⁶ after the analogous SK Merger was rejected by the Experts Voting Committee, Mr. ██████ asked to be alerted “*in advance*” if the Merger would go to the Experts Voting Committee because “there are many people interested in Samsung”.³⁷⁷
- e. The full extent of the interactions between the Blue House and the Ministry remains unknown, since the ROK has refused to produce a status report for President ██████ that it has acknowledged to exist.³⁷⁸ The Claimant respectfully repeats its request for adverse inferences as to the content of this report or

³⁷² Seoul High Court, ██████/█████ Decision, **Exh C-79**, p. 37; Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, p. 24. The ROK attempts to discredit this as “speculation”, but does not dispute the fact that such instructions were given to the Minister: *see* Rejoinder, ¶ 182(b). *Compare*, Reply, ¶ 355(f). Moreover, according to the Special Prosecutors in the ██████ Indictment, the President directly called ██████—a close associate of Minister ██████’s—in late June 2015 and informed him that this was her instruction. *See*, “[Exclusive] We release the indictment against Jae-yong Lee in full”, Ohmy News, 10 September 2020, **Exh R-316**, pp 57.

³⁷³ Reply, ¶ 108.

³⁷⁴ *See, e.g.*, “Jae-in Moon ‘Grounds for Impeachment Have Become Clearer with Special Investigation’”, *JoongAng Ilbo*, 6 March 2017, **Exh C-493**, p. 2 (emphasis added).

³⁷⁵ *See* Record of text messages between ██████ (Blue House) and ██████ (MHW), 19 June-9 August 2015, **Exh C-438**.

³⁷⁶ Rejoinder, ¶ 178.

³⁷⁷ Record of text messages between ██████ (Blue House) and ██████ (MHW), 19 June-9 August 2015, **Exh C-438**, p. 6439 (text message on 26 June 2015 at 2.49pm and 2.56pm).

³⁷⁸ Letter from Respondent to Tribunal, 10 June 2020, p. 2; Respondent’s Annotated Appendix, 10 June 2020, Part I(1), row 1 (“the status report referenced by the Claimant was not a final report but merely a draft.”).

reports, which are further evidence of President ██████'s personal involvement in directing the NPS's action in relation to the Merger.³⁷⁹

- f. Minister ██████ instructed Ministry officials that they needed to be "100% sure" that the Merger would go through.³⁸⁰ He also personally instructed the Ministry's Director General ██████ to ensure that the NPS would vote "*in favor*" of the Merger.³⁸¹
- g. Furthermore, after it became apparent that the Experts Voting Committee could not be trusted to carry out the President's instructions, the Ministry and the Blue House directed the NPS that this decision should be made by the Investment Committee.³⁸²
- h. The Ministry's Director General ██████ instructed NPS CIO ██████ "to handle [the Merger vote] in the Investment Committee", which was an instruction to approve the Merger.³⁸³ The ROK has never denied that this instruction was given, merely submitting (incredibly) that the Claimant has failed to prove it.³⁸⁴

³⁷⁹ Reply, ¶ 355(e).

³⁸⁰ Reply, ¶ 355(g); Transcript of Court testimony of ██████ (█████/█████ Seoul High Court), 26 September 2017, **Exh C-524**, p. 4; Seoul High Court, ██████/█████ Decision, **Exh C-79**, p. 29. *See also*, Seoul Central District Court, ██████/█████, **Exh C-69**, p. 7.

³⁸¹ Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 32-33.

³⁸² Reply, ¶ 355(h) and (i); "[Exclusive] We release the indictment against Jae-yong Lee in full", Ohmy News, 10 September 2020, **Exh R-316**, p. 57 ("Upon receiving the report on the analysis of the propensity and the assenting or dissenting position of each Special Committee member as above, Hyung-pyo Moon determined that the vote 100% in favor of the merger could not be ensured if the agenda were referred to the Special Committee, and on 8 July 2015, instructed Wan-seon Hong, through Nam-kwon Jo, etc., to the effect that the merger should not be referred to the Special Committee but should be approved by the Investment Committee.").

³⁸³ *See* Seoul Central District Court, ██████/█████, **Exh C-69**, p. 47; Seoul High Court, ██████/█████ Decision, **Exh C-79**, p. 18 (the translation of the High Court judgment records the evidence very slightly differently: "In response, [█████] excused the other employees and clearly told [█████] that it was the [Minister's] intention to have the voting rights turned over to the Investment Committee."); Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 22 March 2017, **Exh C-497**, pp. 15 ("Q: If it hadn't been for the Defendant [Minister ██████]'s *instruction to have the Merger approved*, you would not have visited the NPS in person to instruct CIO ██████ to make the decision in the Investment Committee, correct? A: Yes" (emphasis added)), 32-33 ("Q: . . . when you said 'It is the intention of the Minister to handle it in the Investment Committee,' you meant 'It's the Minister's order, so the Investment Committee should vote in favor of the Merger', right?; A: Yes."). *See also* Reply, ¶¶ 108(c) and 355(j).

³⁸⁴ *Compare* Rejoinder, ¶¶ 191, 306.

- i. The Blue House also directed that “supporting materials” should be prepared to ensure that the Investment Committee would vote in favor notwithstanding the opposition of the advisory firms that had objected to the unfair Merger Ratio.³⁸⁵
- j. One of the most vivid descriptions of the close control that the Blue House exercised over the purportedly “independent”³⁸⁶ Merger vote throughout the process is the evidence of Investment Committee Member Mr. ██████ that the members were recalled from dinner after the Merger vote and told to be “on standby to wait for the *final* approval from the Blue House regarding the decision of the Investment Committee.”³⁸⁷ As Investment Committee member Mr. ██████ noted, had the result not been in accordance with its directions, the Blue House could thus have “change[d] the ultimate decision making direction after the Investment Committee determination”.³⁸⁸ It is thus irrelevant that this was after the conclusion of the meeting.³⁸⁹
118. Overall, this evidence confirms overwhelmingly that the ROK sought to—and did—direct and control the NPS’s decision to vote in favor of the Merger. Moreover, the record demonstrates that *specific* instructions were indeed given to key members of the Investment Committee to vote in favor of the Merger. In particular, the ROK does not dispute that at least two influential persons who attended the Investment Committee meeting—CIO ██████ (who chaired the Committee) and Mr. ██████ (who presented materials in favor of the Merger, including the falsified synergy and Merger Ratio calculations)—received *direct* instructions from the Ministry of Health and Welfare that the Investment Committee was to vote on the Merger, with the intention of ensuring

³⁸⁵ Fourth Statement Report of ██████ to the Special Prosecutor, 4 January 2017, **Exh C-481**, pp. 12-13 (“Director ██████ . . . asked me how about if [the Merger] was decided by the Investment Committee. . . . So I reported this situation to Executive Secretary ██████, upon which he instructed me to have the Ministry of Health and Welfare to review the Investment Committee to decide in favour of the merger, and also to prepare supporting materials for the Investment Committee to make a decision on its own despite the opposition of the advisory firms. So I got back to either Director ██████ or Deputy Director ██████ . . . saying that the Investment Committee would make the decision.”); Second Suspect Examination Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-488**, pp. 13-14.

³⁸⁶ Rejoinder, ¶¶ 278 (i), 347, fn. 616.

³⁸⁷ Reply, ¶ 147(c); Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, p. 16 (emphasis added).

³⁸⁸ Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 3 April 2017, **Exh C-499**, p. 24.

³⁸⁹ Rejoinder, ¶ 101(d)(i).

that the Investment Committee voted in favor of the Merger.³⁹⁰ Furthermore, CIO ██████ chaired the Committee and exercised control over it. In accordance with instructions he had received from the Ministry, he then took the necessary action to ensure that the majority voted to approve the Merger. This included hand-picking the members of the Investment Committee,³⁹¹ directing the NPS Research Team to present the Investment Committee manipulated valuations and a fabricated “synergy effect” calculation,³⁹² and then pressuring Committee members to support the Merger.³⁹³

119. Against this weight of evidence, the question of whether or not *each* member of the Investment Committee was given those specific instructions is irrelevant. A corrupt actor only engages in as much corruption as is needed to achieve its specific goal.³⁹⁴ Here, the ROK did not need to give specific instructions to *each* member of the Investment Committee to achieve its corrupt plans. In a word the ROK’s assertion “that the NPS made its decision to vote in favor of the Merger *on the basis of its own will*”³⁹⁵ is absurd.

³⁹⁰ Reply, ¶ 108. *See* SOD, ¶ 311 (“Even assuming arguendo that evidence supported the Claimant’s allegation of an instruction to approve the Merger, the most the Claimant could show is that such instruction would have been given to limited specific individuals (Mr. ██████ and Mr. ██████)”).

³⁹¹ ASOC, ¶ 128; Reply, ¶¶ 141-144 ; Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 26 April 2017, **Exh C-507**, p. 4; Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, pp. 3-4, 6-7; Suspect Examination Report of [█████ ██████] to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 41-42 (“Except in the case of the [Samsung] merger, I had never designated members [of the Investment Committee] myself. . . . [Because] I thought the Samsung merger was an important case, [I] designated committee members myself unlike in the past.”); Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-465**, p. 7. *See also*, Seoul Central District Court, ██████/█████, **Exh C-69**, pp. 49-50; Seoul High Court, ██████/█████ Decision, **Exh C-79**, p. 20.

³⁹² ASOC, ¶¶ 123, 119-120; Reply, ¶¶ 123, 131; Statement Report of ██████ to the Special Prosecutor, 9 January 2017, **Exh C-487**, p. 7280 (emphasis added). *See also*, Seoul Central District Court, ██████/█████, **Exh C-69**, pp. 53-54; Seoul High Court, ██████/█████ Decision, **Exh C-79**, pp. 23-25; First Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-466**, p. 18.

³⁹³ ASOC, ¶¶ 129-131; Reply, ¶¶ 145-146; Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-463**, pp. 7-8; Statement Report of ██████ to the Special Prosecutor, 26 December 2016, **Exh C-465**, p. 7; Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 10 April 2017, **Exh C-500**, p. 12; Transcript of Court Testimony of ██████ (█████/█████ Seoul Central District Court), 19 April 2017, **Exh C-503**, pp. 20-21; Suspect Examination Report of [█████ ██████] to the Special Prosecutor, 26 December 2016, **Exh C-464**, pp. 45-47. *See also*, Seoul High Court, ██████/█████ Decision, **Exh C-79**, pp. 25-26; Seoul Central District Court, ██████/█████, **Exh C-69**, pp. 17, 55-56.

³⁹⁴ *See* Reply, ¶ 356.

³⁹⁵ Rejoinder, ¶ 99.

V. THE ROK'S PURPORTED "SOVEREIGN POWER" OBJECTION IS IRRELEVANT

A. THERE IS NO SOVEREIGN POWER REQUIREMENT UNDER THE TREATY OR INTERNATIONAL LAW

120. In its Rejoinder, the ROK once again contends it bears no liability for the NPS's conduct because its approval of the Merger and exercise of the vote "did not involve an exercise of sovereign power".³⁹⁶ While the ROK tries to present this as a merits issue, it is effectively raised as a (entirely concocted) additional threshold objection and so it is addressed as such in this pleading.

121. In its Reply, the Claimant has already established that the purported ROK's "sovereign power" objection has no legal basis and should be dismissed by the Tribunal, for the following three reasons:³⁹⁷

- a. There is no support in the Treaty or in general international law for the proposition that an international obligation must involve the exercise of "sovereign power".³⁹⁸ Indeed, as we have already seen, the "measures" requirement in the Treaty is defined inclusively.³⁹⁹ It does not exclude commercial conduct.
- b. The purported "sovereign power" requirement cannot be reconciled with the law of State responsibility.⁴⁰⁰
- c. The principle that a mere contractual breach does not itself entail a treaty breach, which is of course utterly irrelevant here, does not support the ROK's proposed test.

122. In its Rejoinder, the ROK entirely ignores the first and second elements of the Claimant's response, to which it therefore has provided no response. In engaging only with the third element, it contends that the cases rejecting treaty claims for a mere

³⁹⁶ Rejoinder, ¶ 341.

³⁹⁷ Reply, Section III.D.

³⁹⁸ Reply, ¶¶ 370-372.

³⁹⁹ *See above*, Section III.A, see in particular, ¶ 35.

⁴⁰⁰ Reply, ¶¶ 362-369.

breach of contract support the existence of a broader principle that States are excused from international liability for any commercial conduct.⁴⁰¹

123. On the first element, the ROK has failed to engage with a recent award that results in this Tribunal needing to look no further on this objection. For the ROK’s purported sovereign power requirement was also rejected in *Strabag v. Libya*, where the tribunal held that it would “in effect call for the Tribunal to introduce limits or conditions [into the treaty] that do not appear in its language or necessarily follow from its ordinary meaning”, and that such a requirement “has no foundation in the text of the [treaty].”⁴⁰²
124. On the second element, the ROK seeks to duplicate an attribution objection that has already been addressed. It suggests in a perplexing statement that, even if an act is attributable to the State under ILC Articles 4 or 8, “that is not enough for an act that is in its very nature a commercial act to give rise to international responsibility, and so the claim must still fail.”⁴⁰³ The case it inaccurately paraphrases, however, is concerned with a question of attribution. Moreover, to the extent that the tribunal was suggesting that commercial acts are not attributable under ILC Articles 4 or 8, that is wrong as a matter of law, as has already been demonstrated above.⁴⁰⁴
125. In relation to the third element, the blanket sovereign powers rule which the ROK confects relies on its own selective reading of “the language”⁴⁰⁵ of a few awards that address a quite different circumstance. As the ROK accepts, all of the cases it relies on arise in the context of a contractual breach which has no parallel here.⁴⁰⁶ These cases

⁴⁰¹ Rejoinder, ¶¶ 342-345.

⁴⁰² *Strabag SE v. Libya*, ICSID Case No. ARB(AF)/15/1, Award, 29 June 2020, **Exh CLA-189**, ¶ 164.

⁴⁰³ Rejoinder, ¶ 350; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, **Exh CLA-6**, ¶ 315 (“[T]he Tribunal concludes that even if the acts which were not found attributable to the Respondent could somehow be considered so attributable—for example if they are assumed to have been effected under an instruction or under the control of the State—no international responsibility of the ROG could have arisen in any event from these acts, because of their very nature.”).

⁴⁰⁴ See Commentary to the ILC Articles, **Exh CLA-38**, Article 4, ¶ 6 (“[I]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as ‘commercial’ or as *acta iure gestionis*.”); see also, *Hulley Enterprises Limited v. Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, **Exh CLA-37**, ¶ 1479.

⁴⁰⁵ Rejoinder, ¶ 343.

⁴⁰⁶ Rejoinder, ¶ 345.

cite the sovereign powers principle exclusively to assist in drawing the distinction between mere contractual and treaty claims:

- a. *Impregilo v. Pakistan*: the Claimant has not “misread”⁴⁰⁷ the statement of the “sovereign power” principle in this case. The tribunal made plain that it was discussing the sovereign power requirement only in respect of the question whether a “breach of an investment contract can be regarded as a breach of a BIT”.⁴⁰⁸
- b. *Duke Energy v. Ecuador*: the ROK’s contention ignores the tribunal’s words “different in nature from a contract breach” which provide the immediate context for the extract on which the ROK relies, that “in other words a violation which the State commits in the exercise of its sovereign power”.⁴⁰⁹ Again, the case must be read in the context of the claimant’s attempt to bring a treaty claim for a mere contractual breach.
- c. *Bayindir v. Pakistan*: the ROK says that this case “cannot be read to have held that *only* a contractual breach claim is subject to [a sovereign power test].”⁴¹⁰ But it is difficult to see what other conclusion could possibly be drawn from the tribunal’s statement that: “the test of ‘puissance publique’ would be relevant *only* if Bayindir was relying upon a contractual breach (by NHA) in order to assert a breach of the BIT”.⁴¹¹
- d. *Siemens v. Argentina*: the ROK also claims that a “clear statement of the principle” of sovereign power may be found in this case, but again, it is made in

⁴⁰⁷ Rejoinder, ¶ 343(a).

⁴⁰⁸ *Impregilo S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/02/17, Decision on Jurisdiction, 26 April 2005, **Exh RLA-27**, ¶ 259; indeed, the tribunal in *Bayindir v. Pakistan* relied on the same passage to find that *Impregilo* did not support the existence of a sovereign power requirement that applies generally to all BIT claims. See: *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exh CLA-25**, fn. 72.

⁴⁰⁹ *Duke Energy Electroquil Partners & Electroquil SA v. Republic of Ecuador* (ICSID Case No. ARB/04/19), Award, 18 August 2008, **Exh RLA-41**, ¶ 345 (emphasis added).

⁴¹⁰ Rejoinder, ¶ 343(c).

⁴¹¹ *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005, **Exh CLA-25**, ¶ 183.

the context of distinguishing between a mere breach of contract and a treaty breach.⁴¹²

126. The ROK also argues that its novel requirement *should* be the law because it would be reasonable or make the best sense, going so far as to suggest that the burden is on the Claimant to explain why its made-up rule should not exist.⁴¹³ That the ROK resorts to such normative arguments is revealing of their lack of any legal foundation.
127. In summary, the ROK relies on a few selective quotes of the case-law to attempt to fashion a new blanket rule that all commercial actions by a State are excluded from treaty liability. Such a rule lacks any legal foundation, whether in the text of the Treaty or in public international law. It should be dismissed outright by the Tribunal.

B. THE ROK’S MEASURES IN ANY EVENT CONSTITUTE AN EXERCISE OF “SOVEREIGN POWER”

128. Even if the novel test that the ROK proposes were applicable, it would be satisfied here. The conduct in question constitutes an exercise of governmental powers for the reasons already explained above in the context of ILC Article 5 and Article 11.1.3(b) of the Treaty.⁴¹⁴ A vote by the NPS is not a vote like any other commercial shareholder⁴¹⁵ for the further simple reason that the NPS is not the legal owner of the National Pension Fund’s shares in SC&T. The *State* is the legal owner.⁴¹⁶
129. As a “secondary point”, the ROK claims that “the exercise of voting rights derives from the contracts that shareholders enter into with a company when they acquire its shares” and thus the exercise of these rights is commercial.⁴¹⁷ But this is irrelevant. The Claimant is not a party to any contract between SC&T and NPS, and neither is it suing

⁴¹² Rejoinder, ¶ 344; citing *Siemens AG v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, **Exh RLA-35**, ¶ 253 (“What all these decisions have in common is that for the State to incur international responsibility it must act as such, it must use its public authority.”). *See also, id.*, ¶ 248 (“arbitral tribunals have considered that, for the behavior of the State as party to a contract to be considered a breach of an investment treaty, such behavior must be beyond that which an ordinary contracting party could adopt and involve State interference with the operation of the contract.”).

⁴¹³ Rejoinder, ¶¶ 342, 343(b), 345 (accusing the Claimant of accepting such a limitation “for no valid reason” that the “reason” is “unexplained by the Claimant”; that it would “make[] no sense”; and that “there is no reason why a State’s contractual breaches would be exempt from Treaty liability while other types of commercial conduct, in which any commercial party also could engage, should trigger Treaty liability.”).

⁴¹⁴ *See above*, Section IV.C.2, *see in particular* ¶¶ 96-97.

⁴¹⁵ *Compare* Rejoinder, ¶ 347.

⁴¹⁶ *See above*, ¶ 96.c.

⁴¹⁷ Rejoinder, ¶ 349.

the ROK for a breach of such a contract. The Claimant is bringing its Treaty claim for the entirety of the ROK's misconduct in relation to the approval of and exercise of the Fund's vote on the Merger. Such a vote was part and parcel of the NPS's governmental function, delegated by statute from the Minister of Health and Welfare, to manage the National Pension Fund. It is no way analogous to a mere contractual claim.

130. Accordingly, the Tribunal should reject the ROK's alleged sovereign power requirement for the same reasons that it should find that the NPS's conduct is attributable to the ROK.

VI. THE CLAIMANT'S CLAIMS ARE NOT AN ABUSE OF PROCESS

131. In the Rejoinder, the ROK pursues two abuse of process objections: *first*, that “the Claimant purposely “restructured” its investment for the purpose of pursuing litigation”; and *second*, that the Claimant’s Share Transfer Agreement with SC&T “resolved the issues the Claimant seeks to relitigate here”.⁴¹⁸

132. Each of these arguments is unfounded and each is based on what can only be described as a further example of the ROK’s regrettable tendency to place an aggressive “spin” on the evidence that, time and again, tips over into misstatement of the facts. Each of the ROK’s abuse of process theories is addressed, by reference to the actual evidentiary record, in turn in the sub-sections that follow.

A. THE CLAIMANT’S SHARE PURCHASES WERE NOT AN ABUSIVE RESTRUCTURING OF ITS INVESTMENT

133. The ROK’s first abuse of process objection centers on the claim that the Claimant purchased SC&T shares (both as an alternative and in addition to swaps) in order to pursue litigation—against whom is carefully not specified.

134. Thus, the ROK’s so-called “restructuring” objection does not involve any allegation that the Claimant moved itself from a jurisdiction that did not afford it treaty coverage to one that did. Nor does the ROK allege that the Claimant did not already have treaty coverage before it acquired more SC&T shares, because of course it did. Nor, indeed, does the ROK even allege that the *only* reason that the Claimant purchased more shares in SC&T was for the purpose of bringing a Treaty claim. As a consequence, even *on its face* the ROK’s objection finds no support in the legal authorities that either the Claimant or the ROK itself has made reference to.

135. The ROK initially takes issue with the Claimant’s citation to ICJ authority concerning the “exceptional circumstances” threshold for showing an abuse of process, dismissing the leading international judgment on this doctrine of the ICJ in the *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* case⁴¹⁹ as just “a single decision

⁴¹⁸ Rejoinder, ¶ 130.

⁴¹⁹ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, ICJ Reports 2018, 6 June 2018, **Exh CLA-130**, ¶ 150 (“it is only in exceptional circumstances

from the ICJ” on the requisite international law standard.⁴²⁰ But of course this standard has been repeated since not only by the ICJ,⁴²¹ but also invoked by numerous investment treaty tribunals.⁴²² And notably the ROK does not cite to any tribunal or court disapproving or even questioning that standard.

136. By reference to those authorities, the test that the ROK is constrained to set for itself is to show that the Claimant purchased shares in order “to *gain* the protection of an investment treaty at a point in time when a specific dispute was foreseeable.”⁴²³ In the Rejoinder, the ROK asserts that in order to meet this test, it must persuade the Tribunal, on the basis of the evidence, to answer two simple questions in the affirmative:
- a. *First*, “did the Claimant restructure its investment to gain Treaty protection”?
 - b. *Second*, “when it did so, was a dispute foreseeable”?⁴²⁴
137. For reasons that are elaborated below, the Claimant submits that this formulation (no doubt deliberately) glosses over some critical issues, such that the analysis should more properly be framed as follows:
- a. *First*, was the Claimant’s investment “restructured” at all?

that the Court should reject a claim based on a valid title to jurisdiction on the ground of abuse of process”)

⁴²⁰ Rejoinder, ¶ 131. Contrary to what the ROK states at ¶ 131 of its Rejoinder, the Claimant’s references to “‘decisions’ plural” in its Reply was not “misleading”.

⁴²¹ *See Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, **Exh CLA-180**, ¶ 113 (“only in exceptional circumstances should the Court reject a claim based on a valid title of jurisdiction on the ground of abuse of process”, where there is “clear evidence” that the applicant’s conduct amounts to an abuse of process).

⁴²² *See, e.g., Chevron Corporation (USA) and Texaco Petroleum Company (USA) v. The Republic of Ecuador*, UNCITRAL, PCA Case No. 34877, Interim Award, 1 December 2008, **Exh CLA-182**, ¶ 143 (“[I]n all legal systems, the doctrines of abuse of rights, estoppel and waiver are subject to a high threshold. Any right leads normally and automatically to a claim for its holder. *It is only in very exceptional circumstances that a holder of a right can nevertheless not raise and enforce the resulting claim.* The high threshold results from the seriousness of a charge of bad faith amounting to abuse of process. As Judge Higgins stated in her 2003 Separate Opinion in the Oil Platforms case, there is ‘a general agreement that the graver the charge the more confidence there must be in the evidence relied on.’”) (emphasis added); *Renée Rose Levy and Gremcitel S.A. v. Republic of Peru*, ICSID Case No. ARB/11/17, Award, 9 January 2015, **Exh CLA-187**, ¶ 186 (“As for any abuse of right, the threshold for a finding of abuse of process is high, as a court or tribunal will obviously not presume an abuse, and will affirm the evidence of an abuse only in ‘very exceptional circumstances’”).

⁴²³ Rejoinder, ¶ 131 (quoting *Philip Morris Asia Limited v. The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **Exh RLA-77**, ¶ 554).

⁴²⁴ Rejoinder, ¶ 133.

- b. *Second*, if so, was this for the sole purpose of obtaining investment treaty protection?
- c. *Third*, and if so, at that time was a dispute with the ROK a very high probability (from the Claimant’s perspective)?

138. The answer to each of those questions is clearly “no”.

1. The Claimant’s investment was enlarged over time in a mix of swaps and shares, not “restructured”

139. As the Claimant observed in the Reply, abuse of process objections more typically arise in investment arbitration in the context of corporate restructuring to obtain investment-treaty-protected nationality, which is not at issue here.⁴²⁵ While insisting that it does not need to show *corporate* restructuring,⁴²⁶ the ROK evidently does accept that it has to show restructuring, because it labors mightily to contort the facts concerning the evolution of the Claimant’s investment in SC&T into an ill-fitting “investment restructuring” narrative.

140. Little turns on this aspect of the ROK’s effort to “spin” the record, but one factual error calls for correction: the ROK speculates that purchases of SC&T shares were funded by the sale of SC&T swaps.⁴²⁷ The chronology set forth in Mr. Smith’s evidence and the Reply belies that putative linkage:

- a. Beginning in November 2014, the investment was held in swaps referencing SC&T shares, and by 27 January 2015 total swap holdings referenced a 1.51% interest in SC&T shares.⁴²⁸
- b. The Claimant’s share purchases beginning in January 2015 were made while those swap holdings were maintained, so there is no basis for even suggesting that these purchases were funded by the disposition of swap positions.⁴²⁹
- c. The swap positions relating to 1.51% of SC&T shares were closed in March 2015. At the beginning of March, the Claimant directly owned 1.43% of

⁴²⁵ Reply, ¶ 391.

⁴²⁶ Rejoinder, ¶ 132.

⁴²⁷ See Rejoinder, ¶ 135.

⁴²⁸ Second Smith Statement, Appendix A.

⁴²⁹ Second Smith Statement, Appendix A.

SC&T's shares, and by 20 April 2015, it owned 4.74% of SC&T's shares.⁴³⁰ The ROK does not even try to explain how the proceeds of closing swap positions in relation to 1.51% of SC&T's shares can have in a matter of weeks generated funds to purchase an additional 3.31% of SC&T's shares.

141. Quite simply, the acquisition of shares did not amount to a "restructuring" of the investment. It constituted an *enlarging* of an existing investment.

2. The Claimant purchased SC&T shares to acquire shareholder rights, not investment treaty protection

142. Even on the basis of the cases it relies on, the ROK must show that the Claimant's only reason for any alleged "restructuring" was to gain investment treaty protection that it did not already have. The existence of another legitimate purpose for the "restructuring" would be fatal to this objection.

143. This is clear from the very authorities on which the ROK relies:

- a. In *Phoenix Action*, the tribunal required a showing that an investment was made with the "unique goal" or "the sole purpose" of accessing treaty protection with respect to a specific, pre-existing national dispute.⁴³¹ In that case, a former Czech national, Mr. Beno, created the claimant company Phoenix Action Ltd in 2002 under Israeli law and caused it to acquire an interest in two Czech companies ultimately owned by his family members and which were already involved in ongoing disputes in the Czech Republic. Two months after the acquisition, Phoenix Action commenced ICSID arbitration under the Israel-Czech BIT in respect of the same ongoing disputes. One of the companies was subsequently sold back to its original owner for the same price paid by Mr. Beno in 2002. Analyzing the issue raised as one of whether the Claimant had a qualifying investment, the Tribunal held:

The Claimant made an 'investment' not for the purpose of engaging in economic activity, but for *the sole purpose* of bringing international litigation against the Czech Republic. This alleged investment was not made in order to engage in national economic activity, it was made *solely for the purpose*

⁴³⁰ Second Smith Statement, Appendix A.

⁴³¹ *Phoenix Action, Ltd. v. the Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, **Exh RLA-45**, ¶ 142 (emphasis added).

of getting involved with international legal activity. *The unique goal* of the ‘investment’ was to transform a *pre-existing* domestic dispute into an international dispute subject to ICSID arbitration under a bilateral investment treaty. This kind of transaction is not a *bona fide* transaction and cannot be a protected investment under the ICSID system.⁴³²

b. In *Philip Morris*, the tribunal considered that an abuse of process could be established in circumstances where a corporate restructuring had been undertaken for the “*determinative*” or “*sole*” reason of gaining treaty protection with respect to “a *specific* dispute”.⁴³³ The Tribunal found that the Philip Morris Group restructured ownership of its Australian business in February 2011 by transferring those rights to Philip Morris Asia, a company incorporated in Hong Kong, for “the main and determinative, if not sole, reason . . . [of] bring[ing] a claim under the Treaty [the Hong Kong-Australia BIT]” almost one year after the Australian government’s announcement in April 2010 that it intended to enact plain-packaging legislation in respect of tobacco.⁴³⁴

144. The ROK does not even contend that the Claimant’s sole purpose in purchasing SC&T shares was to obtain investment treaty protection. Elsewhere in its pleadings, the ROK alleges that the Claimant purchased its shares “for the very purpose of interfering with the Merger,”⁴³⁵ an assertion that in the Rejoinder has morphed into the claim that “the Claimant made its investment *solely to oppose the Merger*”.⁴³⁶ So the ROK itself advances a reason, indeed a “sole[.]” reason, for the Claimant’s purchase of shares in addition to swaps that has nothing to do with obtaining investment treaty protection.

⁴³² *Phoenix Action, Ltd. v. the Czech Republic* (ICSID Case No. ARB/06/5), Award, 15 April 2009, **Exh RLA-45**, ¶ 142 (emphasis added).

⁴³³ *Philip Morris Limited v. The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **Exh RLA-77**, ¶ 584 (finding that “the main and determinative, if not sole, reason for the restructuring was the intention to bring a claim under the Treaty”) and ¶ 554 (requiring that “an investor [must have] changed its corporate structure to gain the protection of an investment treaty at a point in time when a specific dispute was foreseeable”) (emphasis added). See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, **Exh CLA-150**, ¶ 2.99 (“In the Tribunal’s view, the dividing-line [between legitimate restructure and an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy”) (emphasis added).

⁴³⁴ *Philip Morris Limited v. The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **Exh RLA-77**, ¶ 584.

⁴³⁵ SOD, ¶ 376.

⁴³⁶ Rejoinder, ¶ 141 (emphasis added).

145. The ROK's assertions attribute foreknowledge about the Merger to the Claimant that it in fact did not have. There was no reason to expect the Merger at the time the Claimant first purchased shares in January 2015. To the contrary, market analysts expected any possible merger to receive "strong pushback" from SC&T shareholders.⁴³⁷ Mr. Smith confirms that the individuals taking decisions on behalf of the Claimant did not expect that the rumored merger would actually be pursued, given the highly detrimental terms that would be caused by the Merger Ratio.⁴³⁸ This expectation was reinforced by a meeting with SC&T senior management on 9 April 2015 at which Claimant's advisors were specifically told that SC&T "had not looked into a merger with Cheil and was not planning to do so."⁴³⁹
146. But in any event, the acquisition of shares from January 2015 was not for the purpose of a possible future treaty claim against the Government, but rather for the commercial purpose of increasing and protecting the value of its existing investment specifically by acquiring voting rights and the other rights associated with shareholder status.⁴⁴⁰
147. Mr. Smith's evidence and the Claimant's subsequent behavior confirms that the acquisition of the shares had legitimate business purposes unrelated to any litigation intent. The Claimant used its status as a shareholder to protect its investment in the following ways. From 4 February 2015, it corresponded with SC&T to express concerns

⁴³⁷ Macquarie Research, "Samsung C&T Seven answers to seven un-answered questions", 9 February 2015, **Exh C-148**, p. 5.

⁴³⁸ See, e.g., First Smith Statement, ¶¶ 22, 35; Second Smith Statement, ¶¶ 32, 38, 50; Third Smith Statement, ¶ 7(ii), (iv) and (v). Contemporaneous media articles relying on information from Samsung insiders also dismissed the possibility of an SC&T-Cheil Merger. See, e.g., "With Cheil Industries Skyrocketing, Samsung says 'Corporate Governance Reorganization? Nothing Has Changed'", *Money Today*, 23 April 2015, **Exh C-701**, p. 2 ("The possibility of a merger between Cheil Industries and Samsung C&T was also dismissed. The Samsung insider said, 'The construction divisions of Cheil Industries and Samsung C&T have different business scales and directions, so it is difficult to aim for synergy there.'").

⁴³⁹ First Smith Statement, ¶ 31. The ROK has not put forward any evidence to contradict Mr. Smith's evidence concerning this meeting or the expectation to which it gave rise. On the contrary, the ROK's own Public Prosecutor corroborates Mr. Smith's account. "[Exclusive] We release the indictment against Jae-yong Lee in full", *Ohmy News*, 10 September 2020, **Exh R-316**, p. 17 ("Defendant Yeong-ho Lee, SC&T's CFO, met with Elliott on 9 April 2015 on behalf of SC&T and confirmed that SC&T had 'no plans for a merger with [Cheil]', and, Elliott sent a letter of thanks to SC&T on 16 April 2015 for SC&T management's confirmation on there being no plans for a merger with [Cheil].").

⁴⁴⁰ See, e.g., First Smith Statement, ¶ 23(i); Second Smith Statement, ¶ 35; Third Smith Statement, ¶ 7(ii). See also Email exchange between James Smith and Tim Robinson (both Elliott), 28-29 January 2015, **Exh C-686** ("[W]e need to get ourselves in a position to take the fight to them. Let's get on the bid and make our way to 3% . . .").

over the rumored merger.⁴⁴¹ In April 2015, the Claimant, met with SC&T management; and it met with the NPS, the largest shareholder in SC&T, to “explain[] our investments in Korea”, discuss “the rumours of a SC&T-Cheil merger” and convey Elliott’s view that “a merger at the current share prices would be highly detrimental to SC&T shareholders.”⁴⁴²

148. On 25 May 2015—the day before the Merger was announced—the Claimant was busily continuing to improve its restructuring proposals to put to the █████ Family and SC&T management.⁴⁴³ It was “shocked” when on 26 May 2015, the boards of SC&T and Cheil announced that they had agreed to a merger based on the prevailing share prices.⁴⁴⁴ At the time, the Claimant moved promptly to prepare for what it believed at the time would be a fair proxy fight against the Merger proposal, in order to protect its existing investment in SC&T and its longer term plans for the company. The ROK makes much of the fact that the Claimant purchased further shares after 26 May 2015,⁴⁴⁵ but the legitimate commercial purpose for those purchases is clear: the Claimant purchased these further shares to increase its chances of defeating the Merger by increasing the size of its vote at the EGM,⁴⁴⁶ which is also evident from the various shareholder rights to be exercised as indicated in Claimant’s SC&T Real Shareholder Certificate.⁴⁴⁷
149. As is clear from the above, there is not a shred of evidence that the Claimant purchased the shares for the purpose of gaining Treaty protection. The reason for purchasing

⁴⁴¹ First Smith Statement, ¶ 23(ii); Second Smith Statement, ¶ 47; Third Smith Statement, ¶ 7(iii); Letter from Elliott to the directors of SC&T, 4 February 2015, **Exh C-11**. *See also* Letter from Elliott to SC&T, 16 February 2015, **Exh C-680**; Letter from SC&T to Elliott, 16 February 2015, **Exh C-681**; Letter from Elliott to SC&T, 27 February 2015, **Exh C-682**; Letter from Elliott to SC&T, 11 March 2015, **Exh C-683**.

⁴⁴² First Smith Statement, ¶ 28. *See also* Second Smith Statement, ¶¶ 47-48; Third Smith Statement, ¶ 7(v).

⁴⁴³ Second Smith Statement, ¶ 63; Elliott, Samsung Group restructuring scenarios, 27 April 2015, **Exh C-377**.

⁴⁴⁴ First Smith Statement, ¶ 36; Third Smith Statement, ¶ 7(vii). *See also* Second Smith Statement, ¶ 61.

⁴⁴⁵ *See e.g.*, Rejoinder, ¶ 141.

⁴⁴⁶ First Smith Statement, ¶ 39(iii); Second Smith Statement, ¶ 39; Third Smith Statement, ¶¶ 7(vii), 8.

⁴⁴⁷ SC&T Real Shareholder Certificate, 1 June 2015, **Exh C-382**. The scope of shareholder rights to be exercised were: “1. Shareholders/beneficiaries’ right to bring a derivative action in court. 4. Right to seek removal of directors in court. 7. Right to seek injunction against unlawful actions of directors. 8. Right to inspect books and records. 9. Right to demand the convocation of general meeting of shareholders. 10. Right to apply to the court for the appointment of an inspector to investigate the affairs of the company and the status of its property. 11. Right to make shareholders /beneficiaries’ proposal. 15. Right to bring an action for revoking or affirming nullity or non-existence of resolutions of general meeting of shareholders in court. 21. Right to inspect various documents. 22. Right to bring an action for nullification of merger in court.”

shares was, as the ROK elsewhere itself contends, to gain the voting and other rights of a shareholder in order to protect the existing investment and, once the Merger came into prospect, to increase the chances of defeating it. The answer to the question whether the Claimant’s purchase of SC&T shares was for the sole purpose of acquiring investment treaty protection is thus a resounding “No”.⁴⁴⁸

3. The specific dispute before this Tribunal was not foreseeable, let alone highly probable, when the Claimant purchased its SC&T shares

150. The final question to which the ROK must prove an affirmative answer is whether the dispute that is now before this Tribunal was highly probable at the time the Claimant purchased its SC&T shares. The ROK’s formulation of this prong of the test for abuse of process is the more woolly question whether “*a specific dispute* was foreseeable”, and, as noted above, the ROK is notably vague about which dispute it contends is to have been foreseeable to satisfy this prong of the analysis. Fortunately, the authorities leave no room for doubt.

151. The authorities the ROK relies on require a showing of foreseeability in relation to the “*specific dispute*” at issue in this arbitration.⁴⁴⁹ Those authorities also, it should be noted, define “foreseeable” as meaning “a very high probability.”⁴⁵⁰ Ultimately, on the facts at issue here, nothing turns on the height of that standard, since there can be no basis for contending that the Claimant foresaw the illegal governmental intervention in the Merger vote—rather than the Merger itself—that is the specific dispute in this arbitration.⁴⁵¹ When purchasing shares throughout the period from January to June 2015, the Claimant was not contemplating, and could not have contemplated, bringing its claims under the Treaty because the criminal and improper conduct of the ROK

⁴⁴⁸ Even if that had been a motivation, it would be immaterial because at the time the Claimant first purchased shares—27 January 2015—it already had Treaty protection because the swaps that it had held since 27 November 2014 were already a protected investment under the Treaty (see Reply, Section III.A.3). The Claimant therefore did not “gain” any investment protection that it did not already have as a holder of swaps in SC&T.

⁴⁴⁹ *Philip Morris Limited v. The Commonwealth of Australia* (UNCITRAL), Award on Jurisdiction and Admissibility, 17 December 2015, **Exh RLA-77**, ¶ 554.

⁴⁵⁰ See also *Pac Rim Cayman LLC v. Republic of El Salvador*, ICSID Case No. ARB/09/12, Decision on Jurisdictional Objections, 1 June 2012, **Exh CLA-150**, ¶ 2.99 (“In the Tribunal’s view, the dividing-line [between legitimate restructure and an abuse of process] occurs when the relevant party can see an actual dispute or can foresee a specific future dispute as a very high probability and not merely as a possible controversy”).

⁴⁵¹ Rejoinder, ¶ 142. See also SOD, ¶ 374.

Government's officials to bring about the Merger was not only unforeseeable, it was inconceivable, and was actively concealed until it was revealed over lengthy period starting toward the end of 2016, well over a year after the Merger.

152. Here again, the record irrefutably confirms that the Claimant did not have a Treaty claim in mind. The NPS vote which caused the Merger took place on 17 July 2015. That the corrupt interference of ROK Government officials caused the NPS vote was not publicly known until October 2016 when the scandal was brought to light through oral testimony and documents disclosed in Korean criminal court proceedings.⁴⁵² Before then, the Claimant was entirely unaware of the ROK's unlawful interference in the Merger.⁴⁵³ And it was only after the subsequent Korean criminal proceedings led to convictions of President █████, Minister █████ and CIO █████, among others, that the Claimant initiated these arbitration proceedings on 13 April 2018.⁴⁵⁴
153. Any fair reading of the evidence on which the ROK attempts to rely in this regard only confirms the Claimant's position. The ROK points to two letters from Elliott to SC&T⁴⁵⁵ and a letter to the NPS, which it falsely characterizes as "warn[ing] the NPS of the 'consequences'—namely, litigation by the Elliott Group—of the NPS's supporting the Merger."⁴⁵⁶ The letters to SC&T are obviously irrelevant to the Claimant's knowledge of a probability of a dispute *with the ROK*. And the ROK's characterization of the letter to the NPS is so egregiously misleading that it bears calling out in some detail:
- a. First, nowhere in the four-page letter to the NPS does the word "consequence" or "consequences" appear. Nor does the word "litigation". In fact, the letter, which warrants the Tribunal's careful review, explains what Elliott thought was

⁴⁵² See "Did corporations pay a fortune to Mir, K-Sports without any 'ulterior motives'?", Mediaus, 12 October 2016, **Exh C-54**; "Did Samsung gain guaranteed 'succession of [JY Lee]' from [Soon-sil Choi]?", OhMyNews, 2 November 2016, **Exh C-55**.

⁴⁵³ First Smith Statement, ¶ 67 ("It was not until October 2016 when the corruption scandal publicly broke that I learned of the involvement of the highest levels of the Korean government in illegally bringing about the Merger through interference with the NPS's vote").

⁴⁵⁴ Letter from Three Crowns to the Republic of Korea (Notice of Intent), 13 April 2018, **Exh C-2**.

⁴⁵⁵ Rejoinder, ¶ 139(d) and (e), citing Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 4 February 2015, **Exh C-11**, and Letter from Elliott Advisors (HK) Limited to the directors of SC&T, 27 May 2015, **Exh C-179**.

⁴⁵⁶ Rejoinder, ¶ 139(f), citing Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **Exh C-187**, p. 4.

a shared opinion concerning the unfairness of the proposed Merger and seeks the NPS's support in voting the Merger down.⁴⁵⁷

b. The concerns expressed are serious, but the tone is constructive, and the Claimant does no more than point out the obvious detrimental economics of the deal, express its serious concerns that *SC&T management* (not the NPS) has committed misconduct, and call on the NPS to act consistently with its own mandate.⁴⁵⁸

c. Indeed, the only consequences foreshadowed in the letter are as follows:

“More broadly, we believe that if NPS is not seen to be publicly opposing certain transactions, like the Proposed Merger, which are so abusive of shareholders rights, there is a real risk that the ‘governance shortfall discount’ from which the Korean equity markets currently suffer will continue to be a significant drag on the value of NPS’ domestic listed equity portfolio. We believe that the Proposed Merger is a situation where the NPS can and should send an appropriate signal to the market that it is serious about rooting out the bad governance practices which have a very real negative impact on the best interests of NPS members.”⁴⁵⁹

154. The document simply does not bear out the ROK's characterization of this letter as threatening “litigation” as “consequences” for the NPS. And in short, there is no evidence—and most certainly not the requisite “clear evidence”—to support the ROK's allegation that the Claimant purchased shares with the intention of invoking Treaty rights against the ROK, much less with the “sole”, “unique” or even “determinative” objective of bringing this arbitration, or that the Claimant foresaw the ROK's unlawful conduct that underpins the claims in these proceedings. Indeed, the only time the Claimant mentioned international arbitration prior to the Merger was to categorically *deny* that it had any such intention when the issue was raised by a third party.⁴⁶⁰ Accordingly, the answer to the final question in this abuse of process analysis is a further resounding “No”.

⁴⁵⁷ Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **Exh C-187**.

⁴⁵⁸ Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **Exh C-187**.

⁴⁵⁹ Letter from Elliott Advisors (HK) Limited to the NPS, 3 June 2015, **Exh C-187**, p. 4.

⁴⁶⁰ Letter from Elliott to NPS, 13 July 2015, **Exh C-232** (updated), p. 10; Third Smith Statement, ¶ 11.

B. THERE IS NO ABUSE OF PROCESS ARISING FROM THE SHARE TRANSFER AGREEMENT

155. The ROK also argues that an abuse of process arises because the Share Transfer Agreement that the Claimant and SC&T entered into in March 2016 “resolved the issues the Claimant now seeks to place before this Tribunal”.⁴⁶¹ Again, and as explained below, this comes nowhere near to showing an abuse of process.
156. As the Claimant has itself described, it pursued and exhausted the statutory remedy that it had against *SC&T itself* in appraisal rights litigation that ultimately led to a settlement between the parties.⁴⁶² That cause of action arose from the statutory right of any opponent to a merger to have its shares repurchased if they were owned prior to the announcement of the merger vote. That repurchase would take place at a price that, like the merger ratio itself, arises from a statutory formula that is based on the short-term traded prices of the applicant’s shares, and so could not fully compensate the Claimant for the harm that it claims in respect of here.⁴⁶³
157. This arbitration concerns the very different question of the ROK’s liability for breaching the Treaty through its illegal intervention in the Merger. The question of the Respondent’s liability under this Treaty clearly has not been resolved to date by any court or tribunal. It is thus simply wrong for the ROK to contend that this international cause of action against the Respondent cannot be brought because the Claimant pursued and settled a *different* claim in relation to a *different* cause of action against a *different* Respondent.
158. If, as it should, this Tribunal concludes that the Respondent breached the Treaty, then this Tribunal will then need to address the question of the amount of the Claimant’s loss. It is in this limited respect that the Share Transfer Agreement is relevant because, by that agreement, SC&T agreed to pay the Claimant the Buy-Back Price in respect of the shares held by the Claimant as at the date of the Merger announcement (known as the “Buy Back” or “Appraisal” Shares). Recognizing the relevance of the Share Transfer Agreement to the question of full compensation for the Buy Back Shares, the Claimant has from the outset of this arbitration carefully ensured that any amounts that

⁴⁶¹ Rejoinder, Section II.D.2.

⁴⁶² See Reply, ¶¶ 550-552; First Smith Statement, ¶¶ 63-65.

⁴⁶³ See ASOC, ¶¶ 255-258; Reply, ¶ 550.

it has received from SC&T in respect of those shares have been deducted from the Claimant's calculation of its loss.⁴⁶⁴

159. In this way, there can be no double recovery in relation to amounts received by the Claimant. Even if further payments subsequently become payable to the Claimant under the Share Transfer Agreement at some undefined time in the future, this would be after this Tribunal has completed its mandate. It would fall to SC&T to contest that right to further payment if the Claimant has already been compensated through these proceedings.
160. But in any event, as the above discussion confirms, the Share Transfer Agreement bears no relevance to issues of admissibility and falls far outside the contours of the doctrine of abuse of process.
161. The ROK's assertions on abuse of process accordingly lack any legal or factual merit and should be dismissed.

⁴⁶⁴ See ASOC, ¶¶ 264, 267(b); First Boulton Report, ¶ 6.3.2; Reply, ¶¶ 557, 596-597, 617(b); Second Boulton Report, ¶ 10.3.2.

VII. REQUEST FOR RELIEF

162. For the foregoing reasons, the Claimant hereby requests that the Arbitral Tribunal dismisses the ROK's preliminary objections and proceeds to:
- a. DECLARE that the ROK has breached the Treaty; and
 - b. ORDER the ROK to pay the Claimant damages for the loss caused to the Claimant by the ROK's breaches in an amount of US\$ 539,836,168; and
 - c. ORDER the ROK to pay the Claimant pre-award interest at a rate of 5 percent on the sum in (b) above, compounded monthly from 16 July 2015 until the date of the Award, totaling US\$ 167,418,465 as at 30 June 2020; and
 - d. AWARD the Claimant post-award interest at a rate of 5 percent; and
 - e. ORDER the ROK to pay the costs incurred by the Claimant in relation to these proceedings, including all professional fees, attorneys' fees and disbursements and the costs of the Arbitration; and
 - f. ORDER such further or other relief as the Tribunal may deem appropriate.
163. The Claimant reserves the right to amend this Rejoinder on Preliminary Objections as permitted by the UNCITRAL Arbitration Rules and to request such additional or different relief as may be appropriate, including conservatory, injunctive or other relief.

Respectfully submitted,



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