

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

**PCA CASE N° 2018-55**

BETWEEN

MASON CAPITAL L.P.  
MASON MANAGEMENT LLC

*Claimants,*

AND

THE REPUBLIC OF KOREA

*Respondent.*

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**CLAIMANTS' STATEMENT OF REPLY  
AND DEFENCE TO OBJECTIONS TO JURISDICTION**

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April 23, 2021

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## TABLE OF DEFINITIONS

Term	Meaning
ASOC	Amended Statement of Claim
Cayman Fund	Mason Capital Master Fund L.P.
Cheil	Cheil Industries Incorporated, a company within the Samsung Group
Contracting Parties	United States and Korea
CRA	Charles River Associates
Domestic Fund	Mason Capital L.P.
Elliott Arbitration	<i>Elliott Associates. L.P. v. Korea</i> , PCA Case No. 2018-51
General Partner	Mason Management LLC
Investment Manager	Mason Capital Management LLC
Korea	The Republic of Korea
KRW	Korean Won
Limited Partner	Mason Capital, Ltd.
LPA	Second Amended and Restated Limited Partnership Agreement between the General Partner and Limited Partner
Mason	The General Partner and the Domestic Fund
Mason Capital	Mason and its related entities
MHW	Korea's Ministry of Health and Welfare
NPS	Korea's National Pension Service

Samsung Shares	Shares of SEC and SC&T Held By Mason
SC&T	Samsung C&T Corporation
SEC	Samsung Electronics Co., Ltd.
SOD	Korea's Statement of Defence
Treaty or FTA	Free Trade Agreement between the Republic of Korea and the United States of America
USD or \$	US Dollars

## SELECTED DRAMATIS PERSONAE

All descriptions listed in the right-hand column apply to the relevant time period addressed in the Claimants’ Statement of Reply and Defence to Objections to Jurisdiction.

The same Korean name may have different spellings when translated in English. To the extent possible, the left-hand column indicates the different spellings applicable to the same name.

Name (Family Name First Name)	Description
██████████ / ██████████	Head of the NPS Research Team
██████████ (“MHW Pension Bureau Chief ██████████”)	Chief of Bureau of Pension Policy of the Ministry of Health and Welfare
██████████ (“Senior Secretary ██████████”)	Senior Secretary for Employment and Welfare
██████████	Director of the Pension Finance Department of the Ministry of Health and Welfare
██████████ / ██████████	Member of the Investment Committee
██████████ (“CIO ██████████”)	Chief Investment Officer of the NPS Fund
██████████ / ██████████ (“██████████”)	Vice Chairman of Samsung
██████████	Member of the Investment Committee
██████████	Member of the Experts Voting Committee
██████████	Head of the NPS Responsible Investment Team
██████████	NPS Official
██████████	Member of the Investment Committee
██████████	Secretary for Health and Welfare
██████████	Executive Official to the Secretary for Health and Welfare
██████████	Chairman of the Experts Voting Committee
██████████	Head of the NPS Overseas Securities Division / Member of the Investment Committee

██████████	Member of the Investment Committee
██████████	Member of the Investment Committee
██████████ (“Minister ██████████”)	Minister of Health and Welfare
██████████	Executive Official to the Secretary for Health and Welfare
██████████ (“President ██████████”)	President of Korea
Prof. ██████████	Member of the Experts Voting Committee
██████████ / ██████████	Member of the Investment Committee
██████████	Member of the Investment Committee
██████████	Head of the NPS Compliance Team
██████████	Member of the Investment Committee
██████████	Head of KCGS Proxy Team

## I. INTRODUCTION

1. Korea's 278-page Statement of Defence does not put forward any credible response to the overwhelming evidence of Korea's wrongdoing. The record is clear that the Korean government wrongfully interfered with the NPS's vote on the Merger in order to favor Samsung and the █████ Family, to the detriment of SC&T's shareholders – including Mason. The record is also clear that the Korean government took these illicit actions in exchange for bribes, financial support, and other favors.
2. At the behest of Samsung heir-apparent █████, President █████, Minister █████, and their respective entourages interfered with the NPS's decision making processes and subverted those processes to ensure approval of the Merger. As a matter of simple arithmetic, but for the NPS's vote in favor, the Merger would not have been approved at the SC&T shareholders meeting. Korea's courts, its prosecutors, and the NPS itself have already admitted these core facts.
3. In the face of this mountain of evidence, Korea has chosen to equivocate, to distance itself from the record, and to attempt to malign Mason. Korea's position is not tenable. Not only has Mason's account of the relevant events been confirmed by disclosure (much of which Korea adamantly opposed), but the Korean State itself has continued to pursue additional investigations and indictments of the principal wrongdoers that confirm the facts outlined in Mason's Amended Statement of Claim and elaborated on here.
4. Unable to dispute the facts of its wrongdoing, Korea raises an array of meritless admissibility and legal arguments in the hope that one of them will absolve it from its responsibility under the Treaty. Korea's arguments are divorced from both fact and law. For example:
  - a. Despite the overwhelming evidence that Korea's officials interfered with the Merger for the singular purpose of enabling the transfer of billions of dollars in value from SC&T's shareholders to Cheil's, and increasing █████'s control over the Samsung Group (of which SEC is the "crown jewel") at the expense of

minority shareholders, Korea denies that its measures “related to” Mason’s investments in the Samsung Shares.<sup>1</sup>

- b. Ignoring the plain language of the Treaty’s broad definition of “measure” and the views of numerous tribunals and commentators that the term encapsulates all forms of action, step or omission attributable to the State, Korea contends that its officials’ interference with the Merger somehow did not amount to “measures” within the meaning of the Treaty.<sup>2</sup>
- c. Despite the Treaty’s express provision requiring Korea to accord “fair and equitable treatment” to Mason’s investment,<sup>3</sup> and the manifestly arbitrary and egregious nature of its officials’ corrupt, criminal scheme as a result of which President █████ was impeached and sentenced to 25 years imprisonment (later reduced to 20 years), Korea seeks to argue that its wrongdoing somehow does not fall below the minimum standard of treatment under customary international law.<sup>4</sup>
- d. Closing its eyes to the evidence that its officials acted for the benefit of one of Korea’s own most prominent families and the controlling shareholder of SC&T and SEC, the █████ Family, at the expense of foreign investors in Samsung such as Mason, Korea seeks to deny that its measures were discriminatory or that the █████ Family is an appropriate comparator.<sup>5</sup>

None of these defences stands up to legal scrutiny or common sense.

- 5. With no viable defence on liability, Korea seeks to evade its obligation to effect full reparation by denying that its breaches caused Mason any loss because Mason’s losses “amount to zero” or were the result of Mason’s failure to “mitigate” by making new

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<sup>1</sup> The Republic of Korea, Statement of Defence, October 30, 2020 (“SOD”), § IV.B.

<sup>2</sup> SOD, § IV.A.

<sup>3</sup> SOD, § V.B.

<sup>4</sup> SOD, § V.B.

<sup>5</sup> SOD, ¶¶ 417-421.

investments in other Korean listed companies. Korea's arguments are misconceived in law and belied by the facts.<sup>6</sup> For instance:

- a. Korea speculates that the Merger could have been approved even if Korea had not interfered with the NPS's vote because other shareholders who did not vote for the Merger might hypothetically have done so.<sup>7</sup> But Korea cannot deny that as a matter of actual *fact*, the NPS's manipulated vote caused the Merger to be approved. Had the NPS voted against the Merger—as it would have, and as it should have had President █████, Minister █████ and their subordinates not interfered with the NPS's vote—the Merger would *not* have been approved. Hypothetical scenarios of *other* vote configurations, or speculation as to what the NPS might have done in the absence of any interference from the Blue House or the MHW, do not and cannot change what actually occurred. Having wrongfully interfered with the Merger vote, Korea cannot now claim the benefit of a hypothetical alternate reality in which Korea's misconduct did not occur.
- b. Korea asserts that Mason's losses were not the foreseeable consequences of its breaches,<sup>8</sup> ignoring that, by Korea's measures, President █████, Minister █████ and their associates achieved the singular, intended outcome of their actions: (i) the transfer of billions of dollars in value from SC&T's shareholders, such as Mason, to █████ and Cheil's shareholders, and (ii) the increase of █████'s control over the Samsung Group, including SEC. Mason's losses to its investment in the Samsung Shares flow naturally and obviously from the egregious acts of wrongdoing at issue in this case.
- c. Korea claims that Mason voluntarily assumed the risk of Korea's measures, conflating the risk that the Merger might be approved on its own merits (an outcome that did not materialize) and the risk of Korea's covert, criminal scheme.<sup>9</sup> That scheme, of course, was not known to Mason or anyone other

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<sup>6</sup> SOD, ¶ 502.

<sup>7</sup> SOD, § VI.B.2 & n. 959.

<sup>8</sup> SOD, ¶¶ 492-498.

<sup>9</sup> SOD, § VI.A.

than President █████, Minister █████ and the other perpetrators involved, nor did Mason “assume” the risk of patently illegal conduct.

- d. Korea asserts that Mason’s quantification of its damages is “speculative and uncertain” and that Mason has suffered “zero” damages.<sup>10</sup> Korea’s attempts to avoid the consequences of its own wrongs and deny Mason compensation by invoking the burden of proof and spurious critiques of CRA’s valuation are without merit. Mason’s losses have been reliably and independently quantified by Dr. Duarte-Silva of CRA as **\$249.7 million** inclusive of interest as of the date of this Reply.<sup>11</sup> Mason is now entitled to be placed in the same pecuniary position it would have occupied had Korea not interfered with the Merger vote.
- e. Korea, for its part, has adduced no plausible alternative valuation, preferring instead to rely on Prof. Dow’s conclusory and circular statements that Mason suffered “zero” loss because the measure of the *but for* value of Mason’s shares should be the actual stock market value before the Merger vote. Prof. Dow’s so-called “valuation” analysis is deeply flawed, including in its reliance on Korea’s untenable attempts to justify the merger ratio *ex post facto* and its denial that █████ and Samsung manipulated SC&T and Cheil’s share prices in the lead up to the Merger vote.<sup>12</sup>
- f. Korea claims that Mason ought to have “mitigated” its losses by re-investing the proceeds from its sale of its shares in SC&T and SEC in other Korean listed companies, thereby exposing itself to further risk in Korea. The duty to mitigate does not, of course, require an injured party to make new investments in order

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<sup>10</sup> SOD, ¶ 502, 525.

<sup>11</sup> See Second Expert Report of Tiago Duarte-Silva, April 23, 2021 (“**Duarte-Silva Report II**”), ¶¶ 23.

<sup>12</sup> SOD, § VII.B-E.

to offset its losses caused by the State's wrongful acts. Like its other arguments on quantum, Korea's so-called "mitigation" argument is frivolous.

In the absence of any cogent evidence disputing Mason's losses, the Tribunal should now issue an award of damages against Korea as reliably quantified by CRA.

6. Throughout this arbitration, Korea has continuously deployed wasteful, dilatory tactics which have only served to increase the costs of these proceedings. Korea raised unmeritorious preliminary objections, unsuccessfully sought to resist nearly all of Mason's requests for document productions, many of which it apparently seeks to re-litigate at this stage, and refused to produce documents in accordance with the Tribunal's orders. These unnecessary tactics compel an award of Mason's legal costs and expenses, as well as compound interest on all of the damages payable to the Claimants.
7. In the remainder of this Statement of Reply and Defence to Objections to Jurisdiction ("**Statement of Reply**" or "**Reply**"), Mason addresses Korea's attempts to call into question the Tribunal's findings on Mason's qualifying investments in Korea (**Section II**); corrects Korea's attempts to deny or mischaracterize the facts proven by the evidentiary record (**Section III**); explains why Korea's attempts to dispute the admissibility of Mason's claims are without merit (**Section IV**); addresses Korea's baseless arguments on the applicable legal standards under the Treaty and their application to the facts (**Section V**); and explains why Korea has failed to put forward any credible response to Mason's case on damages (**Section VI**). Finally, Mason sets out its request for relief in **Section VII**.
8. This Statement of Reply is accompanied by:
  - a. The Fourth Witness Statement of Kenneth Garschina (**Fourth Garschina CWS-7**).
  - b. The Fourth Witness Statement of Derek Satzinger (**Fourth Satzinger CWS-8**).
  - c. The Second Expert Report of Dr. Tiago Duarte-Silva of CRA (**Duarte-Silva CER-6 or Duarte-Silva Report II**) on damages.

- d. The Second Expert Report of Prof. Daniel Wolfenzon of Columbia Business School (**Wolfenzon CER-7 or Wolfenzon Report II**) on the valuation and market capitalization of conglomerates.
- e. Exhibits **C-120 to C-202**.
- f. Legal Authorities **CLA-170 to CLA-207**.

## **II. MASON MADE A QUALIFYING INVESTMENT IN KOREA**

- 9. Mason’s status as an “investor” protected by the FTA, and the qualification of its Samsung Shares as a protected “investment” was affirmed by the Tribunal in the preliminary objections phase, following extensive written and oral submissions, fact witness evidence, expert evidence and documentary evidence, including wide-ranging cross-examination of Mason’s witnesses at a five-day hearing.<sup>13</sup> Korea’s Statement of Defence nonetheless rehashes the same arguments Korea raised (and lost) during the preliminary objections phase. Korea’s recycled arguments fare no better.

### **A. The Tribunal Has Found That Mason Made a Qualifying Investment in Korea**

- 10. Both the Domestic Fund and the General Partner qualify for protection under the FTA as “investors” of the United States in respect of their direct investments in the Samsung Shares. The status of the General Partner was the subject of the Tribunal’s Decision on Respondent’s Preliminary Objections, which confirmed that “the General Partner has made its own contribution (i), expected its own gain or profit (ii) and assumed its own risk (iii). In addition, and again without ruling on the existence of such jurisdictional requirement, the General Partner has held the Samsung Shares for a sufficient duration (iv).”<sup>14</sup> The Tribunal’s findings apply *a fortiori* to the Domestic Fund, whose status as a protected investor Korea has not disputed.
- 11. The investments made by the Domestic Fund and the General Partner in the Samsung Shares equally qualify as “investments” covered by the Treaty’s protections. Again, in the Preliminary Objections phase, the Tribunal determined that “the General Partner

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<sup>13</sup> Decision on Respondent’s Preliminary Objections, § VI.

<sup>14</sup> Decision on Respondent’s Preliminary Objections, ¶ 203.

owned and controlled the Samsung Shares and made an investment in the sense of Article 11.28 of the FTA.”<sup>15</sup> As explained in the Amended Statement of Claim, the Tribunal’s findings in relation to the making of an investment under Article 11.28 of the FTA apply equally to the Domestic Fund’s investment in the Samsung Shares, which were made on a *pari passu* basis (proportionate to the overall assets under management in each fund).<sup>16</sup>

12. Korea does not, and indeed cannot, challenge the Tribunal’s findings.

**B. Korea Has Not Challenged That Finding, Yet Seeks to Introduce Irrelevant Material to Malign Mason and Its Claim**

13. The Tribunal has already considered and rejected Korea’s arguments that Mason’s consideration of corporate “events,” its “investment horizon,” or its trading pattern were indicative of a short-term investment.<sup>17</sup> Korea does not challenge that ruling. Still, Korea recycles the same arguments in its Statement of Defence,<sup>18</sup> now supplemented with various attempts to cast aspersions on Mason and its investment activities.<sup>19</sup> Korea’s continued mischaracterizations of Mason and its investment in Samsung were and remain baseless. They are also, at this stage of the arbitration and following the Tribunal’s ruling on Korea’s Preliminary Objections, irrelevant and transparently designed to distract from the core issues before the Tribunal and the overwhelming evidence of Korea’s misconduct.
14. Korea describes Mason as a “hit and run” investor engaged in “merger arbitrage” that makes “short-term bets” and exploits price volatility by “coordinating closely” with an activist hedge fund, Elliott.<sup>20</sup> Korea’s goal is not difficult to glean. Echoing the Korean government’s pro-Merger campaign warnings of “vulture funds” and “Jewish money,”<sup>21</sup> in this arbitration Korea seeks to portray Mason as a profiteering American

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<sup>15</sup> Decision on Respondent’s Preliminary Objections, ¶ 249.

<sup>16</sup> Decision on Respondent’s Preliminary Objections, ¶ 111.

<sup>17</sup> Decision on Respondent’s Preliminary Objections, ¶¶ 241-244.

<sup>18</sup> SOD, ¶¶ 40-42, 75-76, 93-94.

<sup>19</sup> SOD, ¶¶ 42-45.

<sup>20</sup> SOD, ¶¶ 42, 44, 45.

<sup>21</sup> Mason Amended Statement of Claim, June 12, 2020 (“ASOC”), ¶ 48.

hedge fund who conspired with Elliott to make a quick buck on the back of the Korean people and is undeserving of relief in this arbitration. Besides being irrelevant, Korea's characterizations are also wrong.

15. As explained in the four Witness Statements and live testimony of Mason's co-founder, Kenneth Garschina, Mason's investment strategy generally and its investment in Samsung in particular are both value-driven.<sup>22</sup> To assess value, Mason analyzes company fundamentals and the potential impact of significant corporate events, such as transactions that have the potential of unlocking the true intrinsic value of the company. In the case of Samsung, Mason's analysis indicated that both SEC and SC&T were significantly undervalued because the Samsung Group was run as an oligarchy for the benefit of the █████ Family, not as a business for the benefit of all shareholders. For SEC and SC&T to realize their true value, that retrograde governance model had to change.<sup>23</sup>
16. Beginning in 2014, the Korean government began to contemplate and pass legislation aimed at reforming corporate governance of the chaebols.<sup>24</sup> Industry analysts and representatives from Samsung likewise began to discuss a future restructuring of the Samsung group.<sup>25</sup> Mason initially believed the rumored restructuring of the Samsung Group could be that trigger for change, prompting Mason to start executing its investment strategy in earnest. When, on May 26, 2015, Samsung announced the proposed SC&T-Cheil merger and its terms, in Mason's eyes, the outcome of that merger became the litmus test for whether a modern, shareholder-focused corporate governance model was possible at Samsung. Believing that rational economic self-interest and Korea's apparent political shift towards an investor-friendly climate would

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<sup>22</sup> See, e.g., Transcript of Hearing on Preliminary Objections, October 2, 2019, p. 108 ln.13ff; p. 140 ln.16ff; p. 170 ln.11ff; p. 172 ln.2ff.

<sup>23</sup> Garschina, ¶ 15, CWS-1; Garschina, ¶¶ 7-8, CWS-3; Garschina, ¶¶ 13-14, 16-17, CWS-5; Garschina, ¶ 7, CWS-7.

<sup>24</sup> Garschina, ¶¶ 10-11, 13, CWS-3; Garschina, ¶ 13, CWS-5; C-45, Email from Jong Lee to David MacKnight et. al., attaching Samsung Restructuring Notes, dated June 16, 2014.

<sup>25</sup> Garschina, ¶¶ 8-11, CWS-3.

prevail over special interests and back-room deals, Mason further built its position in the Samsung Shares.<sup>26</sup>

17. Mason did not, as Korea claims, “bet” or “speculate” that the Merger would not be approved.<sup>27</sup> In Mason’s view, as a matter of basic economics, an honest, shareholder interest-driven vote by SC&T’s shareholders could never go in favor of the Merger because it disproportionately traded ownership of two strong, undervalued businesses (SC&T and SEC) in exchange for ownership of a much weaker, overvalued business (Cheil).<sup>28</sup> Mason was not alone in that view. A leading provider of independent shareholder services, ISS reported that “the combination of Samsung C&T’s undervaluation and Cheil Industries’ overvaluation significantly disadvantages Samsung C&T shareholders” and that the “[p]otential synergies the companies contend are available through the Merger, even if credible, do little to compensate for the significant undervaluation implied by the exchange ratio.”<sup>29</sup>
18. The economic rationale against the Merger held especially true for the NPS, which, with its 11.21% holding in SC&T, was the company’s largest shareholder and had the most to lose from the Merger. More specifically, even if SC&T’s share price could, in theory, experience short-term gains if the Merger was approved (which it did not),<sup>30</sup> the transaction would “permanently lock in a valuation disparity” to the long-term detriment of SC&T’s shareholders.<sup>31</sup> Conversely, “[b]locking the merger [ . . . ] would help improve Samsung’s corporate governance, which is good for the pension fund’s

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<sup>26</sup> Garschina, ¶ 9, CWS-7.

<sup>27</sup> SOD, ¶ 314.

<sup>28</sup> Garschina, ¶ 9, CWS-7.

<sup>29</sup> C-9, Institutional Shareholder Services, Inc., Special Situations Research (“ISS Report”), p. 2; see also ASOC, ¶¶ 44-45, 51; Garschina, ¶ 14, CWS-7; C-192, KCGS, Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T, July 3, 2015, p. 3 (“[T]he merger ratio is determined at a level that is unreasonable to SC&T shareholders”).

<sup>30</sup> Garschina, ¶¶ 11-12, CWS-7; cf. Table 1, *infra*.

<sup>31</sup> C-9, ISS Report, p. 2.

long-term investment returns.”<sup>32</sup> The same was true of the long-term value of SEC.<sup>33</sup> Believing that the NPS would act in its own (and its fiduciaries’) economic interests – as it should have – and would therefore not side with Cheil, Mason concluded that the NPS would vote against the Merger.<sup>34</sup>

19. While some market analysts surmised that the NPS would vote in favor of the Merger driven by potential short-term gains or the optics of siding with the “national interest” against a foreign “corporate raider,”<sup>35</sup> the events leading up to the merger vote on July 17, 2015 strongly suggested otherwise. Galvanized by Elliott’s vocal opposition to the Merger, other foreign investors followed suit,<sup>36</sup> local Korean funds were reported to be “seriously considering opposing the merger deal to get a better return,”<sup>37</sup> and retail investors were protesting against the Merger.<sup>38</sup> According to both market reports and

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<sup>32</sup> **C-131**, *South Korea pension fund to vote against SK group merger*, FINANCIAL TIMES (June 24, 2015).

<sup>33</sup> **C-142**, Email from Jong Lee to Justin Davies et. al., dated July 8, 2015; **C-143**, Email from Jong Lee to Sang Kim, dated July 8, 2015.

<sup>34</sup> Garschina, ¶ 14, **CWS-7**; **C-125**, Email from Emilio Gomez-Villalva to Kenneth Garschina, dated June 8, 2015.

<sup>35</sup> **C-122**, Email from Hoon Sull to Sang Kim, dated June 5, 2015; **C-124**, Email from Kenneth Garschina to Emilio Gomez-Villalva, dated June 8, 2015; Garschina, ¶¶ 13-15, **CWS-7**.

<sup>36</sup> **C-123**, Kwak Jung-soo, *Foreign Investors Expressing Discontent With Samsung C&T And Cheil Industries Merger*, HANKYOREH (June 5, 2015) (“Since US hedge fund Elliott Management publicly stated that the conditions of the merger between Samsung C&T and Cheil Industries were not in the interests of Samsung C&T shareholders, Dutch pension manager APG and other foreign stockholders have also expressed their opposition to the merger. Foreign funds that hold preferred stock in Samsung C&T have even called for a separate meeting of preferred stock holders.”); see also **C-147**, Simon Mundy, *Samsung: The Activist v. The Owners*, FINANCIAL TIMES (July 15, 2015) (“Yet with the deal requiring two-thirds of votes cast to pass, it could yet be scuppered by the large block of foreign investors, who have been encouraged to reject the merger by influential proxy advisers ISS and Glass Lewis. Aberdeen Asset Management and Canada Pension Plan have also voiced opposition to the deal, as has the local company Ilsung Pharmaceuticals, which holds 2 per cent.”); Barry B. Burr, *Big Investors Oppose Samsung C&T, Cheil Deal*, PENSIONS & INVESTMENTS (July 10, 2015) (“Pension funds, proxy-voting advisory firms and a big hedge fund shareholder have lined up against the proposed merger of South Korean companies Samsung C&T Corp. and Cheil Industries Inc. The \$193.1 billion California State Teachers’ Retirement System, West Sacramento; the \$181.4 billion Florida State Board of Administration, Tallahassee; and the C\$238.8 billion (\$193.7 billion) Canada Pension Plan Investment Board, Toronto, all plan to vote against the proposed merger, according to their proxy-voting disclosures. The three pension funds did not provide reasons for their votes”).

<sup>37</sup> **C-122**, Email from Hoon Sull to Sang Kim, dated June 5, 2015.

<sup>38</sup> **C-138**, Email from Jong Lee to undisclosed recipients, dated July 7, 2015; see also **C-129**, Cha Dae-un, *Samsung C&T Minority Shareholders to File Petitions Against the Merger with the*

Mason, these developments made it more unlikely that the NPS would support the merger.<sup>39</sup>

20. Samsung's own actions leading up to the Merger reflected that the members of the Samsung Group were far from confident that they would secure enough votes to approve the transaction. On June 10, 2015, SC&T placed its treasury shares (SC&T stock held by the company itself), 5.8% of SC&T's total shares, to KCC Corporation,<sup>40</sup> the second-largest shareholder in Cheil and thus an entity clearly invested in passing the Merger.<sup>41</sup> The move was criticized by market participants as "a blatant effort to overpower, rather than address, shareholder concerns over valuation" and a decision that "suggests too facile a willingness to force through a transaction despite the concerns of unaffiliated shareholders."<sup>42</sup> SC&T's CEO was also reported to be "visiting" every retail investor who owned more than 2,000 shares, despite his publicly expressed confidence that the Merger would go through – a statement Mason did not find credible and interpreted as a ploy to put pressure on the NPS.<sup>43</sup> Then, on June 30, 2015, Cheil held a shareholder meeting to announce purported "shareholder-friendly" measures post-merger, including increased dividends and corporate governance

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*Court*, YONHAP News (June 22, 2015); **C-137**, Cho Gwi-dong, *Internet Community of Samsung C&T Minority Shareholders: "We Will Solicit Proxies Against the Merger,"* CHOSUN BIZ (July 3, 2015); **C-139**, Kim Seon-yeop, "NPS Should Vote Against the Samsung Merger" . . . *NGO to Stage One-man Protest from Tomorrow*, NEWSPIM (July 7, 2015).

<sup>39</sup> **C-125**, Email from Emilio Gomez-Villalva to Kenneth Garschina, dated June 8, 2015, p. 1. Gomez-Villalva stating that "If NPS thinks about its pocket it should vote no"). *See also C-131*, *South Korea pension fund to vote against SK group merger*, FINANCIAL TIMES, June 24, 2015, p. 1 (describing the NPS's vote against the merger between two units of the SK Group as a "a decision that hints the country's biggest investor could also block a similar deal between Samsung group subsidiaries").

<sup>40</sup> **C-128**, Email from Jong Lee to Kenneth Garschina, attaching C&T Voting Sheet, dated June 10, 2015; **C-9**, ISS Report, pp. 2, 12-13.

<sup>41</sup> **C-9**, ISS Report, pp. 12-13.

<sup>42</sup> **C-9**, ISS Report, p. 2.

<sup>43</sup> **C-140**, Email from Jong Lee to M. Martino, et al., dated July 7, 2015 ("Earlier, the CT ceo made comments that they think merger will pass as long as no votes yes. There is no way they really believe this, given co's recent actions. (Visiting every retail investors who owns more than 2k shares). This is just a media ploy to put more pressure on nps. (And later blame nps if deal gets blocked)").

oversight, in an attempt to ease the concern of SC&T's shareholders and sway their vote in favor of the Merger.<sup>44</sup>

21. Despite these (publicly known) actions, uncertainty about the Merger – and the indicia that the NPS would not support it – grew leading up to the vote. On June 24, 2015, the NPS voted against a proposed merger between two members of another *chaebol*, SK Group on the grounds that the deal could hurt minority shareholders.<sup>45</sup> The *Financial Times* described the decision as suggesting that the NPS, the holder of the “swing vote” on the SC&T and Cheil merger, “is more interested in boosting long-term shareholder value” and “could also block a similar deal between [the] Samsung group subsidiaries.”<sup>46</sup> On July 6, 2015, the KGCS, the Korean version of the ISS and NPS's proxy voting advisor, recommended that the NPS vote against the Merger, making it even more difficult for the NPS to cast a supporting vote.<sup>47</sup> In that report, KCGS noted “reasonable doubts” as to “whether the management of the two companies was given fair consideration in the interests of all shareholders,” and concluded that the proposed merger ratio was “unreasonable to SC&T” because KCGS “believed that the merger is being carried out for the purposes of enabling success of control and not for strategic purposes.”<sup>48</sup>

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<sup>44</sup> C-133, Jonathan Cheng, *Samsung's Cheil Industries Promises Better Dividends if Merger Approved* WALL STREET JOURNAL (June 30, 2015) (“Cheil Industries’ promise of increased dividends and corporate governance oversight appeared to target Elliott’s allegations of weak minority shareholder protection at Samsung C&T, which owns 4.1% of Samsung Electronics.”); C-148, *Chronology of Samsung C&T's Merger with Cheil Industries* (July 17, 2015) (“June 30 -- Cheil Industries pledges to deliver more dividends to shareholders as it seeks to convince investors ahead of a crucial shareholders meeting for a proposed merger with the group's construction arm.”); C-136, Seo Jee-yeon, *Shareholder-friendly policies emerge as focal point in Samsung-Elliott battle* (July 2, 2015) (“This week, the two key Samsung units announced plans to boost shareholder value, including higher dividend payouts and the establishment of a corporate governance committee.”).

<sup>45</sup> C-131, *South Korea pension fund to vote against SK group merger*, FINANCIAL TIMES (June 24, 2015).

<sup>46</sup> C-131, *South Korea pension fund to vote against SK group merger*, FINANCIAL TIMES (June 24, 2015).

<sup>47</sup> C-138, Email from Jong Lee to undisclosed recipients, dated July 7, 2015.

<sup>48</sup> C-192, KCGS, Report on Analysis of Agenda Items of Domestic Listed Companies (2015) - Samsung C&T, July 3, 2015, pp. 1-3.

22. As it eventually transpired, faced with these challenges, Samsung secretly redoubled its efforts behind the scenes and, with the help of the Korean government, ultimately secured approval of the Merger by manipulating the NPS's vote.<sup>49</sup>
23. Before proceeding to the details of Korea's corruption scheme, Mason briefly addresses Korea's remaining attempts to undermine Mason and its claims. As should now be clear to Korea, Mason did not "coordinat[e]" its investment strategy (or this arbitration) with Elliott, even if that were somehow relevant to the merits of Mason's claims.<sup>50</sup> Korea's theory of "coordinati[on]" – rooted in the unremarkable fact that Mason and Elliott have both invested in the same entities in the past, including massive publicly traded companies with thousands of shareholders – is another thinly-veiled attempt to collaterally malign Mason based on its purported association with Elliott, a well-known and sometimes controversial activist investor.<sup>51</sup> Equally unavailing are Korea's insinuations that bringing litigation or arbitration to enforce an investor's shareholder or contractual rights is somehow nefarious or improper.<sup>52</sup> Indeed, many of Mason's own investors are non-for-profit or charitable foundations and universities.<sup>53</sup> Try as it may, Korea's web of speculation, stereotypes, and aspersions cannot conceal or divert from the evidence of Korea's misconduct and the harm suffered by Mason as a result.

### **III. THE KOREAN GOVERNMENT INTERFERED WITH THE MERGER VOTE AND CAUSED THE MERGER TO PROCEED**

#### **A. The Evidentiary Record**

24. The remaining sections of this Section III detail the Korean government's corrupt intervention into the Merger and highlight new information that has emerged since Mason's Amended Statement of Claim. But before launching into this story of fraud

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<sup>49</sup> See *infra* § III.B.

<sup>50</sup> SOD, ¶ 45; Garschina, ¶ 10, CWS-7.

<sup>51</sup> See, e.g., SOD, ¶ 45, n.76 (quoting press reports describing Elliott's business practices as "lies/misconduct" and speculating that Mason "accepted, if not approved Elliott's approach" because it was invested in the same company).

<sup>52</sup> SOD, ¶¶ 42-44.

<sup>53</sup> Satzinger, ¶ 10, CWS-2.

and corruption, Mason makes the following observations about the evidentiary record before the Tribunal.

25. Korea does not deny the core fact that its officials unlawfully interfered with the NPS's decision-making processes in order to tip the scales in favor of Merger approval. Nor does Korea offer a single witness – fact or expert – that offers a different account of its government officials' misconduct. Korea also does not claim that the dozens of criminal trials convicting those participating in the corruption scheme at issue in this arbitration were unfair, that they denied the accused an opportunity to fully present their defences, or that the evidence presented was incomplete or not adequately tested. Nor does Korea dispute, or offer competing evidence against, the allegations in the prosecutorial indictments underlying these completed and ongoing trials. And Korea does not claim that its judicial system is flawed and should not be trusted, or that Korean courts and prosecutors are incompetent, corrupt, or were simply wrong.
26. Instead, Korea attempts to divert the Tribunal's attention from its own wrongdoing by offering competing theoretical interpretations of the factual record (as discussed in greater detail in Section IV.C, below) or by attempting to distance itself from the findings of its own courts and the indictments levied by its own prosecutors. Thus, throughout its submission, Korea purports to “take no view” (but does not deny) “the veracity of the evidence presented” by its own prosecutors or the “correctness” of its own courts' findings, which Korea insinuates are somehow uncertain.<sup>54</sup>
27. Korea's attempts to disclaim the findings of its own judicial system – an organ of the Korean state under international law – are as extraordinary as they are unsustainable.
28. *First*, it is simply not true, as Korea insinuates, that the core factual findings of the Korean trial courts remain contested in the dwindling number of appeals from the relevant criminal convictions. In Korea, as in many jurisdictions, appellate review by the Supreme Court is primarily limited to findings of law; factual determinations are

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<sup>54</sup> SOD, ¶ 120; ¶ 171 (“Korea takes no view as to the correctness of those findings [on the manipulation of the Merger's synergy effect], both of which are pending appeal.”; ¶ 218 (noting Korea “takes no view” on the “veracity” of evidence detailing the chain of orders that ensured NPS approved the Merger); ¶ 484 (Korea “takes no view” whether “the purpose of the Merger was to facilitate a succession plan between members of the [REDACTED] Family”).

reviewable only under extremely limited circumstances, none of which apply to the cases at issue. The Korean Supreme Court reviews factual determinations only in cases involving “a grave mistake of fact” and where the appellant is sentenced to more than 10 years in prison.<sup>55</sup> Thus, for example, the Korean Supreme Court’s final decision on the criminal proceedings against President █████, announced on January 21, 2021, affirmed the High Court’s decision on her bribery conviction and left the court’s factual determinations underpinning that decision undisturbed.<sup>56</sup> Similarly, Minister █████ and CIO █████’s appeals are confined to questions of law; neither has challenged the factual determinations made by the trial courts.<sup>57</sup> And finally, on remand, █████’s conviction was upheld and he was sentenced to 2.5 years imprisonment;<sup>58</sup> his most recent proceeding before the Seoul High Court mainly focused on pleas for leniency.<sup>59</sup> Thus, the Korean courts’ factual findings underlying these convictions – including the facts discussed in the Amended Statement of Claim and this Reply – are final and intact.

29. *Second*, Korea’s attempts to distance itself from its own prosecutors and to cast doubt on the allegations contained in their indictments are unavailing. As this Tribunal has already recognized, “Korean courts and prosecutors” are “(undisputed) State organs.”<sup>60</sup> Prosecutors in Korea fall under the purview of Korea’s Ministry of Justice (the same government entity representing Korea in this arbitration) and investigate crimes and

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<sup>55</sup> **CLA-191**, Korean Criminal Procedure Act, Article 383 Act (providing four grounds for appeal to the Supreme Court among which an appeal in connection with factual findings can only be made “regarding those cases for which death penalty or imprisonment, with or without labor, for an indefinite term or for not less than ten years has been declared, when the judgment attached was affected by a grave mistake of fact ...”).

<sup>56</sup> **CLA-182**, *Prosecutor v. █████*, Decision, Case 2020Do9836 (Korean Supreme Court, January 14, 2021).

<sup>57</sup> **C-181**, Choi Eun-ji, *Special Prosecutor Appeals Against Moon Hyeong-pyo and Hong Wan-seon’s “Alleged Pressure on Samsung Merger” ... “Misunderstanding of Legal Principles,”* NEWS1 (November 20, 2017).

<sup>58</sup> **CLA-181**, *Prosecutor v. █████*, Decision, Case 2019No1937 (Seoul High Court, January 18, 2021); **C-189**, Woo Jae-yeon, (*LEAD*) *Samsung Heir Lee won’t appeal ruling in bribery case*, YONHAP NEWS (January 1, 2021).

<sup>59</sup> **CLA-181**, *Prosecutor v. █████*, Decision, Case 2019No1937 (Seoul High Court, January 18, 2021).

<sup>60</sup> Procedural Order No. 5, January 15, 2021, ¶ 34; *see also* Procedural Order No. 6, March 2, 2021, ¶ 3.

pursue criminal convictions as “representative[s] of the public interest.”<sup>61</sup> As representatives of the public interest, Korea’s Public Prosecutors’ and Special Prosecutors’ office have been vigorously investigating and prosecuting ██████’s bribery scheme and the related unlawful conduct by members of the Korean government. In September 2020, for example, Seoul’s Central District Prosecutors’ Office filed a new indictment against ██████ and ten other current and former Samsung executives focusing primarily on the Merger and events underlying this arbitration.<sup>62</sup> The new charges against ██████ squarely allege that he engaged in stock price manipulation by conspiring to lower the value of SC&T and inflate that of Cheil and taking other illegal acts to force the Merger through.<sup>63</sup> Indeed, Korea’s current president, ██████, through his spokesperson, publicly endorsed the judicial inquiries into his predecessor and her associates and confirmed that Minister ██████ had acted wrongfully and “at the behest of the Blue House” to “force an approval vote for the [M]erger.”<sup>64</sup>

30. As a result of the investigations of Korea’s prosecutors and the robust factual findings confirmed by the Korean judiciary, the evidentiary record of Korea’s corrupt scheme before this Tribunal far surpasses the evidence typically available in investment arbitrations involving allegations of corruption.<sup>65</sup> That evidence – which Korea largely

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<sup>61</sup> **CLA-193**, Prosecutors’ Office Act, Article 4(1)(i).

<sup>62</sup> **C-188**, ██████ Indictment, dated September 1, 2020 (“█████ Indictment”).

<sup>63</sup> **C-188**, ██████ Indictment.

<sup>64</sup> **C-168**, Oh Won-seok, Moon Jae-in, *Grounds for Impeachment Have Become Clearer with Special Investigation*, JOONGANG ILBO (March 6, 2017). See also **C-177**, Kim Min-hye, *Kim Sang-jo’s Criticism ... “Samsung Merger Was a Succession Scenario for Lee Jae-yong,”* YONHAP NEWS (July 14, 2017) (the Chairman of the Korea Fair Trade Commission also stated that “that [the Samsung merger] was part of the succession scenario to empower Vice Chairman Lee after Lee Geon-hui fell ill at a time when Samsung’s governance structure was weak”).

<sup>65</sup> **CLA-9**, *Metalclad v Mexico*, Award, August 30, 2000, ¶ 243 (“corruption is by essence difficult to establish and that it is thus generally admitted that it can be shown through circumstantial evidence”), ¶ 293; **CLA-195**, Zachary Douglas, *The Plea of Illegality in Investment Arbitration*, ¶ 29(1) ICSID Review 68 (2014).

fails to challenge – is set out in further detail in the remaining sections in this Section III.

## **B. The Korean Government Interfered with the Merger Approval Process**

31. As revealed by countless Korean criminal investigations and trials, members of the Korean government, at its highest levels, engaged in a concerted effort to force the NPS to approve the Merger. Multiple Korean government officials unlawfully subverted the NPS’s internal procedures, fabricated the financial figures on the basis of which the NPS approved the Merger, and pressured the NPS to vote for the Merger. Korea’s attempts to dispute individual parts of those efforts, or to suggest benign hypothetical explanations for them, are not credible and are contradicted by the findings of Korea’s own courts.

### **1. President █████ and Minister █████ Ordered Their Subordinates to Ensure That the Merger Be Approved**

32. As detailed in the Amended Statement of Claim, the scheme behind the forced approval of the Merger was put in motion by President █████ around late June 2015, when the Korean president ordered █████, Senior Secretary for Employment and Welfare at the Blue House (“**Senior Secretary █████**”), to pay close attention to the NPS’s stance on the Merger vote. As the Seoul High Court observed, “[t]he [President’s] instruction was not just a general instruction to keep a close eye on ‘the Merger’ but a specific one to keep a close eye on the ‘exercise of voting rights.’”<sup>66</sup>

33. Document production has now revealed that in late June 2015 – as Samsung made a full-court press to force through the Merger – the President shifted her orders and issued a specific requirement that her subordinates ensure that the Merger be accomplished. On or around June 29, 2015, during a Senior Presidential Secretary meeting, President █████ her officials to █████  
█████<sup>67</sup> Those present at the meeting understood that █████

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<sup>66</sup> **CLA-15, Prosecutor v. █████**, Case 2018No1087 (Seoul High Court, August 24, 2018) (“█████ **Seoul High Court**”), p. 87.

<sup>67</sup> **C-166**, Second Suspect Examination Report of █████ to the Special Prosecutor, January 9, 2017, p. 5.

[REDACTED] <sup>68</sup>

The meeting attendees, including Senior Secretary for Employment and Welfare Secretary [REDACTED], [REDACTED]

[REDACTED] <sup>69</sup>

34. Following the meeting, Senior Presidential Secretary [REDACTED] instructed Secretary for Employment and Welfare [REDACTED] that, [REDACTED]

[REDACTED]  
[REDACTED]

[REDACTED] <sup>70</sup> Pursuant to that requirement, Secretary [REDACTED] ordered Executive Official

[REDACTED] [REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED] <sup>72</sup>

35. Around the same time, officials from the Ministry of Health and Welfare (“MHW”) began intervening in the NPS’s voting process with the clear objective of procuring the NPS’s vote in favor of the Merger.<sup>73</sup> Consistent with the President’s directive that the NPS’s vote must come out in favor of the Merger, MHW Minister [REDACTED] specifically

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<sup>68</sup> C-166, Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, January 9, 2017, p. 6.

<sup>69</sup> C-166, Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, January 9, 2017, p. 6.

<sup>70</sup> C-166, Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, January 9, 2017, p. 7.

<sup>71</sup> C-166, Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, January 9, 2017, p. 9.

<sup>72</sup> C-166, Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, January 9, 2017, p. 9.

<sup>73</sup> CLA-14, *Prosecutor v. [REDACTED]*, Decision, Case 2017No1886 (Seoul High Court, November 14, 2017) (“[REDACTED] **Seoul High Court**”), p. 14; *see also* C-166, Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, January 9, 2017, p. 25

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

instructed ██████████, the Chief Bureau of Pension Policy of the MHW (“**MHW Pension Bureau Chief ██████████**”), that the Minister “want[ed] the Samsung merger to be accomplished.”<sup>74</sup>

36. In accordance with Minister ██████████’s order, and as detailed below and in the Amended Statement of Claim,<sup>75</sup> MHW Pension Bureau Chief ██████████, Chief Investment Officer ██████████ (“**CIO ██████████**”), Director of the Pension Finance Department of the Ministry of Health and Welfare ██████████, together with other MHW and NPS officials and Minister ██████████ himself, took a series of actions specifically designed to ensure the NPS would vote in favor of the Merger. Individually and together, they:
- a. subverted the proper internal decision-making processes at the NPS to ensure that the Merger vote would be diverted to the Investment Committee, instead of the proper decision-making organ, the Experts Voting Committee;
  - b. ordered the NPS Research Team to fabricate both a favorable benchmark ratio against which to assess the Merger proposal and a synergy effect to make up for the massive losses the NPS was expected to suffer as a result of the Merger; and
  - c. pressured the members of the Investment Committee to approve the Merger.
37. These unlawful actions are discussed in further detail in Sections III.B and III.C below.
38. Korea does not dispute any of these core facts. Instead, Korea attempts to cast doubt where there is none by suggesting that it is somehow unclear as to whether the directive to intervene in the Merger came from President ██████████ and Minister ██████████ – a position that is directly contradicted by the facts and evidence laid out above. Korea also asserts that the former President’s wrongful actions may or may not have been the result of the bribes she has admitted to accepting from the ██████████ Family.<sup>76</sup>
39. Korea’s position regarding the lack of a “nexus” between President ██████████’s corrupt conduct and the Merger is belied by Korea’s own prosecutors’ most recent indictment

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<sup>74</sup> CLA-14, ██████████ Seoul High Court, p. 14.

<sup>75</sup> ASOC, ¶¶ 84-101.

<sup>76</sup> SOD, ¶¶ 123-130.

of ██████.<sup>77</sup> In that case, which focuses squarely on the events leading up to the Merger, the Public Prosecutors’ Office specifically alleges, based on its years-long investigation of the underlying conduct, that *before* the Merger vote, ██████ and his associates informed President ██████ of their “intent” to sponsor a horseback riding organization of importance to the President and to offer “financial support” to one of her associates “in order to induce cooperation from the President” in support of the Merger.<sup>78</sup> Thus, even though President ██████ may not have received her payment until after she upheld her end of the bargain and procured the Merger vote desired by Samsung, the corrupt *quid pro quo* relationship between the ██████ Family and President ██████ had been set into motion months earlier, with the specific aim of enlisting President ██████’s assistance in approving the Merger.

40. Ignoring this chain of events, Korea principally relies on the findings of the Seoul High Court in President ██████’s bribery case, which focused on bribes paid to President ██████ after the Merger vote and which therefore, in Korea’s view, could not be intended to induce approval of the transaction.<sup>79</sup> Korea neglects to mention that in the very same case, the Seoul High Court found that the Merger was “the most essential piece” of the ██████ Family’s years-long succession plan<sup>80</sup> and that President ██████’s administration was familiar with this plan, provided “decisive assistance” to the Merger “immediately prior” to the vote, and then “sustained” its “friendly stance [ . . . ] towards the succession” afterwards, when the specific bribes at issue in that case were paid.<sup>81</sup> Viewed in context, it is therefore clear that President ██████’s interest and actions in securing approval of the Merger were improperly motivated by a desire to safeguard the ██████ Family’s succession plans and obtain the financial benefits provided and promised by the ██████ Family. Further, the Supreme Court in ██████’s bribery case

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<sup>77</sup> C-188, ██████ Indictment, p. 36.

<sup>78</sup> C-188, ██████ indictment, p. 36.

<sup>79</sup> SOD, ¶ 127.

<sup>80</sup> CLA-15, ██████ Seoul High Court, p. 86.

<sup>81</sup> CLA-15, ██████ Seoul High Court, p. 103.

found that there was sufficient ground to establish a quid pro quo between President [REDACTED] and [REDACTED] with respect to his succession plan.<sup>82</sup>

## 2. The Korean Government Prevented the NPS Experts Voting Committee From Voting on the Merger

41. The Merger should have been voted upon by the Experts Voting Committee according to the NPS’s own rules. That did not happen. Realizing that the only way to guarantee approval of the Merger was to place the vote in the hands of the NPS Investment Committee, the officials tasked with executing President [REDACTED]’s orders diverted the vote from the Experts Voting Committee to the Investment Committee.

42. The evidence is clear that on June 30, 2015, following Minister [REDACTED]’s orders, MHW Pension Bureau Chief [REDACTED] visited the NPS and instructed CIO [REDACTED] that the “Investment Committee should decide on the Merger.”<sup>83</sup> When CIO [REDACTED] asked whether he could inform others at the NPS that this unusual decision was “due to pressure from [the] MHW,” Pension Bureau Chief [REDACTED] replied that “even a little child would know that, but you should not say that [the] MHW intervened.”<sup>84</sup> Given the seriousness of the non-compliance with the NPS’s governance rules, NPS officials tried to convince the MHW officials to have the Merger reviewed by the Experts Voting Committee. However, on July 8, 2015, a week before the Merger vote, [REDACTED]

[REDACTED]  
[REDACTED]<sup>85</sup> The NPS

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<sup>82</sup> **CLA-133**, *Prosecutor v. [REDACTED]*, Judgment, Case 2018Do2738 (Korean Supreme Court, August 29, 2019), pp. 2-3 and pp. 8-9.

<sup>83</sup> **CLA-14**, [REDACTED] Seoul High Court, p. 14.

<sup>84</sup> **CLA-14**, [REDACTED] Seoul High Court, p. 14.

<sup>85</sup> **C-169**, Transcript of Court Testimony of [REDACTED], Case 2017Gohap34 (Seoul Central District Court, March 22, 2017), pp. 31-32 [REDACTED]





C&C, Inc. to the Expert Voting Committee,” the NPS Investment Management Team acknowledged that [REDACTED]<sup>94</sup>

46. Korea attempts to evade the significance of the NPS’s conflicting approach to the SK Merger by arguing that the SK Merger was effectively an outlier. Korea’s position is not credible. The NPS *itself* has acknowledged that the precedent set by the SK merger ought to have been followed in the SC&T/Cheil merger.<sup>95</sup> Specifically, [REDACTED], Chairman of the Experts Voting Committee, observed that “[t]he SK Holdings-SK C&C merger was almost analogous to the Samsung Merger [REDACTED]  
[REDACTED]<sup>96</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>97</sup> Prof. [REDACTED], member of the Experts Voting Committee, testified that, among other things, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>98</sup> Similarly, the NPS Responsible Investment Team determined that, based on the SK Merger precedent, it was appropriate to refer the Merger to the Experts Voting Committee.<sup>99</sup> Korea’s position is not helped by its laundry list of examples in which the Investment Committee had decided *chaebol*-related mergers *in the past*: obviously, the SK Merger could only set a precedent for future mergers.

47. More fundamentally, and regardless of whether the SK Merger set a formal precedent, the SC&T/Cheil Merger should have been referred to the Experts Voting Committee

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<sup>94</sup> **CLA-14**, [REDACTED] Seoul High Court, p. 13; *see also* **C-127**, NPS, Assessment of Referral of SK-SK C&C Merger to the Expert Voting Committee, June 10, 2015, p. 2 (“In essence, The SK Merger is the same as the Samsung merger despite their differing degrees.”).

<sup>95</sup> **C-152**, Statement of [REDACTED] in the Public Prosecutor’s Office (November 23, 2016), p. 15; **CLA-14**, [REDACTED] Seoul High Court, pp. 12-14.

<sup>96</sup> **C-152**, Statement of [REDACTED] in the Public Prosecutor’s Office (November 23, 2016), p. 15.

<sup>97</sup> **C-152**, Statement of [REDACTED] in the Public Prosecutor’s Office (November 23, 2016), pp. 15-16.

<sup>98</sup> **C-127**, NPS, Assessment of Referral of SK-SK C&C Merger to the Expert Voting Committee, June 10, 2015, p. 2.

<sup>99</sup> **CLA-14**, [REDACTED] Seoul High Court, p. 56.

for the simple reason that the two mergers shared the same characteristics that made both difficult decisions not suitable for resolution by the Investment Committee.<sup>100</sup> Korea offers no cogent explanation for why that did not happen.

48. Instead, Korea argues that (i) under the Guidelines on the Exercise of the National Pension Fund Voting Rights (“**Voting Guidelines**”), a vote by the Experts Voting Committee was permitted, but not required; and (ii) it was within the Investment Committee’s discretion to determine whether to refer a vote to the Experts Voting Committee. Both arguments ignore the overwhelming evidence that the reason why the vote was kept away from the Experts Voting Committee was to ensure approval of the Merger.<sup>101</sup>
49. Contrary to Korea’s suggestion, the Voting Guidelines are not on par with the Management Guidelines. In particular, while the Management Guidelines were established on the basis of the Korean National Pension Act, the Voting Guidelines do not have an independent statutory basis. Instead, the Voting Guidelines were issued under the umbrella of the Management Guidelines and, therefore, in the hierarchy of the legal sources regulating the NPS’s organization and activities, the Voting Guidelines are subordinate to the Management Guidelines.<sup>102</sup> Therefore, any potential conflict between the two sources was to be resolved in favor of the Management Guidelines, which, as described above, called for a mandatory referral to the Experts Voting Committee for any “difficult” vote.<sup>103</sup>
50. Nor did the Investment Committee have unfettered discretion to keep for itself a vote that it should have referred to the Experts Voting Committee. Were that the case, the

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<sup>100</sup> See *supra* ¶ 45.

<sup>101</sup> See *infra* ¶ 51-54.

<sup>102</sup> The Management Guidelines find their basis under and are promulgated in accordance with the National Pension Act (**CLA-25**, National Pension Act, Article 105). The Voting Guidelines, in turn, subordinately find their basis in the Management Guidelines (**C-6**, Management Guidelines, Articles 17(4)). Thus, the Voting Guidelines expressly confirm that “[t]he exercise of voting rights of shares held by the Fund shall be governed by these Guidelines *except as otherwise provided by the relevant laws and regulations*” (emphasis added) (**C-75**, Voting Guidelines, Article 2).

<sup>103</sup> Indeed, the Voting Guidelines were amended in 2018 to remove ambiguity as to the necessity to refer difficult matters to the Expert Voting Committee. Compare **C-75**, Article 8(2) of the pre-2018 Voting Guidelines (“For items which the NPSIM finds difficult to make a decision,

Investment Committee would have *de facto* veto power over whether the Experts Voting Committee, a superior decision-making body, would ever have an opportunity to weigh in on difficult merger votes – which the Management Guidelines *required*. As explained by the Chairman of the Experts Voting Committee, [REDACTED], [REDACTED] and [REDACTED] <sup>104</sup> Thus, [REDACTED] <sup>105</sup> This was especially true where the reason the Investment Committee kept the vote for itself was in order to avoid a negative vote from the Experts Voting Committee and to carry out President [REDACTED] and Minister [REDACTED]’s orders to make sure the NPS supported the Merger against the NPS’s own interests.<sup>106</sup>

b. The MHW and the NPS Deliberately Avoided the Experts Voting Committee to Guarantee the Approval of the Merger

51. The evidence is clear that the only reason behind denying the Experts Voting Committee the right to vote on the Merger was to make sure the Merger went through. The MHW and the NPS officials tasked with carrying out President [REDACTED] and Minister [REDACTED]’s [REDACTED] <sup>107</sup> studied vote trends within both the Experts Voting Committee and the Investment Committee, and decided

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the NPSIM may request for a decision to be made by the Experts Voting Committee on the Exercise of Voting ...”), with **R-252**, Article 8(2) of the post-2018 Voting Guidelines (“Notwithstanding paragraph (1), if an item falls within one of the following categories, the Special Committee on the Exercise of Voting Rights [ . . . ] makes a decision on the item, and the National Pension Service exercises its voting rights accordingly ...”). See also **C-6**, Article 17(5) of the Management Guidelines, superior to the Voting Guidelines, and which also requires that difficult matters are referred to the Expert Voting Committee (“Whilst voting rights shall, in principle, be exercised by the NPS, proposals for which it is difficult for the NPS to determine whether to support or oppose shall be decided on by the Experts Voting Committee for the Exercise of Voting Rights”).

<sup>104</sup> **C-152**, Statement of [REDACTED] in the Public Prosecutor’s Office (November 23, 2016), p. 14 (emphasis added).

<sup>105</sup> **C-152**, Statement of [REDACTED] in the Public Prosecutor’s Office (November 23, 2016), p. 16.

<sup>106</sup> See *infra* ¶¶ 51-54.

<sup>107</sup> **C-166**, Second Suspect Examination Report of [REDACTED] to the Special Prosecutor, January 9, 2017, p. 5 (emphasis added).

to avoid the Experts Voting Committee after it became clear that their involvement risked a negative vote on the Merger.

52. Documents produced in disclosure reveal that the NPS carefully engineered the Merger vote to secure the Korean government’s desired outcome while attempting to maintain the veneer of propriety over NPS’s actions. A NPS report entitled “Analysis of Pros and Cons of Exercising Voting Rights at Each Level” expressly acknowledged that a vote by the Experts Voting Committee would [REDACTED] [REDACTED]<sup>108</sup> – an admission that flatly contradicts Korea’s position in this arbitration – [REDACTED] [REDACTED]<sup>109</sup> At the same time, the MHW prepared a document entitled “Action Plan for Beginning Discussions at the Investment Committee” that described [REDACTED] [REDACTED]<sup>110</sup> This “Action Plan” was shared with the Blue House.<sup>111</sup>

53. Following these “analyses,” “action plans,” and communications with the Blue House, under the direction of Minister [REDACTED], MHW Pension Bureau Chief [REDACTED] met again with CIO [REDACTED] and other NPS officials and instructed them to ensure that the Merger vote be decided by the Investment Committee.<sup>112</sup> Some NPS officials tried to resist the pressure to bypass the Experts Voting Committee because they knew it was against the NPS’s own rules. That did not fly with the MWH: [REDACTED] [REDACTED]

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<sup>108</sup> C-194, NPS, Analyze the Pros and Cons of Exercising Voting Right at Each Level, [undated] p. 1.

<sup>109</sup> C-194, NPS, Analyze the Pros and Cons of Exercising Voting Right at Each Level, [undated] p. 1. *See also* C-169, Transcript of Court Testimony of [REDACTED] (Case 2017Gohap34, Seoul Central District Court), March 22, 2017, p. 31 [REDACTED] [REDACTED]; C-130, Email from [REDACTED] to [REDACTED], dated June 24, 2015 [REDACTED].

<sup>110</sup> C-197, MHW, Plan of Action for Beginning Discussions at the Investment Committee, July 8, 2015, p. 1.

<sup>111</sup> C-141, Email from [REDACTED] to [REDACTED], July 8, 2015; C-154, Statement of [REDACTED] to the Special Prosecutor, December 22, 2016, p. 4.

<sup>112</sup> CLA-14, [REDACTED] Seoul High Court, p. 14.



Team to fabricate forecasted synergies between Cheil and SC&T to cover up the massive losses the NPS stood to suffer from the Merger.

56. In its Statement of Defence, Korea attempts to justify the fabricated benchmark ratio by arguing that it was in line with the merger ratio proposed by some market analysts.<sup>117</sup> Korea misses the point. NPS’s own internal documents establish that the benchmark ratio was the outcome of a corrupt, fraudulent, outcome-oriented process within the NPS. Whether or not the benchmark happened to align with other ratios discussed in the market – many of which were based on data manipulated by Samsung and therefore also inherently flawed – the NPS’s fraudulent modelling was, *ab initio*, not a fair or reliable basis for the Investment Committee’s vote.

57. The NPS’s own documents tell this story. A NPS internal memorandum entitled “Strategies to Overcome Controversy Surrounding the Undervaluation of SC&T with Respect to the Merger” reflects that, as of May 26, 2015 – shortly after the Merger and the merger ratio were announced – the NPS Research Team recognized that [REDACTED]

[REDACTED]<sup>118</sup> But just a month later, following President [REDACTED] and Minister [REDACTED]’s orders that the NPS needed to come out in favor of the Merger, the NPS Research Team pivoted to rationalizing the proposed merger ratio. An NPS internal audit report examining the conduct of NPS employees at the time of the Merger reflects that, as a first resort, the NPS Research Team deliberately fabricated a benchmark ratio designed to make the proposed merger ratio of 1:0.35 appear more reasonable.<sup>119</sup> The Research Team had to revise their calculation *three times* to arrive at a benchmark that fit the bill:

- a. On June 30, 2015, the Research Team circulated a first draft which determined that an appropriate merger ratio was an average of 1:0.64.<sup>120</sup> This draft,

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<sup>117</sup> SOD, ¶ 81.

<sup>118</sup> C-132, NPS, Proposals to Resolve the Controversy Over the Undervaluation of SC&T with Respect to the Merger, May 26, 2015, p. 2.

<sup>119</sup> C-26, Findings of Targeted Audit by NPS In Connection With SC&T-Cheil Merger (July 3, 2018) (with translation) (“NPS Audit of SC&T-Cheil Merger”), pp. 1-2.

<sup>120</sup> CLA-13, Prosecutor v. [REDACTED], p. 50; CLA-14, [REDACTED] Seoul High Court, pp. 21-22.

however, did not satisfy [REDACTED], head of the NPS Research Team, who instructed his team to *re-calculate* the benchmark ratio to push it closer to the official Merger ratio proposed by Samsung (1:0.35).<sup>121</sup>

- b. Following this order, on July 6, 2016, the Research Team produced a new ratio of 1:0.39 by arbitrarily applying a discount rate to the valuation of SC&T (increasing the discount from 24% to 33%).<sup>122</sup> The Research Team also doubled the value of Samsung Biologics, of which Cheil was an indirect shareholder, from KRW 4.8 trillion to KRW 11.6 trillion, to boost Cheil's value even though that valuation of Samsung Biologics' was admittedly "too optimistic."<sup>123</sup>
- c. Eventually, the Research Team produced a third report on July 10, 2015, with an adjusted ratio of 1:0.46 – a 41% discount for SC&T's shareholders relative to the Research Team's originally calculated ratio of 1:0.64.<sup>124</sup> The subsequent NPS audit concluded that the final 41% discount rate was arrived at "without any consistent criteria" and "with no subsequent verification."<sup>125</sup>

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<sup>121</sup> **CLA-14**, [REDACTED] Seoul High Court, pp. 21-22.

<sup>122</sup> **C-26**, NPS Audit of SC&T-Cheil Merger, pp. 1-2; **CLA-14**, [REDACTED] Seoul High Court, pp. 21-22.

<sup>123</sup> **CLA-14**, [REDACTED] Seoul High Court, p. 21.

<sup>124</sup> **C-26**, NPS Audit of SC&T-Cheil Merger, p. 2; **CLA-14**, [REDACTED] Seoul High Court, pp. 22-23.

<sup>125</sup> **C-26**, NPS Audit of SC&T-Cheil Merger, p. 2; *see also* **CLA-14**, [REDACTED] Seoul High Court, pp. 22-23.

58. [REDACTED]  
[REDACTED]<sup>126</sup>
59. However, even measured against the NPS’s final version of the benchmark ratio, the Merger, if executed at the ratio proposed by Samsung, would have resulted in a direct financial loss to the NPS of nearly KRW 138.8 billion (\$115.2 million).<sup>127</sup>
60. CIO [REDACTED] attempted to address this issue with Samsung at a meeting on July 7, 2015, when he asked [REDACTED] to adjust the official merger ratio to make it less unfavorable to SC&T’s shareholders – and thus make a vote in favor of the Merger more defensible in the public eye; [REDACTED] refused.<sup>128</sup> Thus, to bridge the \$115.2-million gap, CIO [REDACTED] “fabricat[ed] the merger synergy and present[ed] it to the Investment Committee for the benefit of [REDACTED] and other Cheil shareholders,”<sup>129</sup> an act the Seoul High Court described as an “active [ . . . ] breach of his duty.”<sup>130</sup> Minister [REDACTED] himself also intervened and, in a “criminal abuse of authority,” “made [REDACTED] [head of the NPS Research Team] explain the Merger using a manipulated merger synergy value in order to induce a decision in favor of the Merger.”<sup>131</sup>
61. Following these orders, on July 9, 2015, the NPS Research Team fabricated a synergy effect that would offset *any* loss suffered by NPS as a result of the merger ratio.<sup>132</sup> [REDACTED], the NPS official responsible for calculating the synergy effect, testified that [REDACTED]  
[REDACTED]<sup>133</sup> He further testified that

<sup>126</sup> C-135, Transcript of Telephone Calls between Head of the Research Team [REDACTED] and Deputy Director [REDACTED], July 2, 2015, p. 7.

<sup>127</sup> CLA-14, [REDACTED] Seoul High Court, p. 82.

<sup>128</sup> CLA-13, Prosecutor v. [REDACTED], p. 13 (“[H]e met with [REDACTED] in person on July 7, 2015 [ . . . ] and suggested [a] readjustment of the merger ratio in favor of SC&T and issuance of an interim dividend for SC&T shareholders,” but [REDACTED] refused to accede to this request.)

<sup>129</sup> CLA-14, [REDACTED] Seoul High Court, p. 68.

<sup>130</sup> CLA-14, [REDACTED] Seoul High Court, p. 68.

<sup>131</sup> CLA-14, [REDACTED] Seoul High Court, p. 36.

<sup>132</sup> CLA-13, Prosecutor v. [REDACTED], pp. 14-15, 53, 62.

<sup>133</sup> C-163, Statement of [REDACTED] to the Special Prosecutor (January 2, 2017), p. 9 [REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]  
[REDACTED]<sup>134</sup> The NPS’s internal audit report expressly acknowledged that the “fabricated synergy effect” resulted from attempts to “blow up the share value” of one of Cheil’s holdings and “arbitrarily select[ing]” figures in the calculation.<sup>135</sup>

62. [REDACTED]  
[REDACTED]<sup>136</sup> Contrary to Korea’s suggestion that this manipulated analysis was not a central point of discussion for the Investment Committee, the minutes of the Committee’s meeting reflect that its members relied on, and discussed at length, the synergy effect calculated by the NPS Research Team before casting their vote:

- a. [REDACTED], head of the NPS Research Team, admitted that “[REDACTED]  
[REDACTED]  
[REDACTED]

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[REDACTED]  
[REDACTED]  
[REDACTED] p. 13  
[REDACTED]  
[REDACTED]

<sup>134</sup> C-163, Statement of [REDACTED] to the Special Prosecutor (January 2, 2017), p. 16 [REDACTED]  
[REDACTED]  
[REDACTED].

<sup>135</sup> C-26, NPS Audit of SC&T-Cheil Merger, p 2.

<sup>136</sup> C-174, Transcript of Court Testimony of [REDACTED], Case 2017Gohap34/2017Gohap183 (Seoul Central District Court, May 8, 2017), pp. 26-27; C-145, Unedited Minutes of the Investment Committee Meeting (July 10, 2015). While Korea suggests that the benchmark merger ratio calculated by the NPS Research Team was irrelevant because the Investment Committee had access to other analyses at the meeting, [REDACTED]  
[REDACTED]  
[REDACTED] SOD, ¶ 172.

[REDACTED]

[REDACTED]<sup>137</sup>

b. CIO [REDACTED] doubled down on the importance of the purported synergy, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>138</sup>

c. [REDACTED] assured the Investment Committee that [REDACTED]

[REDACTED], while CIO [REDACTED]

represented that [REDACTED]

[REDACTED]<sup>139</sup>

d. In response to [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]<sup>140</sup>

e. CIO [REDACTED] [REDACTED]

[REDACTED]<sup>141</sup>

63. In addition to this clear contemporaneous evidence of the critical role the purported merger synergy played in the Investment Committee’s vote, the Committee members themselves later confirmed that they would have not voted in favor of the Merger but for the modelled synergy effect:

a. Committee member [REDACTED] told the Special Prosecutor that [REDACTED]

[REDACTED]

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<sup>137</sup> C-145, Unedited Minutes of the Investment Committee Meeting (July 10, 2015), p. 8 (emphasis added).

<sup>138</sup> C-145, Unedited Minutes of the Investment Committee Meeting (July 10, 2015), p. 8 (emphasis added).

<sup>139</sup> C-145, Unedited Minutes of the Investment Committee Meeting (July 10, 2015), pp. 8-9.

<sup>140</sup> C-145, Unedited Minutes of the Investment Committee Meeting (July 10, 2015), p. 9.

<sup>141</sup> R-201, 2015-30<sup>th</sup> Investment Committee Meeting Minutes (July 10, 2015), p. 16.

[REDACTED]  
[REDACTED]<sup>142</sup>

b. Committee member [REDACTED] testified that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED],<sup>143</sup> and [REDACTED]  
[REDACTED]  
[REDACTED]<sup>144</sup>

c. Committee member [REDACTED] told [the Special Prosecutor] that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>145</sup>

d. Committee Member [REDACTED] similarly told the Special Prosecutor that  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>146</sup>

e. Committee member [REDACTED] also told the Special Prosecutor that  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>142</sup> C-158, Second Statement Report of [REDACTED] to Special Prosecutor, December 27, 2016, p. 14 (emphasis added).

<sup>143</sup> C-171, Transcript of Court Testimony of [REDACTED] (2017Gohap34-2017Gohap183, Seoul Central District Court), April 10, 2017, p. 8.

<sup>144</sup> C-171, Transcript of Court Testimony of [REDACTED] (2017Gohap34-2017Gohap183, Seoul Central District Court), April 10, 2017, p. 12.

<sup>145</sup> C-161, Second Statement Report of [REDACTED] to the Special Prosecutor, December 28, 2016, p. 7.

<sup>146</sup> C-159, Statement Report of [REDACTED] to the Special Prosecutor, December 28, 2016, p. 17.



Securities Division (and *ex officio* member of the Investment Committee), [REDACTED]  
[REDACTED].<sup>151</sup>

66. In the week leading up to the Investment Committee’s meeting, CIO [REDACTED] [REDACTED]  
[REDACTED]. As testified by  
Committee member [REDACTED], CIO [REDACTED] [REDACTED]  
[REDACTED].<sup>152</sup> [REDACTED]  
[REDACTED]  
[REDACTED]<sup>153</sup> During the meeting itself, CIO [REDACTED]  
[REDACTED].<sup>154</sup>

67. Korea attempts to trivialize CIO [REDACTED]’s pressure on Committee members as a mere  
expression of his “personal view.”<sup>155</sup> Korea’s characterization is naïve at best. CIO  
[REDACTED] chaired the Committee, appointed and supervised eight of its eleven members,  
and personally hand-picked the remaining three. The notion that the “personal view”  
(often and emphatically expressed) of their leader was seen by the Investment  
Committee members as anything other than a directive for their vote not only defies

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<sup>151</sup> C-173, Transcript of Court Testimony of [REDACTED] Case 2017Gohap34/2017 Gohap183  
(Seoul Central District Court, April 19, 2017), pp. 23-24 [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]; C-155, Statement Report of [REDACTED] to the  
Special Prosecutor, December 26, 2016, p. 19 (testifying that [REDACTED]  
[REDACTED]).

<sup>152</sup> C-157, Statement Report of [REDACTED] to the Special Prosecutor (December 26, 2016), p. 3.

<sup>153</sup> C-157, Statement Report of [REDACTED] to the Special Prosecutor (December 26, 2016), p. 7  
[REDACTED]  
[REDACTED].

<sup>154</sup> C-171, Transcript of Court Testimony of [REDACTED] (2017Gohap34-2017Gohap183,  
Seoul Central District Court), April 10, 2017, p. 12 ([REDACTED]  
[REDACTED]  
[REDACTED]).

<sup>155</sup> SOD, ¶ 180.





the extraordinary lengths to which Korea has gone in its Defence in an attempt to justify the conduct of its officials that was as shameful as it was unlawful.

**C. The Merger Process Would Not Have Been Approved But For the NPS's Vote**

73. Korea does not dispute that the NPS cast the deciding vote at the SC&T shareholders' meeting on July 17, 2015. Shareholders holding 132,355,800 votes attended the meeting and the merger was approved by a margin of only 2.86%.<sup>166</sup> With its 11.21% stake (17,512,011 votes representing more than 13.2% of the voting shares), the NPS exercised the decisive vote.<sup>167</sup> Even Korea cannot dispute that.
74. Instead, Korea suggests that its wrongful actions did not cause the Merger's approval because shareholders other than the NPS voted, or *could have voted*, in favor of the Merger.<sup>168</sup> Korea's position is contrary to simple arithmetic and to the rulings of Korea's own courts.
75. As detailed in the Amended Statement of Claim<sup>169</sup> and illustrated in **Table 1** below, had the NPS abstained or voted against the Merger, the Merger would not have been

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<sup>166</sup> CLA-14, [REDACTED] Seoul High Court, p. 28.

<sup>167</sup> CLA-14, [REDACTED] Seoul High Court, p. 28.

<sup>168</sup> SOD, ¶¶ 105-109.

<sup>169</sup> ASOC, ¶¶ 61-63.



[REDACTED] 172

And the Seoul High Court has since specifically held that “[h]ad NPS [ . . . ] voted against the Merger, the resolution for the Merger would have been rejected for failing to satisfy the quorum for resolution (i.e., failing to meet two thirds of the votes held by shareholders present).”<sup>173</sup>

78. In short, as multiple Korean State organs have already admitted, based on the *actual* Merger vote, had NPS voted differently, the Merger would have failed. Hypothetical scenarios of *other* vote configurations do not and cannot change what actually occurred.

**D. After the NPS Enabled the Merger, the NPS Sought to Cover Up Wrongdoing and Key Individuals Involved in the Scheme Were Rewarded**

79. After the Merger was approved, those involved in the fraudulent scheme sought to conceal any evidence of their wrongdoing and the key participants received their reward.

80. The record, including documents produced in disclosure reveal that:

- a. On July 14, 2015, after the Merger had been approved, the head of the NPS Research Team, [REDACTED], [REDACTED] [REDACTED].<sup>174</sup> That report was described by

<sup>172</sup> C-198, MHW, Report on NPS Exercise of Voting Rights Regarding Samsung C&T and Cheil Industries Merger (July 9, 2015), p. 1.

<sup>173</sup> CLA-115, *Ilung Pharmaceuticals Corp v. Samsung C&T Corp*, Case 2016Ra20189, 20190 Appraisal Price Decision (Seoul High Court, May 30, 2016) (with translated excerpts), p. 22; see also CLA-14, [REDACTED] Seoul High Court, p. 9 (finding that the NPS held the “casting vote” on the Merger); see also C-167, Statement Report of [REDACTED] to the Special Prosecutor, February 22, 2017 [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

C-146, Text message from [REDACTED] (Head of the Planning Division at the Samsung Future Strategy Office) to [REDACTED] (President of the Samsung Future Strategy Office), dated July 10, 2015 [REDACTED]  
[REDACTED]

<sup>174</sup> C-174, Transcript of Court Testimony of [REDACTED], Case 2017Gohap34-2017Gohap183 (Seoul Central District Court, May 8, 2017), p. 27.

one of the NPS Research Team members [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>175</sup>

b. In addition to papering over the record, in an act of clear obstruction of justice, the Research Team Head “instructed the working group to delete the interim reports and other relevant documents on two occasions (the week after the Investment Committee [meeting] and immediately before the prosecutorial raid for search and seizure.”<sup>176</sup>

c. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>177</sup>

81. Having covered its tracks, the Korean government also rewarded those who had faithfully executed the corruption scheme. After leaving the MHW, Minister [REDACTED] was [REDACTED]

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<sup>175</sup> C-174, Transcript of Court Testimony of [REDACTED], Case 2017Gohap34-2017Gohap183 (Seoul Central District Court, May 8, 2017), p. 27.

<sup>176</sup> C-26, NPS Audit of SC&T-Cheil Merger (July 3, 2018), p. 3; *see also*, C-162, Statement Report of [REDACTED] to the Special Prosecutor, January 2, 2017, pp. 19-20 [REDACTED]  
[REDACTED]. Notably, these efforts to conceal the record of NPS’s wrongdoing were in direct violation of the NPS’s own document retention regulations. *See* CLA-194, NPS, Established Rules for Record Management, Article 12(4), May 29, 2013, (requiring that records should not be arbitrarily modified); CLA-171, [REDACTED] v. *National Pension Service*, Decision, Case 2018GaHap559994 (Seoul Central District Court, June 19, 2020) p. 3 (“the Plaintiff himself deleted the interim versions of the Report [ . . . ] This is a violation of his obligation to store and maintain the data.”). The NPS Disciplinary Committee eventually dismissed the NPS Research Head exactly for such conduct, which is also a criminal offense under Korean law; CLA-171, [REDACTED] v. *National Pension Service*, Decision, Case 2018GaHap559994 (Seoul Central District Court, June 19, 2020); CLA-154, Korean Criminal Act, Article 155(1).

<sup>177</sup> C-164, First Statement Report of [REDACTED] to the Special Prosecutor, January 3, 2017, pp. 17-18.



tamper with the NPS's own records of this process or for the MHW to sanitize the NPS's disclosures to the public.<sup>185</sup>

84. Equally unavailing is Korea's apparent suggestion that since the merger ratio met the technical statutory requirements under Korean law, that somehow absolves the fraud and corruption deployed to secure the Merger vote. It does not. The Merger did not rise and fall on its own merit; it was the product of an inherently flawed approval process tainted by fraud, and involving misconduct at the highest ranks in the Korean government. An unfair process cannot and did not lead to a fair outcome.
85. With that background, Mason now turns to Korea's specific arguments purporting to justify the Merger. None of these arguments has any merit.
86. Korea first tries to defend the Merger by arguing that the ratio of 1:0.35 was required as a matter of Korean corporate law.<sup>186</sup> It is true that, under Korea's Capital Markets Act, the ratio to be used in a stock-for-stock swap is calculated by taking the average of each merging entity's average closing prices for the most recent month and week (in each case weighted by trade volume) as well as its most recent closing price.<sup>187</sup> However, it is simply not the case that this statutory merger ratio is immune to manipulation. As Korean corporate legal scholars have observed, the merger ratio can be manipulated in situations – like this one – where the merger is between affiliates with the same controlling shareholder; under those circumstances, the common controlling shareholder of the merger entities can time the merger announcement to ensure favorable merger ratio.<sup>188</sup>
87. That is exactly what happened here. In a report prepared on July 8, 2015, the NPS analyzed the “appropriateness of [the] merger timing,” observing that the “Merger was

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<sup>185</sup> See *supra* ¶¶ 79-81.

<sup>186</sup> SOD, ¶ 79.

<sup>187</sup> **CLA-190**, Enforcement Decree of the Financial Investment Services and Capital Markets Act, Article 176-5(1), July 1, 2015.

<sup>188</sup> **CLA-203**, Chang-Hyun Song, Byung Tae Kin, Joon-Hyuk Chung and Sang-Beom Hong, *Analysis of Freeze-outs in Korea: Quest for Legal Framework Synchronizing Transactional Efficiency and Protection of Minority Shareholders*, 8 *Journal of Korean Law* 277 (June 2, 2009).

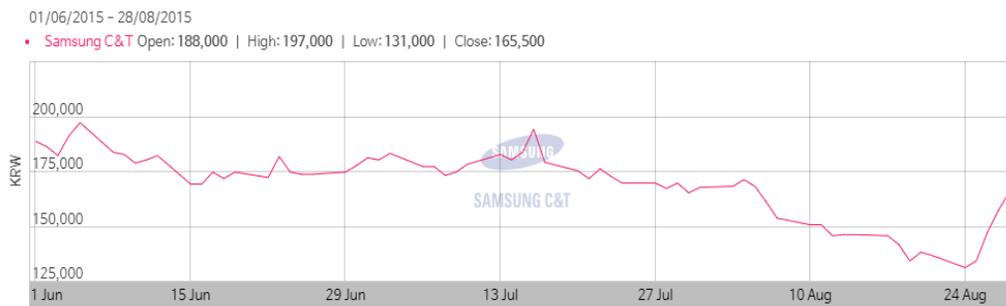




Public Prosecutor, this was not a one-time phenomenon; the recent [REDACTED] indictment sets out in great detail the lengths [REDACTED] and his associates went to in order to disseminate “false” and “pretextual” information in support of the Merger, “induce[] favorable public media coverage through the media representatives,” and “manipulat[e] public opinion to distort the investors’ decision making,” among other actions.<sup>199</sup>

92. Indeed, one only need to look at the share price of SC&T and SEC following the approval vote to gauge that *actual* market behavior was fundamentally inconsistent with Korea’s defence of the Merger: both companies’ share price precipitously dropped and continued to steadily fall thereafter, as shareholders raced to sell their stock.

**Table 2(a). SC&T Stock Price – 1 June 2015 – 31 August 2015<sup>200</sup>**



**Table 2(b). SEC Stock Price – 1 June 2015 – 31 August 2015<sup>201</sup>**



and during the meeting, he asked me not to write a negative report, saying that the Hanwha Group and Samsung have a good relationship and that there are many deals taking place between the two.”).

<sup>199</sup> C-188, [REDACTED] Indictment, pp. 25-26.

<sup>200</sup> Source: <http://www.samsungcnt.com/eng/stockInfo/stockChart.do>.

<sup>201</sup> Source: <https://www.samsung.com/global/ir/stock-information/stock-chart/>

93. Korea finally points to civil litigation conducted immediately after the Merger vote in which Korean courts declined to nullify or annul the transaction.<sup>202</sup> But these cases concerned questions of corporate law and, applying a different standard of relief, addressed only narrow issues related to the statutory formula applied and the potential nullification of the transaction. Neither the Elliott litigation nor the *Il Sung Pharmaceuticals* case relied on by Korea was conducted with the benefit of knowledge of the full scope of Korea’s wrongdoing; in the Elliott case, the unlawful conduct of President █████ and other officials was not yet public knowledge.<sup>203</sup> In the *Il Sung Pharmaceuticals* case, the Court, still unaware of the full scope of the government’s intervention in the NPS vote and Samsung’s stock price manipulation, deliberately avoided deciding whether the Merger was carried out to enable the █████ Family’s succession plans, and merely observed that, as a matter of Korean corporate law, such a purpose was not grounds for annulling the Merger.<sup>204</sup> Neither case squarely addressed how or why the NPS voted the way it did. And in this arbitration, the evidence is clear that NPS made the wrong decision for the wrong reasons.

#### **IV. MASON’S CLAIMS ARE ADMISSIBLE UNDER THE FTA**

94. In light of the damning evidence of corruption at the highest levels of the Korean government, established to a criminal standard of proof before its own domestic courts, and to which Korea has no substantive response on the merits, Korea raises several technical defences to suggest that the Treaty’s protections do not protect Mason and its investment from that conduct. Korea’s attempts to evade responsibility are to no avail – as established in the Amended Statement of Claim, and confirmed further below, the Treaty clearly applies to Korea’s wrongful behavior.

##### **A. Mason’s Claims Arise Out of “Measures Adopted or Maintained” by Korea**

95. In the Amended Statement of Claim, Mason set out in detail the internationally wrongful conduct of the Korean government, including abuses of authority of State officials at all levels of government, from the Presidential Blue House to the National

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<sup>202</sup> SOD, ¶¶ 86, 113-114.

<sup>203</sup> **R-177**, Seoul Central District Court Case No. 2015KaHab80582, July 1, 2015, pp. 11-14.

<sup>204</sup> **R-242**, Seoul Central District Court Case No. 2016GaHap510827, October 19, 2017, pp. 11-12.

Pension Service. Mason also explained how this conduct clearly falls within the broad and inclusive expression used in the Treaty – “measures adopted or maintained by [Korea]”<sup>205</sup> – which captures the full spectrum of governmental action (or inaction) attributable to Korea.

96. In its Defence, Korea performs interpretive gymnastics in a self-serving attempt to introduce new limitations into the scope of the FTA. At various points, Korea redefines the Treaty’s criteria to mean only:

- a. “legislative or administrative rule-making or enforcement”;<sup>206</sup>
- b. “a formal and official act”;<sup>207</sup>
- c. “a final outcome of an established governmental process”;<sup>208</sup> and
- d. “a decision made subject to the executive, legislative, or judicial rule-making apparatuses of the State.”<sup>209</sup>

97. These restrictions have no basis in the ordinary meaning of the text of the Treaty. Rather, the redefinition proposed by Korea radically curtails the scope of the substantive protections of the FTA and the conduct for which a State is conventionally responsible under customary international law – including conduct in the purported exercise of executive authority, the abuse of power by governmental officials, and conduct that is ultimately *ultra vires* – and defeats the Treaty’s object and purpose. Korea’s position also finds no support in international jurisprudence – indeed, as the International Court of Justice has found, the expression “measure” “is wide enough to cover any act, step or proceeding, and imposes no particular limit on [its] material

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<sup>205</sup> **CLA-23**, Treaty, Art 11.1(1); *see also* ASOC, ¶¶ 113-121.

<sup>206</sup> SOD, ¶ 193.

<sup>207</sup> SOD, ¶ 203.

<sup>208</sup> SOD, ¶ 204.

<sup>209</sup> SOD, ¶ 211.

content or the aim pursued thereby,”<sup>210</sup> a conclusion applied by investment tribunals and scholars to the same language as used in the FTA.

98. In the sub-sections that follow, Mason shows that Korea’s attempts to radically limit the scope of the Treaty’s protections have no foundation, and that Korea’s wrongful conduct easily constitutes “measures adopted or maintained by Korea.”<sup>211</sup>

**1. Korea’s Attempts to Radically Limit the Scope of the Treaty’s Protections Have No Foundation**

99. *First*, Korea’s redefinition of the scope of the Treaty is not supported by the ordinary meaning of the word “measure.” Korea relies on a number of cherry-picked dictionary definitions to suggest that a “measure” should be limited to “a proposed legislative act, a ‘legislative enactment proposed or adopted,’ or a ‘legislative bill.’”<sup>212</sup> But the dictionaries relied upon by Korea demonstrate precisely the opposite – defining measure to include “a step planned or taken as a means to an end,”<sup>213</sup> “a plan or course of action taken to achieve a particular purpose,”<sup>214</sup> and “[a] plan or course of action intended to attain some object.”<sup>215</sup> These definitions are consistent with the International Court of Justice’s observation above, made in the context of the “ordinary sense [of] the word [“measure”].”<sup>216</sup> They are also consistent with the facts before the Tribunal: multiple Korean government officials took a series of steps, each of which intended to (and did) interfere with the NPS’s vote in order to ensure that the Merger would be approved.<sup>217</sup>
100. Indeed, the Treaty broadly defines “measure” to “include[] any law, regulation, procedure, requirement or practice.”<sup>218</sup> As noted in the Amended Statement of Claim,

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<sup>210</sup> **CLA-112**, *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment, December 4, 1998, ¶ 66.

<sup>211</sup> **CLA-23**, Treaty, Art 11.1(1).

<sup>212</sup> SOD, ¶ 200.

<sup>213</sup> **R-325**, Merriam-Webster Dictionary (online), “measure,” accessed October 29, 2020.

<sup>214</sup> **R-323**, Lexico (Oxford University) (online), “measure,” accessed October 29, 2020.

<sup>215</sup> **R-329**, Oxford English Dictionary (online), “measure,” accessed October 29, 2020.

<sup>216</sup> **CLA-112**, *Fisheries Jurisdiction (Spain v. Canada)*, ICJ Judgment, December 4, 1998, ¶ 66.

<sup>217</sup> *See supra* § III.B.

<sup>218</sup> **CLA-23**, Treaty, Article 1.4.

this definition is broad and inclusive, and does not support Korea’s selective approach.<sup>219</sup> Yet Korea argues that “there is nothing inherent in the term “include” in this context that connotes non-exhaustiveness” and suggests the definition creates a “closed system of known measures.”<sup>220</sup> That reading is plainly wrong. For one, such an interpretation is inconsistent with the ordinary meaning of the word “include.” Nor is it consistent with the remainder of the Treaty. In the general definitions section of the FTA, only two words are used to connect a definition with its meaning – in the vast majority (31), “means” is used to connote precision, or exhaustiveness. In two instances, “includes” is used, including in respect of “measure.” If, as Korea suggests, “measure” was supposed to mean exclusively the items listed in the Treaty, then the Treaty could have said exactly that, for the thirty-second time: that “measure *means* any law, regulation, procedure, requirement or practice.” Basic principles of textual interpretation mandate that this word choice was intentional and that the Tribunal should not, as Korea urges, interpret the word “include” to ascribe to it the meaning of another word (“means”) the drafters of the Treaty could have, but did not use.

101. But even accepting Korea’s limited reading, the items listed in the definition are themselves very broad and contemplate both formal and informal conduct (for example, a “requirement,” meaning “something called for or demanded,” or a “practice,” meaning “the actual application or use of an idea, belief, or method” or “constant action or performance; conduct”).
102. Korea’s reliance on the Korean version of the FTA takes Korea’s argument no further. Korea defines the relevant equivalent expression (“조치”) as including “necessary steps after a careful examination” of the state of affairs that have taken place.<sup>221</sup> This definition is entirely consistent with the generic and expansive English definition referred to in paragraph 100 above, as well as the facts before the Tribunal – which

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<sup>219</sup> ASOC, ¶ 118.

<sup>220</sup> SOD, ¶ 202. In contrast, the authority Korea relies upon observes, in relation to the same definition in the NAFTA, that “[t]he definition is also open ended: the categories of activity set out in the definition are not exclusive.” **RLA-101**, Meg Kinnear, Andrea Bjorklund and John Hannaford, *Investment Disputes Under NAFTA: An Annotated Guide to NAFTA* (2008), p. 18.

<sup>221</sup> **R-334**, Standard Korean Language Dictionary (online), “조치,” accessed October 12, 2020.

plainly show that multiple Korean government officials took the necessary steps to interfere with the NPS’s vote and secure approval of the Merger.<sup>222</sup>

103. *Second*, the immediate context of the word “measure” (that is, “measures adopted or maintained”) does not assist Korea’s case either. As set out in the Amended Statement of Claim, the expression “adopted or maintained” merely sets out the two temporal conditions in which a measure could cause harm – that is, by way of its introduction, or by its persistence over time<sup>223</sup> (including in circumstances where a measure has been introduced before the entry into force of the Treaty).
104. That reading is again supported by the dictionaries relied upon by Korea. As Black’s Law Dictionary explains in relation to the word “adopt,” “To adopt a route for the transportation of the mail *means to take the steps necessary* to cause the mail to be transported over that route.”<sup>224</sup> “Adopt” is further defined as “[t]o accept, consent to, and put into effective operation,” or “[t]o take up (an opinion, attitude, course of action, etc.); to choose (a method, practice, term, etc.) for one’s use.”<sup>225</sup> The Korean version (“채택하다”) again supports this reading – the equivalent expression means “To choose such things as a work of art, an opinion, or a system *and make use of it.*”<sup>226</sup> The facts also plainly show that Korea’s government officials adopted a course of action, through the myriad ways in which they interfered with the NPS’s vote, that was necessary to (and did) secure the desired Merger outcome.
105. The scant authorities Korea relies upon in relation to this point again support Mason’s case. As explained by Kinnear, Bjorklund and Hannaford, the expression “appears to describe two distinct situations: first, a circumstance in which a new measure is adopted by a Party, giving rise to a possible complaint; and second where a measure continues

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<sup>222</sup> See *supra* § III.B.

<sup>223</sup> ASOC, § IV.E.

<sup>224</sup> **R-318**, Black’s Law Dictionary (online), “What is ADOPT?,” accessed October 29, 2020 (emphasis added).

<sup>225</sup> **R-318**, Black’s Law Dictionary (online), “What is ADOPT?,” accessed October 29, 2020.

<sup>226</sup> **R-335**, Standard Korean Language Dictionary (online), “채택하다,” accessed October 12, 2020 (emphasis added).

to be maintained by the Party.”<sup>227</sup> Prof. Vandeveld concur – “the words ‘adopted or maintained’ are intended to make clear that BIT obligations apply to measures by a party that are adopted after the treaty enters into force as well as those adopted prior to the treaty’s entry into force but maintained by the party after entry into force.”<sup>228</sup>

106. Korea’s suggestion that its definition of “measures adopted or maintained” is necessitated by the “democratic corrective roles” performed by different institutions of government is unavailing.<sup>229</sup> To the extent that measures taken by one or more State organs breach the protections of the Treaty and cause loss to a protected investor they are actionable, save to the extent the treaty requires the investor to first exhaust local remedies. But that does not transform the nature of the act. As Prof. Momtaz has observed,

[T]he separation of powers is a principle of internal political organization of the State; it cannot be relied on vis-à-vis other States on the international level. . . . If it is true that an internationally wrongful act cannot be classified as such before local remedies have been exhausted, it is nevertheless the case that *the act may be classified as an act of the State as soon as it has been committed*.<sup>230</sup>

107. Further, as Korea attempts to obfuscate, the action (or inaction) of any person or entity with delegated powers, including those well outside the boundaries of the “democratic

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<sup>227</sup> **RLA-101**, Meg Kinnear, Andrea Bjorklund and John Hannaford, *Investment Disputes Under Nafta: An Annotated Guide to NAFTA* (2008), p. 20.

<sup>228</sup> **CLA-50**, Kenneth J. Vandeveld, *U.S. INTERNATIONAL INVESTMENT AGREEMENTS* (Oxford Univ.), p. 192.

<sup>229</sup> SOD, ¶ 201.

<sup>230</sup> **CLA-199**, Djamchid Momtaz, Gérard Cahin & Olivier de Frouville, *Chapter 19: Attribution of Conduct to the State*, in *THE LAW OF INTERNATIONAL RESPONSIBILITY* (James Crawford, Alain Pellet & Simon Olleson eds., Oxford Univ. Press, 2010), pp. 239-241 (emphasis added); *see also*, **CLA-166**, International Law Commission's Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001) (the “**Commentaries on the ILC Articles**”), Article 44.

corrective roles” as between the principal branches of government, may constitute a measure for which Korea is internationally responsible.

108. In the present case, legitimate systems of control as between governmental organs were used to facilitate the breach, rather than perform a corrective function. Korea cannot hide behind the hypothetical possibility of such correction to excuse its breach.
109. *Third*, the broader context and use of the word “measures” throughout the Treaty is of limited assistance, and in no way supports a restrictive use of the term – indeed even in the examples used by Korea reference is made to “laws, regulations, and *all other* measures.”<sup>231</sup>
110. *Fourth*, the restrictive new definition of “measures adopted or maintained” put forward by Korea produces absurd and arbitrary results that are inconsistent with both the Treaty’s object and purpose, and the protections provided by the rest of the investment chapter. For instance:
- a. The restriction of Korea’s responsibility to “formal and official act[s]” creates a perverse incentive for State actors to “treat” investors fairly and equitably in a purely formal sense, while being perfectly free to mistreat investors through informal channels without any international responsibility for their conduct.
  - b. Korea does not dispute, not could dispute, that it is internationally responsible for conduct that is illegal or ultra vires – as ILC Article 7 makes clear – such conduct is attributable “even if it exceeds [a person or entity’s] authority or contravenes instructions.”<sup>232</sup> Yet Korea’s redefinition carves out a huge swathe of this conduct from the scope of its international responsibility.
111. A significant proportion of the substantive protections Korea provides under the Treaty would effectively have no meaning under Korea’s new definition. For example, as Korea accepts, the full protection and security standard in Article 11.5 “require[s] that law enforcement authorities exercise due diligence to protect covered investment

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<sup>231</sup> SOD, ¶ 206; **CLA-23**, Treaty, Article 20.2.

<sup>232</sup> **CLA-166**, Commentaries on the ILC Articles, Article 7.

against damage by rioters or looters,”<sup>233</sup> and a failure to do so would be internationally wrongful. However, such a failure could not conceivably fall within the restrictive and formalistic definition of “measures adopted or maintained” that Korea proffers.

112. *Fifth*, the jurisprudence considering this expression, including the authorities set out in the Amended Statement of Claim, confirms that “measures adopted or maintained” is not an expression of limitation.
113. Notwithstanding the relevant expression is found in numerous investment treaties (including the 2004 and 2012 US Model BITs), Korea can find no support in the case law or commentaries for its suggested restrictive approach. The three cases scrounged up in support in Korea’s Defence deal with entirely different propositions:
  - a. In *Waste Management*,<sup>234</sup> the tribunal considered whether alleged “measures tantamount to...expropriation” were in fact tantamount to expropriation. The tribunal used the expression “measures” and “conduct” interchangeably when it defined the relevant question – “the question is whether there was *any conduct* tantamount to an expropriation which might trigger NAFTA Article 1110” – and did not suggest that the alleged “measures,” including “actions and refusals to act” and a City “campaign of obstruction (in cahoots with Guerrero and Banobras),” were not “measures.”<sup>235</sup>
  - b. In *Azinian*,<sup>236</sup> the tribunal found that contractual breaches were not per se breaches of the NAFTA. The tribunal did not discuss the meaning of “measures adopted or maintained” at all.
  - c. In *Railroad Development Corporation*, the tribunal considered a *ratione temporis* objection that the relevant measure (and the dispute in relation to the measure) pre-dated the treaty’s entry into force. The Tribunal ultimately did

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<sup>233</sup> **RLA-128**, Kenneth Vandavelde, *BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION* (Oxford Univ. Press 2010), p. 244.

<sup>234</sup> **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014.

<sup>235</sup> **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶158.

<sup>236</sup> **RLA-84**, *Robert Azinian and others v. The United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award, November 1, 1999.

not need to decide the date of the measure, and observed that the measure could be understood as “part of a process” and a “continuing act” – concluding that “if the Lesivo Resolution is viewed as a measure taken on a specific date, it was taken on the day of publication. Alternatively, if it is considered as part of a process, then it is part of a continuing act which started before the date of the entry into force of the Treaty and continued after such date. On either view, Respondent’s argument fails.”<sup>237</sup>

114. Korea also refers to *Mesa Power*,<sup>238</sup> in which the tribunal observed that the word “measures” in the equivalent provision under the NAFTA “must be understood broadly,” and that actions including a state enterprise (OPA)’s “meetings with other [feed-in tariff] applicants which led to benefits not available to the Claimants being granted to these applicants,” the “release of [feed-in tariff program] rankings” and the OPA’s “alleged misadministration of the [feed-in tariff program]” including a “failure...to meet with the Claimant and explain the ranking” were all “measures” under the NAFTA.<sup>239</sup>
115. In response to the numerous authorities referred to in the Amended Statement of Claim, Korea raises three core points, none of which is credible:
- a. That the measures under consideration by the relevant tribunals would have fallen within Korea’s own reconstruction of the FTA. That is ultimately neither here nor there – the tribunals adopted the interpretive approach reflected in their awards, and not the approach put forward by Korea.
  - b. That the some of the tribunals considered the expression “measure” in other treaty contexts. These tribunals’ approaches affirm the clear ordinary meaning of the expression used by Contracting Parties in the FTA.

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<sup>237</sup> **RLA-123**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Second Decision on Objections to Jurisdiction, May 18, 2010, ¶ 125.

<sup>238</sup> **CLA-120**, *Mesa Power v. Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016.

<sup>239</sup> **CLA-120**, *Mesa Power v Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016, ¶¶ 254-256.

- c. That the tribunals' analyses of the issue were not rigorous enough for Korea's satisfaction. This is again a complaint of no substance. The selective and overwrought "analysis" presented in the Defence to deal with what is a simple and unambiguous<sup>240</sup> expression should not be the standard for other tribunals, let alone a guide for this Tribunal.

## 2. Korea's Wrongful Conduct Easily Constitutes "Measures Adopted or Maintained by Korea"

116. In its Defence, Korea applies its new definition to the corrupt conduct of its President and her subordinates, its Ministry of Health and Welfare, and its National Pension Service to assert that that conduct is outside the scope of the Treaty's protections. Again, that objection has no foundation.
117. The corrupt scheme by which President █████, Minister █████, CIO █████ and their respective subordinates coordinated to achieve the approval of the merger of SC&T and Cheil to the benefit of the controlling █████ Family is precisely the "plan or course of action taken to achieve a particular purpose" the FTA clearly encompasses.<sup>241</sup>
118. Korea's suggestion that "no component of Korea's rule-making or enforcement authority was ever implicated" is wrong,<sup>242</sup> and relies upon a false and overly formalistic view of how a government, and in particular an executive branch of government, operates in practice. To pursue this course of action, President █████ exercised (and abused) her governmental authority as the head of the executive branch of Korea, granted by the fundamental law of Korea, the Korean constitution, to achieve her particular purposes. As set out further above, President █████ issued a specific requirement that her subordinates ensure that the Merger be accomplished, which set her subordinates in action to procure that result. In the same fashion, Minister █████

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<sup>240</sup> Contrary to Korea's self-serving assertion (SOD, ¶ 208), the principle of *in dubio mitius* has no role to play here. Further, as the tribunal in *Eureka* noted, in relation to the authority cited by Korea, "This Tribunal feels bound to add that reliance by the Tribunal in *SGS v. Pakistan* on the maxim *in dubio mitius* so as effectively to presume that sovereign rights override the rights of a foreign investor could be seen as a reversion to a doctrine that has been displaced by contemporary customary international law, particularly as that law has been reshaped by the conclusion of more than 2000 essentially concordant bilateral investment treaties." **CLA-109, Eureka B.V. v. Republic of Poland**, Partial Award, August 19, 2005, ¶ 258.

<sup>241</sup> **R-323**, Lexico (Oxford University) (online), "measure," accessed October 29, 2020.

<sup>242</sup> SOD, ¶ 219.

abused the authority delegated to him by the President, and by the relevant legislation and regulations, including the procedures through which he was entitled to exercise control over the NPS's decision making, to ensure an affirmative Merger Vote. Minister █████ demanded both his subordinates and CIO █████ take steps to ensure the Merger was approved by the NPS. At the NPS, established practices and procedures about the way in which the Merger was to be considered and voted upon were subverted, such that the decision made by the NPS, in purported exercise of powers delegated by legislation and by regulation, was also corrupted.

119. This was no “pursuit of a policy initiative” or the mere “application of pressure.”<sup>243</sup> This was the direct exploitation and abuse of structures of control and supervision, which depend upon and exist as a result of the underlying legal and regulatory framework. Korea's analogy to the U.S. system of government (with dialogue between the legislative and executive branches with separate areas of authority) is of no value. There is a direct line of authority from the President, the head of the executive branch, to the Minister of Health and Welfare (who is appointed and removed by the President), to the chief executives of the National Pension Service (who are appointed and removed by the President and the Minister of Health and Welfare).
120. There is no question that President █████, Minister █████, CIO █████, and the many other government officials involved acted *qua* President, Minister, CIO, and government officials when they gave the orders to subvert the NPS's vote and ensure approval of the Merger. These were no private citizens engaging in wrongful acts. Nor were their actions private infractions they could equally easily commit as private citizens – they did not run a red light or shoplift from a store. They needed to, and at all times acted under, the clout of official authority to perpetrate their illegal scheme; without that authority which demanded compliance, their efforts would have been entirely ineffectual.
121. It cannot be that the Treaty should be interpreted in a way that provides aggrieved investors with relief over anything but the grossest examples of abuse of power and authority by government actors acting in their official capacity.

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<sup>243</sup> SOD, ¶ 219.

## **B. Korea's Measures *Related to* Mason and the Samsung Shares**

122. In its Amended Statement of Claim, Mason established that Korea's measures related directly to Mason and its investments.<sup>244</sup> President █████, Minister █████, CIO █████, and their subordinates interfered with the SC&T-Cheil merger for the singular purpose of enabling the transfer of billions of dollars from SC&T's shareholders, including Mason, to █████ and Cheil's other shareholders. The measures were also part of a concerted, nationalistic public campaign directed against foreign hedge funds with investments in the Samsung Group.<sup>245</sup>
123. Despite these facts, Korea alleges that its measures did not "relate to" Mason because, according to Korea, the measures were not specifically directed at Mason.<sup>246</sup> This argument is hopeless. The evidence shows that the measures specifically targeted Mason and its investment in the Samsung Shares. In any event, as tribunals have confirmed, the "relating to" requirement under Article 11.1(1) of the FTA is satisfied where the measure has an effect on the investor or investment that is more than merely incidental or tangential.<sup>247</sup> Mason easily satisfies this requirement on the facts of this case.

### **1. Korea Mischaracterizes the "Relating to" Requirement Under the FTA**

124. The Parties agree that the words "relating to" in Article 11.1(1) of the FTA require that there be a legally significant connection between Korea's measures and Mason or its investment. As the United States has explained in its Non-Disputing Party Submission, the requirement will be satisfied where the connection is more than the mere incidental effect of measures on an investment, and this "depends on the facts of a given case."<sup>248</sup> However, in its Defence, Korea argues that Mason "understates the limiting effect of

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<sup>244</sup> ASOC, § IV.E.2.

<sup>245</sup> ASOC, ¶ 6 & § I.V.E.2; *see also* ¶ 131 above.

<sup>246</sup> SOD, § IV.B.1.

<sup>247</sup> **RLA-167**, *Resolute Forest Products Inc v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, January 30, 2018, ¶ 242.

<sup>248</sup> United States Non-disputing Party Submission, February 1, 2021, ¶ 7 ("US NDP Submission").

this requirement,”<sup>249</sup> citing to the decisions in *Methanex* and *Resolute Forest*,<sup>250</sup> and claims that the measures must be directly and expressly directed at the investor.<sup>251</sup> This is incorrect. Korea’s argument finds no basis under the FTA and or the cited authorities.

125. *First*, the FTA does not limit the types of connections that might exist between a measure and an investor or a covered investment. Rather, Article 11.1 merely states that “[t]his Chapter applies to measures adopted or maintained by a Party relating to: (a) investors of the other Party; (b) covered investments [ . . .].”<sup>252</sup> There is no basis in suggests. The ordinary and natural meaning of the words “relating to” is “to connect (something) with (something else).”<sup>253</sup> Those words, read in accordance with their natural and ordinary meaning, and in line with the object and purpose of the FTA, are broad and admit to any connection.
126. *Second*, as tribunals have noted, a restrictive reading would wrongly introduce a legal causation test as a threshold jurisdictional question, thereby conflating jurisdiction and causation.<sup>254</sup> The requirement of legal causation under international law, addressed in Section VI.A.2 below, already requires a nexus of “proximity” or “foreseeability” between the measures and the claimed loss. Korea’s interpretation of the “relating to” requirement would introduce an unprincipled additional limitation at the jurisdictional stage of the analysis.
127. *Third*, the two cases cited by Korea were decided on their particular facts, with both tribunals agreeing that the “relating to” language does not require that the measure be

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<sup>249</sup> SOD, ¶ 224.

<sup>250</sup> SOD, § IV.B.1.

<sup>251</sup> SOD, § IV.B.

<sup>252</sup> **CLA-23**, Treaty, Article 11.1.

<sup>253</sup> See **C-190**, Merriam-Webster Dictionary (online), “relate to,” accessed April 20, 2021.

<sup>254</sup> See, e.g., **RLA-167**, *Resolute Forest Products Inc v Government of Canada*, PCA Case No. 2016-13, Decision on Jurisdiction and Admissibility, dated January 30, 2018, ¶ 242; **RLA-147**, *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, ¶¶ 6.20, 6.26.

adopted for the purpose of causing loss to the investor or be “expressly directed at” that investor.

128. In *Methanex*,<sup>255</sup> the United States argued that California’s general prohibition on the sale of gasoline with a form of methanol additive could not, without more, give rise to breaches “relating to” Methanex as a foreign methanol producer. The tribunal held that while there was no “legally significant connection” between the general prohibition and Methanex’s investment, the threshold was satisfied insofar as the United States was alleged to have intended to benefit the domestic ethanol producers, to the detriment of foreign methanol producers such as *Methanex*.<sup>256</sup> Contrary to Korea’s mischaracterization of the *Methanex* decision, the tribunal did not find that such measures needed to be “expressly directed at” the investor.<sup>257</sup>
129. Similarly, the *Resolute Forest* tribunal did not find any requirement that the measures be expressly directed at the investor either. In *Resolute Forest*, the tribunal considered that Canada’s economic measures supporting a paper mill competing with the claimant’s paper mill in a different Canadian Province “related to” the claimant’s investment because the measures intended to favor a domestic competitor, and “in a small and saturated market it was to be expected that competitors would be affected.”<sup>258</sup> Thus, in line with the *Methanex* decision, the *Resolute Forest* tribunal agreed that a measure having a secondary effect on an investment “related to” that investment, and that such a secondary effect was more than a “tangential” or “merely consequential” one.<sup>259</sup>

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<sup>255</sup> **RLA-92**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002.

<sup>256</sup> **RLA-92**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, August 7, 2002, ¶¶ 157-158.

<sup>257</sup> SOD, ¶ 234.

<sup>258</sup> **RLA-167**, *Resolute Forest Products Inc v Government of Canada*, ¶ 248.

<sup>259</sup> **RLA-167**, *Resolute Forest Products Inc v Government of Canada*, ¶ 242.

## 2. Mason Readily Satisfies the “Relating to” Requirement on the Facts of This Case

130. The evidence shows that Korea’s measures directly “related to” Mason and its investments in the Samsung Shares.
131. *First*, SC&T’s shareholders, including Mason, were the specific targets of Korea’s scheme. Korea interfered with the SC&T-Cheil Merger with the singular intent of enabling a substantial value transfer from SC&T’s shareholders, including Mason, to ██████ and Cheil’s other shareholders. This scheme was devised for the benefit of ██████, in order to increase the ██████ Family’s control over the Samsung Group as a whole, of which SEC was the “crown jewel.” Contrary to Korea’s assertion that “[t]he vote was meaningless to Mason when cast, and was only given meaning through the contemporaneous and later acts of SC&T and Cheil’s management and other shareholders,”<sup>260</sup> Korea’s interference with the vote directly and permanently damaged Mason’s SC&T shares by locking-in the severe undervaluation of those shares embedded in the unfair merger ratio.<sup>261</sup>
132. *Second*, Korea’s measures were also part of a concerted, nationalistic and public campaign directed against foreign hedge funds, including Mason. President ██████ has admitted that she interfered with the merger because she considered that “[t]he corporate governance of Samsung Group is vulnerable to threats from foreign hedge funds [ . . . ] a crisis of Samsung Group is a crisis of the Republic of Korea,”<sup>262</sup> and that she instructed her subordinates “to come up with systematic countermeasures against foreign capital.”<sup>263</sup> Korea’s measures were therefore specifically directed against Mason and other foreign hedge funds invested in the Samsung Group.
133. *Finally*, contrary to Korea’s arguments, Mason’s case is entirely consistent with the purpose of the “relating to” requirement. As Korea notes, the Methanex tribunal considered that such a requirement serves to ensure that claims cannot be brought by

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<sup>260</sup> SOD, ¶ 224.

<sup>261</sup> See § VI.B below.

<sup>262</sup> CLA-15, ██████ Seoul High Court, p. 102.

<sup>263</sup> CLA-15, ██████ Seoul High Court, pp. 92-93.

an “indeterminate class of investors.”<sup>264</sup> Mason formed part of a determinate class of investors directly impacted by Korea’s measures, shareholders in SC&T and the wider Samsung Group. By interfering with a critical corporate governance decision requiring shareholder votes of two of the Samsung Group’s listed companies, SC&T (which held a significant stake in SEC) and Cheil, for the benefit of the ■ Family, Korea interfered with the rights of the shareholders in the Samsung Group.

134. For these reasons, Korea’s objection is without merit and falls to be dismissed.

**C. Korea is Responsible Under the FTA for These Measures**

135. Given the central and essential role of a number of parts of the Korean State apparatus in the corrupt scheme, consistent with the chain of command embedded in the structure of the Korean State, Korea seeks to evade liability for its internationally wrongful conduct by distancing itself from and disclaiming responsibility for its own National Pension Service. It is undisputed that the NPS is an organ established under the Ministry of Health and Welfare by legislation,<sup>265</sup> pursues a public function in the public interest,<sup>266</sup> and acts under the supervision and control of the President, the Minister of Health and Welfare and bodies within that Ministry.<sup>267</sup> Korea is not entitled to and cannot be permitted to disclaim responsibility for the NPS’s conduct.

136. In the Amended Statement of Claim, Mason demonstrated that Korea is responsible for the conduct of all of its organs – the conduct of President ■ and her subordinates, Minister ■ and his subordinates, and the conduct of the NPS, including CIO ■ and his subordinates.<sup>268</sup>

137. In its Defence, Korea accepts that it is responsible for the conduct of former President ■ and her subordinates, and Minister ■ and his subordinates.<sup>269</sup> As set out

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<sup>264</sup> SOD, ¶ 231; **RLA-92**, *Methanex Corporation v. United States of America*, UNCITRAL, Partial Award, ¶ 137.

<sup>265</sup> Expert Report of Prof. Sung-Soo Kim, October 30, 2020 (“**Kim Report**”), ¶ 28; SOD, ¶¶ 20, 228.

<sup>266</sup> SOD, ¶¶ 20, 228.

<sup>267</sup> Kim Report, ¶ 32; SOD, ¶¶ 20, 35-36, 228.

<sup>268</sup> ASOC, ¶¶ 125-159.

<sup>269</sup> SOD, ¶¶ 16-20, 238.

further below in Section V, that conduct violated the treaty's standards of treatment. Further, but for President █████ and Minister █████ (and their respective officials')'s involvement in the corrupt scheme to benefit the █████ Family, the NPS would not have voted in favor of the Family's interest and against its own self-interest, and in turn, Mason would have suffered no loss.<sup>270</sup>

138. As such, as a matter of judicial economy, it is open to the Tribunal to put to one side the objection raised by Korea about the scope of its responsibility for the NPS, and base its finding of Korea's responsibility and Mason's loss on the conduct of President █████ and Minister █████, the two highest figures in the chain of command, and the subordinates under their control. The purpose of their intervention was to ensure the Merger was approved and the nature of that intervention was designed to procure that result (which it did). There is no basis for the assertion that there was "immense distance" between the Minister and the organization he controlled and supervised or unspecified "myriad intervening factors,"<sup>271</sup> which Korea suggests entitle it to escape the consequences of its internationally wrongful acts. These matters are addressed further below in Section VI.A.

139. To the extent the Tribunal wishes to address the objection, in the sub-sections that follow, Mason demonstrates that the FTA is consistent with, and does not exclude customary international law principles of State responsibility; the NPS is indeed part of the central government of Korea and a State organ under customary international law; alternatively it is a non-governmental body exercising powers delegated by the central government, or in the further alternative, its conduct was directed and/or controlled by President █████, Minister █████, and their respective subordinates.

**1. Article 11.1(3) is Consistent With, and Does Not Exclude Customary International Law Principles**

140. In its Statement of Defence, Korea asserts that the Contracting Parties specifically addressed and excluded the customary international law rules of State responsibility, by crafting in Article 11.1 of the treaty an exhaustive and fully self-contained *lex*

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<sup>270</sup> See *supra* § III.C and *infra* § VI.A.

<sup>271</sup> SOD, ¶ 238.

*specialis*.<sup>272</sup> Notwithstanding that position, Korea cherry-picks certain customary international law rules which it asserts are favorable to its case on attribution and invites the Tribunal to apply these rules as a “useful guide” to attribution under the FTA.<sup>273</sup>

141. This is clearly not how the *lex specialis* principle works, nor how it should be applied by the Tribunal in the present circumstances. Equally, Korea’s distortion of the negotiating history of the FTA provides no support for its position.
142. *First*, it is trite to state that the relevant starting point for the Tribunal is the customary international law of State responsibility, reflected in the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (“**ILC Articles**”),<sup>274</sup> given that as the FTA, like all treaties, is “predicated for [its] existence and operation on being part of the international law system [ . . . ][it] must be ‘applied and interpreted against the background of the general principles of international law’.”<sup>275</sup> Indeed, in Article 11.22 of the FTA, the parties integrated “applicable rules of international law” into the law governing the treaty, and directed the Tribunal to apply such rules in determining disputed issues.<sup>276</sup>
143. *Second*, the *lex specialis* principle only applies to exclude these customary international law rules to the extent the parties manifestly intended to displace those rules – as the commentaries to the ILC Articles observe, “it is not enough that the same subject matter is dealt with by two provisions, there must be some *actual inconsistency* between them, or else a *discernable intention* that one provision is to exclude the other.”<sup>277</sup> Article 11.1 of the FTA evinces no such inconsistency or intention to exclude customary international law.

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<sup>272</sup> SOD, ¶¶ 239-249.

<sup>273</sup> SOD, ¶¶ 245, 281.

<sup>274</sup> **CLA-166**, Commentaries on the ILC Articles.

<sup>275</sup> **CLA-198**, Campbell McLachlan, *The Principle of Systemic Integration and Article 31(3)(C) of the Vienna Convention*, *The International and Comparative Law Quarterly*, Vol. 54, April, 2005, p. 280.

<sup>276</sup> **CLA-23**, Treaty, Article 11.22(1).

<sup>277</sup> **CLA-166**, Commentaries on the ILC Articles, Article 55, cmt. 4 (emphasis added).

144. Indeed, as a leading scholar observes, in respect of essentially the same provision in the 2004 US Model BIT, that the treaty “merely codifies the customary international law principle that States are responsible under international law only for conduct attributable to them...thus customary international law rules would govern the determination of those measures that are measures by a party.”<sup>278</sup>
145. Similarly, as the United States has observed in its non-disputing party submission in the present case, as well as other disputes under the FTA, where the FTA addresses the question of attribution, the approach is intended to be “consistent with the principles of attribution under customary international law.”<sup>279</sup> Nowhere does the United States suggest that the parties intended to exclude customary international law principles.
146. Korea’s assertion that the Contracting Parties “specifically contemplated including a provision that reflected ILC Article 8 in earlier iterations of the Treaty, but did not” and as such “specifically intended to exclude such conduct” is plainly wrong.<sup>280</sup> The *travaux préparatoires* simply demonstrate that the parties proposed slightly different formulations of what became Article 11.1(3)(b), ultimately reflecting the customary international law position under ILC Article 5 (non-governmental entities exercising delegated powers), and compromised upon one of those formulations.<sup>281</sup> At no point did the parties contemplate excluding the customary international law rule reflected in ILC Article 8, or indeed excluding any of the customary law rules of State responsibility.
147. *Third*, the authorities upon which Korea relies are of limited application and of limited assistance to the Tribunal:

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<sup>278</sup> **CLA-50**, Kenneth J. Vandeveld, U.S. INTERNATIONAL INVESTMENT AGREEMENTS (Oxford Univ. Press), p. 192.

<sup>279</sup> US NDP Submission, ¶ 3.

<sup>280</sup> SOD, ¶ 249.

<sup>281</sup> **R-37**, Fourth Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), November 22, 2006, p. x-1; **R-38**, Fifth Draft Agreement of the Korea-US Free Trade Agreement (*travaux préparatoires*), December 18, 2006, p. x-1.

- a. In *Al-Tamimi*,<sup>282</sup> the observations of the tribunal in relation to the purported exclusion of ILC Article 8 were strictly *obiter*, given the tribunal concluded that there was no evidential basis to suggest any State direction or control of the non-State entity.<sup>283</sup> In any event, these observations do not bear scrutiny – the approach taken by the tribunal has not been followed by other investment tribunals, and has been criticized by commentators – as Kovács has observed, the decision’s “exclusion of ILC Article 8 due to a *lex specialis* that mirrored the principle of attribution in ILC Article 5 is *questionable*.”<sup>284</sup>
  
- b. The tribunal in *Al-Tamimi* in turn relied upon the earlier decision of the tribunal in *UPS*,<sup>285</sup> a decision to which Korea also refers. The legal context before the tribunal in *UPS* (the NAFTA), in which the liability of “privately-owned monopol[ies],” “government monopolies” and “state enterprises” vis-à-vis the State is addressed in a dedicated chapter, bears no resemblance to the FTA.<sup>286</sup> The question before the tribunal was also different – that is, whether the separate, dedicated and comprehensive regimes concerning the attribution of the conduct of State organs and State enterprises in the NAFTA displaced Articles 4 and 5 of the ILC Articles, which deals with the same subject matter (not an entirely different mode of attribution).
  
- c. The decision in *F-W Oil* does not assist Korea’s case – indeed, if anything, it supports Mason’s case.<sup>287</sup> The tribunal observed that while a treaty provision

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<sup>282</sup> **RLA-156**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015.

<sup>283</sup> **RLA-156**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015, ¶ 338.

<sup>284</sup> **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW* (2018), p. 68 (emphasis added).

<sup>285</sup> **RLA-156**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3, 2015, ¶ 321; **CLA-18**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007.

<sup>286</sup> **CLA-18**, *United Parcel Service of America, Inc. (UPS) v. Government of Canada*, ICSID Case No. UNCT/02/1, Award on the Merits and Separate Statement of Dean Ronald A. Cass, May 24, 2007, ¶¶ 58-62.

<sup>287</sup> **RLA-98**, *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, March 3, 2006.

on attribution could operate as a *lex specialis*, it could also not have that effect, and “the applicable secondary rules of State responsibility remain unaffected.”<sup>288</sup> In that regard, the tribunal noted that “what the two Governments chose to lay down expressly in Article XV(2) of the BIT is to all intents and purposes indistinguishable from the position under general international law, as exemplified by Article 5 of the ILC’s draft Articles.”<sup>289</sup> That observation stands in direct contradiction to the *Al-Tamimi* tribunal, which had considered essentially the same language considered by the *Al-Tamimi* tribunal.<sup>290</sup>

## 2. The NPS is Part of the Central Government of Korea Pursuant to Article 11.1(3)(a) of the FTA and a “State Organ” Under Customary International Law

148. As set out in the Amended Statement of Claim, the NPS is part of the central government of Korea, and a “State organ” under customary international law, as reflected in Article 4 of the ILC Articles. As the commentaries to ILC Article 4 note, “the reference to a State organ in article 4 is intended in the most general sense...[i]t extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level.”<sup>291</sup> Kovács summarizes the position – “The basic rule of attribution in ILC Article 4 is ultimately concerned with the *reality* of any given situation alleged to involve internationally wrongful State conduct...In simple terms, *it is the triumph of substance over form.*”<sup>292</sup>
149. In its Statement of Defence, Korea denies that its own National Pension Service is a part of the Korean government, or constitutes a “State organ” under customary

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<sup>288</sup> **RLA-98**, *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, March 3, 2006, ¶ 206.

<sup>289</sup> **RLA-98**, *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, March 3, 2006, ¶ 203.

<sup>290</sup> See **RLA-98**, *F-W Oil Interests, Inc. v. Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award, March 3, 2006, ¶ 196(b); **RLA-156**, *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, November 3 2015, ¶ 318.

<sup>291</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 6.

<sup>292</sup> **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW* (2018), p. 2 (emphasis added).

international law principles. To sustain this proposition, Korea overstates the function of internal law, fundamentally misstates the internal law position, and then fixates on certain aspects of the NPS's legal status that Korea erroneously contends disqualify it from constituting a "State organ." In doing so, Korea attempts to downplay its own representations as to the status of public institutions as State organs in foreign courts, and the findings of other international tribunals to the same effect.

150. *First*, Korea overstates the role of internal law in the analysis the Tribunal must undertake to confirm the NPS's status as a State organ. The characterization of the NPS as a "State organ" is fundamentally a question of applicable international law (that is, under the FTA and customary international law). While for obvious reasons the content of internal law and practice is relevant as a factual matter (that is, that the NPS is a creature of internal law, and as the commentaries to the ILC Articles observe "[t]he structure of the State and the functions of its organs are not, in general, governed by international law"),<sup>293</sup> the position of internal law as to whether or not an entity is an "organ" has only very limited relevance. As the commentaries observe, "[c]onduct is thereby attributed to the State as a subject of international law and not as a subject of internal law."<sup>294</sup>
151. The relevance of an entity's *characterization* under internal law is limited to circumstances where that law defines what entities are considered organs, and the entity in question falls within the internal law definition. As Article 4(2) of the ILC Articles provides, "[a]n organ includes any person or entity which has that status in accordance with the internal law of the State."<sup>295</sup> As the commentaries explain, "[w]here the law of a State characterizes an entity as an organ, no difficulty will arise."<sup>296</sup>
152. *Second*, and to that end, Korea fundamentally misstates the position under internal law. Korea asserts that Korean law defines what entities are considered "organs" for the purposes of international law, and limits those organs to three narrow categories – that is, the highest institutions in each of the branches of government established by the

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<sup>293</sup> **CLA-166**, Commentaries on the ILC Articles, Chapter 2, cmt. 6.

<sup>294</sup> **CLA-166**, Commentaries on the ILC Articles, Chapter 2, cmt. 7.

<sup>295</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4(2).

<sup>296</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 11.

Korean constitution (the National Assembly, the Presidency, Prime Minister, State Council and the Courts), the Ministries established under the Presidency and Prime Minister, and a small number of entities specially established as “central administrative agencies.”<sup>297</sup>

153. Korea relies on the report of Prof. Kim, a Prof. with ties to the government spanning, in his own admission, “over the past three decades,”<sup>298</sup> who currently holds a position in the Korean government,<sup>299</sup> and who has been retained by Korea in other arbitral proceedings.<sup>300</sup> In response to Mason’s request for all documents evidencing the appointment of Prof. Kim to any roles or functions by Korea, to which Korea agreed, it provided a mere 4 documents (including those on Korea’s exemption log), notwithstanding Prof. Kim acknowledging at least seven appointments by the Korean government.<sup>301</sup>
154. Putting to one side Prof. Kim’s patent lack of independence from the government of Korea, Prof. Kim critically misstates the position under Korean law. For the fundamental premise that underpins his entire report, and Korea’s position in this arbitration – that is, that Korean law explicitly defines what entities are considered “organs” for the purposes of international law,<sup>302</sup> that those entities are limited to the three narrow categories referred to above,<sup>303</sup> and that that definition is exhaustive and exclusive,<sup>304</sup> Prof. Kim provides absolutely no primary or secondary evidence in support. The bald assertion made by Prof. Kim is complete devoid of authority – not one piece of legislation or commentary supports his self-serving view.

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<sup>297</sup> SOD, ¶ 257; *see also*, **R-342**, Government Organization Act, Article 2(2).

<sup>298</sup> Kim Report, ¶ 1.

<sup>299</sup> Kim Report, ¶ 5.

<sup>300</sup> Kim Report, ¶ 4.

<sup>301</sup> Procedural Order No. 5, January 15, 2021, p. 220; Kim Report, ¶¶ 1, 5.

<sup>302</sup> Kim Report, ¶ 11.

<sup>303</sup> Kim Report, ¶ 11.

<sup>304</sup> Kim Report, ¶ 16.

155. Indeed, Prof. Kim uses the expression “국가기관” (guk-ga-gi-gwan) to define the concept of a “State organ” under Korean law.<sup>305</sup> That expression is not used at all in the Government Organization Act neither is it defined or exhaustively catalogued in other statutes.
156. This false premise infects the entirety of Prof. Kim’s analysis. The remainder of his analysis simply rehashes this premise, noting that the legal characteristics of the NPS, reflecting the deep structural and functional integration of the NPS into the Korean State, do not “convert” it into one of the three narrow and exclusive categories of “State organs” he has created.<sup>306</sup>
157. Not only is Prof. Kim’s analysis wrong, but it is ultimately irrelevant – as the commentaries to the ILC Articles make clear, “*it is not sufficient to refer to internal law for the status of State organs*. In some systems the status and functions of various entities are determined not only by law but also by practice, and *reference exclusively to internal law would be misleading* [ . . . ] Even if [the law purports to perform the task of classifying “State organs”], the term “organ” used in internal law may have a special meaning, and not the very broad meaning it has under article 4... Accordingly, *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.*”<sup>307</sup>
158. The reality is that Korean law does “not classify, exhaustively or at all, which entities have the status of ‘organs’.”<sup>308</sup> As such, the NPS’s structural and functional characteristics under Korean law are critical – in the language of the commentaries to the ILC Articles, “*the powers of an entity and its relation to other bodies under internal*

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<sup>305</sup> Kim Report, (Original ver.) ¶ 11.

<sup>306</sup> See, e.g. Kim Report, ¶¶ 7, 27, 47, 49, 56.

<sup>307</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 11 (emphasis added).

<sup>308</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 11.

law will be relevant to its classification as an ‘organ’.’<sup>309</sup> An analysis of these factors highlight the NPS’s deep integration into the machinery of the State.

159. As set out in the Amended Statement of Claim, the NPS’s *powers* highlight its fundamental position within the Korean State apparatus. For example:
- a. As Korea does not and cannot dispute, the NPS is a creature of statute – its powers derive exclusively from the National Pension Act (“NPA”), subordinate legislation that entrusts matters to the NPS, and from delegations from the Minister of Health and Welfare in accordance with the NPA.<sup>310</sup> By extension, the NPS has no independent mandate as its sole purpose is to conduct the State affairs assigned or delegated to it under the NPA.
  - b. The NPS is responsible for the provision of pension benefits for old-age, disability, or death. As the Korean constitution and Government Organization Act recognizes, social welfare is fundamentally a State function.<sup>311</sup> This is further clarified by the NPA, which obliges the State to establish and implement policies for stable and continuous pension benefits.<sup>312</sup> The NPS’s powers can only be exercised in discharge of that quintessentially governmental function, and in furtherance of the public purpose underlying the national pension system – the promotion of stable livelihoods and national social welfare.<sup>313</sup>
  - c. To discharge that State function, the NPS has the power to impose mandatory contributions from Korean employees and employers.<sup>314</sup> That power is the source of the funds comprising the National Pension Fund,<sup>315</sup> over which the

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<sup>309</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 11 (emphasis added).

<sup>310</sup> **CLA-157**, Korean National Pension Act, Articles 24, 25, 102; **CLA-150**, Enforcement Decree of the National Pension Act, April 16, 2015, Article 76.

<sup>311</sup> **CLA-149**, Constitution of the Republic of Korea, February 25, 1988, Article 34; **CLA-155**, Korean Government Organization Act, November 19, 2014, Article 38 – social security is a responsibility of the Ministry of Health and Welfare.

<sup>312</sup> **CLA-157**, Korean National Pension Act, Article 3-2.

<sup>313</sup> **CLA-157**, Korean National Pension Act, Article 1.

<sup>314</sup> **CLA-157**, Korean National Pension Act, Article 88(2).

<sup>315</sup> **CLA-157**, Korean National Pension Act, Article 101(2).

NPS has the power to manage and operate, a power originally bestowed on the Minister of Health and Welfare, but delegated by way of Presidential Decree to the NPS.<sup>316</sup> As Korean courts have recognized, the National Pension Fund, “as a “national fund” managed and operated by the Minister of Health and Welfare, one of the heads of central government agencies, falls under the national finance.”<sup>317</sup>

- d. The assets of the National Pension Fund managed and operated by the NPS remain the property of the State.<sup>318</sup> Consequently, the NPS is not subject to corporate taxes, including capital gains taxes, in connection with its management of the Fund.<sup>319</sup>

160. The NPS’s *relations with other bodies* under internal law confirm its position within the Korean government, as the NPS’s own diagram highlights:<sup>320</sup>

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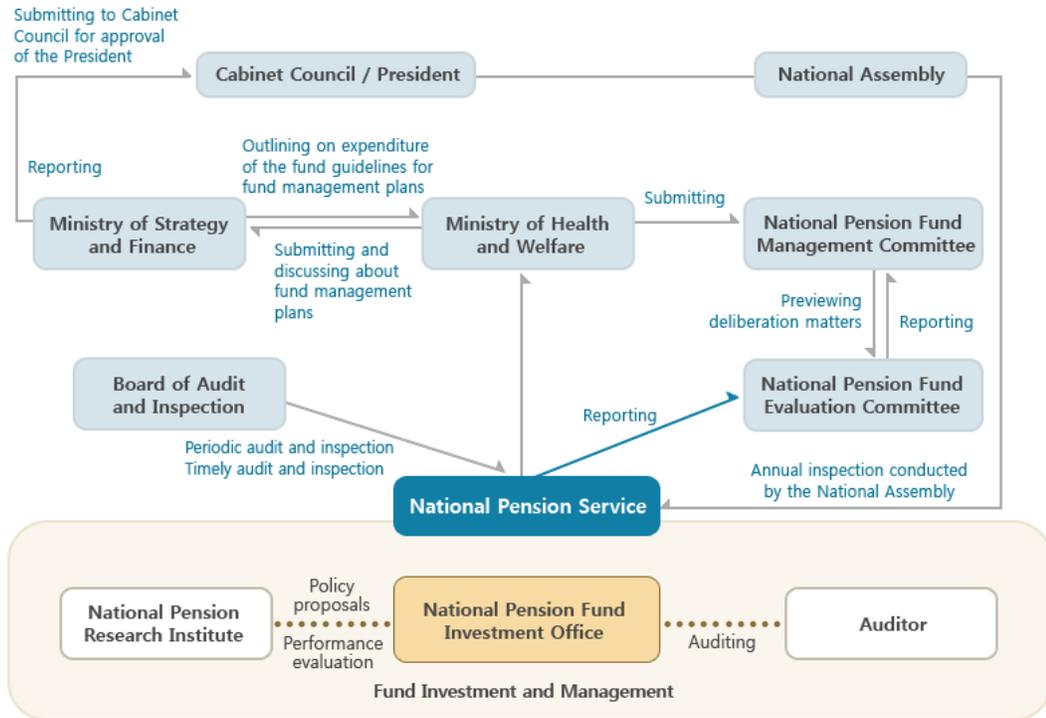
<sup>316</sup> **CLA-157**, Korean National Pension Act, Article 120; **CLA-150**, Enforcement Decree of the National Pension Act, April 16, 2015, Article 76.

<sup>317</sup> **CLA-126**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, August 25, 2015) p. 3.

<sup>318</sup> **CLA-126**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, August 25, 2015) p. 3; **CLA-127**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2015Nu59343 (Seoul High Court, March 9, 2016).

<sup>319</sup> **C-195**, Clarification on Corporate Tax Exemption, NPS Press Release (May 26, 2020).

<sup>320</sup> **C-149**, NPS Website, Fund Governance, accessed September 22, 2015.



For example:

- a. Under the National Pension Act, the Minister for Health and Welfare remains “in charge” of the national pension services provided under the Act, including by the NPS.<sup>321</sup>
- b. The NPS is established “to effectively carry out services commissioned by the Minister of Health and Welfare to attain the purpose set forth in Article 1 [that is, the public purpose of providing national social welfare].”<sup>322</sup>
- c. The entire NPS board is appointed by the Minister of Health and Welfare,<sup>323</sup> the chief executive officer is appointed by the President upon the Minister’s recommendation.<sup>324</sup>

<sup>321</sup> CLA-157, Korean National Pension Act, Article 2.

<sup>322</sup> CLA-157, Korean National Pension Act, Article 24.

<sup>323</sup> CLA-157, Korean National Pension Act, Articles 30(2), 38.

<sup>324</sup> CLA-157, Korean National Pension Act, Article 30(2).

- d. The content of the NPS’s articles of incorporation are prescribed by the National Pension Act,<sup>325</sup> and any amendments to the articles must be approved by the Minister of Health and Welfare.<sup>326</sup> The Minister of Health and Welfare can order the amendment of the articles of incorporation.<sup>327</sup>
- e. The operational and administrative budget of the NPS is provided by the national treasury.<sup>328</sup>
- f. The NPS’s operational plan must be approved by the Fund Operation Committee,<sup>329</sup> part of the Ministry of Health and Welfare, and by the Minister of Health and Welfare.<sup>330</sup> The Fund Operation Committee prescribes the NPS’s operational guidelines,<sup>331</sup> and also determines “matters relating to the details of operation and use of the [National Pension Fund]” and all “other important matters relating to the operation of the Fund.”<sup>332</sup> The Committee is chaired by the Minister of Health and Welfare, and comprises four vice ministers from other ministries, as well as others appointed by the Minister of Health and Welfare.<sup>333</sup>
- g. Once the Fund Operation Committee has approved the operational plan, it must also be approved by the President.<sup>334</sup>
- h. The Minister of Health and Welfare has the power to order the NPS to provide reports and inspect its services or property on demand.<sup>335</sup>

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<sup>325</sup> **CLA-157**, Korean National Pension Act, Article 28.

<sup>326</sup> **CLA-157**, Korean National Pension Act, Article 28(2).

<sup>327</sup> **CLA-157**, Korean National Pension Act, Article 41(3).

<sup>328</sup> **CLA-157**, Korean National Pension Act, Article 87.

<sup>329</sup> **CLA-157**, Korean National Pension Act, Article 107.

<sup>330</sup> **CLA-157**, Korean National Pension Act, Article 41(1).

<sup>331</sup> **CLA-157**, Korean National Pension Act, Article 103.

<sup>332</sup> **CLA-157**, Korean National Pension Act, Article 103.

<sup>333</sup> **CLA-157**, Korean National Pension Act, Article 103(2).

<sup>334</sup> **CLA-157**, Korean National Pension Act, Article 107.

<sup>335</sup> **CLA-157**, Korean National Pension Act, Article 41(3).

- i. The Minister of Health and Welfare appoints the NPS’s auditor.<sup>336</sup> The Minister of Health and Welfare must also approve the NPS’s accounting regulations.<sup>337</sup>
- j. In addition to all of the mechanisms above, the NPS is also subject to the oversight of the National Assembly (the Korean legislature),<sup>338</sup> the Board of Audit and Inspection,<sup>339</sup> and the National Pension Fund Evaluation Committee, part of the Ministry of Health and Welfare,<sup>340</sup> and the general public – as the details of the operation of the Fund are to be published in daily and economic newspapers.<sup>341</sup>

161. *Third*, in response to the functional and structural integration of the NPS under Korean law, which Korea does not, and cannot dispute, Prof. Kim highlights that these features do not “convert” the NPS into an entity within the arbitrary category of entities he asserts constitute “State organs.”<sup>342</sup> Prof. Kim likewise creates a distinction between “macro” and “micro” level oversight – a distinction which has no basis in law, and of which Prof. Kim has no experience in practice as it relates to the NPS.<sup>343</sup>

162. Further, Korea places great weight on the special legal personality of the NPS, a factor which it asserts is “dispositive.”<sup>344</sup> That is clearly wrong. As the commentaries to the ILC Articles make clear – “[i]n 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

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<sup>336</sup> **CLA-157**, Korean National Pension Act, Article 30(2).

<sup>337</sup> **CLA-157**, Korean National Pension Act, Article 42(2).

<sup>338</sup> **CLA-157**, Korean National Pension Act, Article 107(2), (4).

<sup>339</sup> Kim Report, ¶ 69; **SSK-14**, Board of Audit and Inspection Act.

<sup>340</sup> **CLA-157**, Korean National Pension Act, Article 104. The National Pension Fund Evaluation Committee is also referred to as the “National Pension Fund Operational Practices Review Board.”

<sup>341</sup> **CLA-157**, Korean National Pension Act, Article 107(4); **CLA-150**, Enforcement Decree of the National Pension Act, Article 87.

<sup>342</sup> *See, e.g.*, Kim Report, ¶ 7, 27, 47, 49, 56.

<sup>343</sup> Kim Report, ¶¶ 41-43.

<sup>344</sup> SOD, ¶ 268.

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.*<sup>345</sup>

163. Korea also places significance on technical incidents to that personality, including the NPS’s power “to acquire, hold, and dispose of property in its own name,” and that it is “governed by the provisions of civil law.”<sup>346</sup> These features do not undermine the NPS’s status as an organ under Korean law:

- a. While the NPS may technically be empowered to acquire property in its own name, the principal property it administers, the assets of the National Pension Fund, remain State property under Korean law. To that end, Korean courts have determined that the acquisition of securities through the National Pension Fund is an “acquisition by the State” and “the NPS’s transfer of share certificates constitutes the State’s transfer of share certificates.”<sup>347</sup>
- b. As the National Pension Act makes clear, the provisions of the Civil Act pertaining to non-profit incorporated foundations apply to the NPS as a “gap-filling” measure – that is, to the extent the National Pension Act does not prescribe otherwise.<sup>348</sup>

164. Contrary to Korea’s assertion, international investment jurisprudence highlights that the separate legal personality of an entity does not necessitate a finding that it is not a “State organ.” For example, In *MCI*,<sup>349</sup> the tribunal considered the Claimant’s

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<sup>345</sup> **CLA-166**, Commentaries on the ILC Articles, Chapter 2, cmt. 7 (emphasis added).

<sup>346</sup> SOD, ¶ 266.

<sup>347</sup> **CLA-127**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2015Nu59343 (Seoul High Court, March 9, 2016); **CLA-126**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, August 25, 2015), p. 4.

<sup>348</sup> **CLA-157**, Korean National Pension Act, Article 48.

<sup>349</sup> **CLA-179**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007.

argument that the Ecuadorian Instituto Ecuatoriano de Electrificación (INECEL), a national electricity service, was a State organ of Ecuador. Like the NPS, INECEL was established pursuant to its own law, but had separate personality and was “legally independent of the State.”<sup>350</sup> State representatives or delegates constituted a majority of its board and INECEL was “empowered to exercise certain public powers.”<sup>351</sup> The Respondent’s argument that because INECEL “had a separate legal personality, its own capital, and autonomous management, [it] must not be confused with the State”<sup>352</sup> was roundly rejected by the tribunal, which concluded that “INECEL, in light of its institutional structure and composition as well as its functions, should be considered, in accordance with international law, as an organ of the Ecuadorian State.”<sup>353</sup>

165. The cases cited in support by Korea again do not advance its case on the decisiveness of legal personality. In each instance, a range of other circumstances necessitated the cursory analyses and conclusions that the relevant entity was not a State organ:

- a. In *Bayindir*,<sup>354</sup> the tribunal considered the Claimant’s primary position that the relevant acts were taken by the government ministries and then “subsequently implemented by National Highway Authority (“NHA”) [the relevant entity] through contractual means,”<sup>355</sup> noted the limited connections between the NHA and the government entities put forward by the Claimant and concluded that the NHA was not a State organ.<sup>356</sup> The cursory analysis of the *Bayindir* tribunal

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<sup>350</sup> **CLA-179**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 222.

<sup>351</sup> **CLA-179**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 224.

<sup>352</sup> **CLA-179**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 224.

<sup>353</sup> **CLA-179**, *M.C.I. Power Group, L.C. and New Turbine, Inc. v. Republic of Ecuador*, ICSID Case No. ARB/03/6, Award, July 31, 2007, ¶ 225.

<sup>354</sup> **RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009.

<sup>355</sup> **RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 114.

<sup>356</sup> **RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶¶ 118-119.

has been the subject of criticism – for example, in *Paushok*,<sup>357</sup> the tribunal observed that “[h]aving noted that the NHA had a distinct legal personality under the laws of Pakistan, it decided that "(b)ecause of its separate legal status, the Tribunal discards the possibility of treating NHA as a State organ under Article 4 of the ILC Articles.” The simple fact that an institution has separate legal status does not allow one to conclude automatically that that institution is not an organ of the State; in order to reach such a conclusion, a tribunal has to engage in a broader analysis which includes the functions assigned to that entity.”<sup>358</sup> The impugned conduct was nevertheless found to be attributable to the State under ILC Article 8.<sup>359</sup>

- b. In *EDF*,<sup>360</sup> the tribunal again offered no reasoning for its cursory conclusion, save for that the Claimant’s own expert admitted that the relevant entities were not State organs.<sup>361</sup> The impugned conduct was nevertheless found to be attributable to the State under ILC Article 8.
- c. In *Hamester*,<sup>362</sup> the tribunal considered a range of factors, including the legislation under which the Ghanaian Cocoa Board was created,<sup>363</sup> the commercial nature of its separate personality,<sup>364</sup> its commercial function to “trade in cocoa beans,”<sup>365</sup> its obligation to “conduct its affairs on sound

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<sup>357</sup> **CLA-141**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, April 28, 2011.

<sup>358</sup> **CLA-141**, *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. Government of Mongolia*, Award on Jurisdiction and Liability, April 28, 2011, ¶ 583.

<sup>359</sup> **RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 125.

<sup>360</sup> **CLA-103**, *EDF v. Romania*, ICSID Case No. ARB/05/13/, Award, October 8, 2009.

<sup>361</sup> **CLA-103**, *EDF v. Romania*, ICSID Case No. ARB/05/13/, Award, October 8, 2009, ¶ 190.

<sup>362</sup> **RLA-125**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010.

<sup>363</sup> **RLA-125**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 184.

<sup>364</sup> **RLA-125**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 184.

<sup>365</sup> **RLA-125**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 184.

commercial lines,”<sup>366</sup> and the vesting of assets in the Board itself before concluding that it did not meet the criteria of a State organ.<sup>367</sup>

d. In *AMTO*,<sup>368</sup> the tribunal examined the status of Energoatom, a State-owned enterprise, considering the legislation under which it was created, its charter, which emphasized the complete separation of Energoatom from responsibility for the property and obligations of the State, and the Claimant’s contention that its participation in a regulated energy market, before reaching its somewhat cursory conclusion that while the entity was not a State organ, its conduct was nevertheless attributable under the equivalent of ILC Article 5.<sup>369</sup>

166. *Ultimately*, the value of Korea’s selective presentation of cases concerning other entities in different legal and factual contexts is limited. As an illustration, under Korean law, local governments have separate legal personality (though, like the NPS, this does not take the form of an ordinary corporation).<sup>370</sup> Nonetheless, Korea cannot deny that it is responsible for the internationally wrongful conduct of local government authorities (both under the FTA in which local government authorities are expressly mentioned, but also under applicable customary international law).<sup>371</sup>
167. The most valuable precedents clearly derive from the Korean law context, and in particular, other entities in similar legal circumstances to the NPS. Fortunately for the Tribunal, the status of a “public institution,” like the NPS, and with very similar legal characteristics has recently been considered by an investment tribunal constituted under the FTA. In *Dayyani v. Korea*, the tribunal concluded that Korea Asset Management

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<sup>366</sup> **RLA-125**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 185.

<sup>367</sup> **RLA-125**, *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, June 18, 2010, ¶ 185.

<sup>368</sup> **RLA-109**, *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, March 26, 2008.

<sup>369</sup> **RLA-109**, *Limited Liability Company Amto v. Ukraine*, SCC Arbitration No. 080/2005, Final Award, March 26, 2008, ¶¶ 100-102.

<sup>370</sup> **CLA-192**, Local Autonomy Act, Article 3(1).

<sup>371</sup> **CLA-23**, Treaty, Article 11.1(3)(a); **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 6.

Corporation (**KAMCO**) was a State organ, and that its acts were attributable to Korea.<sup>372</sup>

168. Contrary to Korea’s assertions,<sup>373</sup> the NPS and KAMCO and share all of the same features that Korea has asserted are critical to the question of attribution, and in many respects KAMCO is even further from the central State apparatus. For example:
- a. Both the NPS and KAMCO do not qualify as “State organs” pursuant to Prof. Kim’s arbitrary and unsupported definition.<sup>374</sup>
  - b. Both the NPS and KAMCO have separate juristic personality, the power “to acquire, hold, and dispose of property in [their] own name,” to sue and be sued in their own name, and are “governed by civil law” as a gap-filling measure.<sup>375</sup>
  - c. Both the NPS and KAMCO are “public institutions,” and more particularly, fit within the small sub-group of 16 public institutions known as “fund-management-type quasi-governmental institutions.”<sup>376</sup>

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<sup>372</sup> **C-107**, Jerrod Hepburn, *Korea investment treaty arbitrations: a round up of recent development*, IA REPORTER (September 24, 2018); **C-108**, Jerrod Hepburn, *Full details of Iranians' arbitral victory over Korea finally come into view, with arbitrators seeing BIT breach after investment deposit not returned, but disagreeing whether any compensation was warranted*, IA REPORTER (January 22, 2019); **C-105**, Alison Ross & Tom Jones, *Bruising loss for South Korea at hands of Investors*, GAR (June 8, 2018); **CLA-135**, *Republic of Korea v. Dayyani & Ors*, [2019] EWHC 3580 (Comm), December 20, 2019.

<sup>373</sup> SOD, ¶ 270.

<sup>374</sup> KAMCO is not a “constitutional institution,” established under the Government Organization Act, or specifically established as a “central administrative agency.”

<sup>375</sup> **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, March 21, 2012, Article 37(1).

<sup>376</sup> **C-102**, Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release (January 31, 2018). “Market-type” state-owned enterprises like Kangwon Land do not have the same designation (*compare* Kim Report, ¶ 24).

- d. While the chairperson of the NPS’s board is appointed by President, and its directors by the Minister of Health and Welfare,<sup>377</sup> the president and directors of KAMCO are appointed by its general shareholders’ meeting.<sup>378</sup>
  - e. While the NPS is definitively funded by the national treasury since it is established without capital,<sup>379</sup> KAMCO is provided with capital under law and the government “may, when it is deemed necessary,” invest in or finance expenses of KAMCO.<sup>380</sup>
169. Korea refused Mason’s request for a copy of the *Dayyani* decision.<sup>381</sup> Even when requested to produce the decision to the Claimant in the *Elliott* arbitration, Korea refused to comply.<sup>382</sup> Nonetheless, in its Statement of Defence, Korea asserts that the decision was reached on certain basis (without exhibiting a copy of the decision), and that the decision was wrong.<sup>383</sup> That approach is untenable and unacceptable.
170. As noted in the Amended Statement of Claim, KAMCO also made representations to the judicial organs of the United States in the context of State immunity proceedings to the effect that “KAMCO is Treated as a Government Organ Under Korean Law.”<sup>384</sup> Its “overwhelming evidence” in support of that proposition was that:
- a. “KAMCO was created pursuant to a national statute, the KAMCO Act, which specifically determined its mission, regulatory functions, public corporate

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<sup>377</sup> **CLA-157**, Korean National Pension Act, Article 30(2).

<sup>378</sup> **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, March 21, 2012, Article 17(2)-(3).

<sup>379</sup> **CLA-157**, Korean National Pension Act, Article 43.

<sup>380</sup> **CLA-147**, Act on the Efficient Disposal of Non-Performing Assets of Financial Companies and the Establishment of Korea Asset Management Corporation, March 21, 2012, Article 9(1)(3).

<sup>381</sup> Procedural Order No. 5, January 15, 2021, p. 200.

<sup>382</sup> **C-202**, *Elliott Associates v. Republic of Korea*, PCA Case No. 2018-51, Statement of Reply and Defense to Preliminary Objections, July 17, 2020, ¶ 324.

<sup>383</sup> SOD, ¶ 271.

<sup>384</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006), p. 41.

structure, and level of government supervision.”<sup>385</sup> The same is true of the NPS.<sup>386</sup>

- b. “KAMCO is subject to the Framework Act on the Management of Government Affiliated Institutions, which applies only to Korean government agencies.”<sup>387</sup> The same is true of the NPS.<sup>388</sup>
- c. “KAMCO is subject to audit by the Board of Audit and Inspection, the government body responsible for auditing all government agencies, and also subject to annual inspection and special investigation by the National Assembly.”<sup>389</sup> The same is true of the NPS.<sup>390</sup>
- d. “KAMCO is exempt from paying certain taxes, and can be granted special tax relief for its own welfare.”<sup>391</sup> The same is true of the NPS.<sup>392</sup>
- e. “KAMCO's officers are “deemed public officials” and are subject to prosecution under certain provisions of the Korean Criminal Act that apply only to public officials.”<sup>393</sup> The same is true of the NPS.<sup>394</sup>

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<sup>385</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006), p. 41.

<sup>386</sup> **CLA-157**, Korean National Pension Act.

<sup>387</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006), p. 41.

<sup>388</sup> The Framework Act on the Management of Government Affiliated Institutions was repealed and replaced by the Act on the Management of Public Institutions (**CLA-20**, Article 2), which governs public institutions including the NPS.

<sup>389</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006), p. 41.

<sup>390</sup> **CLA-157**, Korean National Pension Act, Article 107(2), (4); Kim Report, ¶ 69; **SSK-14**, Board of Audit and Inspection Act.

<sup>391</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006), p. 41.

<sup>392</sup> **C-195**, Clarification on Corporate Tax Exemption, NPS Press Release (May 26, 2020).

<sup>393</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006), p. 41.

<sup>394</sup> **CLA-157**, Korean National Pension Act, Article 40.

f. “KAMCO’s employees are considered government officials under the Public Service Ethics Act.”<sup>395</sup> The same is true of the NPS.<sup>396</sup>

171. Similar representations were made in respect of Korea Deposit Insurance Corporation (**KDIC**),<sup>397</sup> which also shares all these fundamental legal characteristics with the NPS, including sitting outside Prof. Kim’s arbitrary definition, having separate legal personality, and falling within the small sub-group of “fund-management-type quasi-governmental institutions.”<sup>398</sup> In its response to Mason’s request for documents evidencing further instances in which it has asserted this inconsistent position, Korea refused to produce the documents, yet did not deny that such documents existed.<sup>399</sup>
172. Indeed, there are yet further instances where Korea has asserted that entities with the same characteristics as the NPS are “State organs” to its fellow Contracting Party. In *Peninsula Asset Mgmt. v. Hankook Tire Co.*,<sup>400</sup> the Korean government intervened and made representations to both the U.S. State Department and the United States District Court for the Southern District of New York that the Korean Financial Supervisory Service, then a “public institution” like the NPS,<sup>401</sup> with separate legal personality,<sup>402</sup>

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<sup>395</sup> **CLA-121**, *Murphy v. Korea Asset Management Corporation*, Brief of Defendant-Appellee Korea Asset Management Corporation (2d. Cir. April 7, 2006), p. 41.

<sup>396</sup> **CLA-204**, Public Service Ethics Act. For example, the NPS’s directors are subject to the Public Service Ethics Act under its Articles 3(1)(12) and 3-2(1)(5).

<sup>397</sup> **CLA-110**, *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425 (S.D.N.Y. 2003); **CLA-111**, *Filler v. Hanvit Bank*, 378 F.3d 213 (2d. Cir. 2004).

<sup>398</sup> **C-102**, Designations of Public Institutions for 2018, Ministry of Economy and Finance Press Release (January 31, 2018), p. 6.

<sup>399</sup> Procedural Order No. 5, January 15, 2021, p. 207.

<sup>400</sup> **CLA-180**, *Peninsula Asset Mgmt. (Cayman), Ltd. v. Hankook Tire Co.*, Case No. 5:04 CV 1153, February 1, 2008.

<sup>401</sup> **CLA-205**, Designations of Other Public Institutions for 2007, Ministry of Planning and Budget Press Release (April 11, 2007).

<sup>402</sup> **CLA-206**, Act on the Establishment, etc. of Financial Supervisory Organizations Excerpt, Article 24(2).

the power to acquire, hold, and dispose of property in its own name, to sue and be sued in its own name,<sup>403</sup> and governed by civil law,<sup>404</sup> was a “State organ.”<sup>405</sup>

173. As acknowledged by Mason, the law of State immunity and State responsibility serve different functions on the plane of international law, yet are fundamentally linked – they both “concur as to the operation to bridge the conduct of State organs and instrumentalities to the sovereign.”<sup>406</sup> As such, States “cannot have it both ways.”<sup>407</sup> Korea has not substantively addressed its inconsistent conduct, save to assert baldly that it is “wholly irrelevant,” and the relevant authorities, “inapplicable.”<sup>408</sup>
174. All of these matters demonstrate that the NPS is a “State organ” as a matter of law, and its conduct is accordingly attributable to Korea.
175. However, even assuming the NPS is not a “State organ” as a matter of law, the NPS clearly satisfies the test of an organ *de facto*. As the International Court of Justice has observed, “it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act

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<sup>403</sup> **CLA-173**, *Cancellation of Imposition of Penalty Surcharge, Etc.*, Seoul High Court Decision No. 2013Nu6260, October 18, 2013.

<sup>404</sup> **CLA-207**, *A claim seeking a declaration that the dismissal is null and void*, Seoul High Court Decision No. 2019Na2029554, March 21, 2020.

<sup>405</sup> **CLA-180**, *Peninsula Asset Mgmt. (Cayman), Ltd. v. Hankook Tire Co.*, Case No. 5:04 CV 1153, February 1, 2008.

<sup>406</sup> **CLA-163**, Carlos De Stefano, *Attribution in International Law and Arbitration* (Oxford Univ. Press, 2020), p. 19.

<sup>407</sup> **CLA-163**, Carlos De Stefano, *Attribution in International Law and Arbitration* (Oxford Univ. Press, 2020), p. 25.

<sup>408</sup> SOD, ¶ 270 & n. 531.

through persons or entities whose supposed independence would be purely fictitious.”<sup>409</sup>

176. The functional and structural reality in which the NPS operates, as a result of the legal framework set out above is more than sufficient to demonstrate its complete dependence as a matter of fact. In particular:

- a. The NPS is completely financially dependent on the Korean State apparatus. The funds for the NPS budget are sourced entirely from the State treasury.<sup>410</sup> In turn, the Fund the NPS manages and operates remains State property.<sup>411</sup>
- b. The NPS is completely operationally dependent on the State. In addition to the role of the Ministry of Health and Welfare and other organs in appointing the entire NPS board and in appointing executive positions, the Minister and/or subordinate committees within the MHW approve the operational plan and guidelines in which the NPS must operate, and approve all major operational decisions.<sup>412</sup>

177. Korea has not adduced any evidence of the practical relationship between the NPS and other State organs to rebut the natural inferences that must be drawn from the legal framework. At its highest, Korea offers the assertion from Prof. Kim, who has no personal experience of the NPS’s operations or expertise in that field, that executive oversight “is very limited and indirect.”<sup>413</sup>

178. In reality, the only evidence of the practical relationship between the NPS and other State organs before the Tribunal is the evidence of the President, the Minister and their

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<sup>409</sup> **RLA-105**, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), I.C.J. Judgment, February 26, 2007, ¶ 392.

<sup>410</sup> **CLA-157**, Korean National Pension Act, Articles 43, 87.

<sup>411</sup> **CLA-127**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2015Nu59343 (Seoul High Court, March 9, 2016); **CLA-126**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, August 25, 2015) p. 3.

<sup>412</sup> *See supra* ¶ 160.

<sup>413</sup> SOD, ¶ 274.

respective subordinates' intervention in the NPS's operations for the purpose of furthering their corrupt scheme.<sup>414</sup> That evidence can only support a finding of the NPS's dependence on these other organs.

179. That finding is in no way disturbed by the authorities selectively put forward by Korea, which are readily distinguishable on the facts:

- a. In *Almås*,<sup>415</sup> the tribunal observed that the Claimant had not claimed that ANR, the entity in question, was a State organ under Polish law, and so considered its potential status as a *de facto* State organ.<sup>416</sup> In reaching its conclusion, the tribunal stressed that ANR engaged in the relevant conduct “on its own behalf” and “on its own account,” that it held the relevant “property in its own name,” and had “financial autonomy” given, like the Suez Canal Authority, it “had a private budget and funds.”<sup>417</sup> The tribunal further noted that Poland’s control and supervision of ANR was “limited,” including as it could appoint only two members of the ANR Board.<sup>418</sup> As set out further above, the NPS bears none of these characteristics.
- b. In *Ulysseas*,<sup>419</sup> the relevant entities, unlike the NPS, had “their own assets and resources to meet their liabilities” and “administrative, economic, financial and operational autonomy.” In the interim phase, the Claimant sought to argue in the context of an alleged contractual waiver of treaty rights that the relevant entity *was not* a State organ – and the tribunal’s observations concerning “mak[ing] the State party to contracts signed by the public entity with third

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<sup>414</sup> See § III.A.

<sup>415</sup> **RLA-161**, *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, June 27, 2016.

<sup>416</sup> **RLA-161**, *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, June 27, 2016, ¶ 209.

<sup>417</sup> **RLA-161**, *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, June 27, 2016 ¶¶ 209-210, 213.

<sup>418</sup> **RLA-161**, *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, June 27, 2016 ¶ 213.

<sup>419</sup> **RLA-127**, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, September 28, 2010; **RLA-134**, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, June 20, 2012.

parties” extracted by Korea must be understood in that context.<sup>420</sup> The tribunal’s cursory analysis at the final stage makes no reference to a claim that the entities are *de facto* State organs, and does not consider the applicable test for such organs.<sup>421</sup>

### 3. The NPS Exercised Powers Delegated by the Korean Central Government or Authorities Pursuant to Article 11.1(3)(b) of the FTA and Under Customary International Law

180. In the alternative, Article 11.1(3)(b) provides that measures adopted or maintained by Korea includes measures adopted or maintained by non-governmental bodies in the exercise of powers delegated by central, regional, or local governments or authorities.

181. As set out in the Amended Statement of Claim, and as is clear from the ordinary meaning of the expression, this article prescribes two conditions – that powers have been delegated by the central government to the relevant non-governmental body, and that the conduct arises out of those powers, and not other powers the entity may have arising from its private law capacity (given that it is a non-governmental body).<sup>422</sup> As demonstrated in the Amended Statement of Claim, the relevant powers exercised by the NPS were delegated by the Minister of Health and Welfare to the NPS, including pursuant to the Enforcement Decree of the National Pension Act.<sup>423</sup> The egregious conduct of the NPS and its officials were clearly in exercise of these delegated powers.<sup>424</sup>

182. In its Statement of Defence, Korea asserts that attribution pursuant to Article 11.1(3)(b) of the FTA requires the relevant powers to be “governmental powers,” that is, powers exercised under the aegis of “governmental authority,”<sup>425</sup> a limitation that has no textual basis in the FTA.

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<sup>420</sup> **RLA-127**, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Interim Award, September 28, 2010, ¶¶ 148-163.

<sup>421</sup> **RLA-134**, *Ulysseas, Inc. v. The Republic of Ecuador*, UNCITRAL, Final Award, June 20, 2012; *see also* § III.B.

<sup>422</sup> ASOC, ¶ 148.

<sup>423</sup> ASOC, ¶ 150.

<sup>424</sup> ASOC, ¶ 151.

<sup>425</sup> SOD, ¶ 280.

183. Assuming *arguendo* that “governmental authority” is required under the FTA, Korea mischaracterizes both the relevant test and its application to the conduct the subject of Mason’s claim. The NPS’s management of State property, in the form of the National Pension Fund, for a public purpose, is in no way “purely commercial conduct,” and bears no resemblance to the analogies proffered by Korea.
184. Prof. Kim’s analysis of Korean law offered in support of Korea’s position is conceptually unsubstantiated and in many respects completely irrelevant, given the question is again one of international law. Nonetheless the analysis is also plainly wrong – as the underlying authorities demonstrate, under Korean law, the acquisition of securities through the National Pension Fund is an “acquisition by the State,” “the NPS’s transfer of share certificates constitutes the State’s transfer of share certificates,” and most fundamentally, the legal effect of the NPS’s exercise of voting rights vests in the State under Korean law – “[e]ven if the [NPS] actually exercises the voting rights for the Shares...the legal effect is attributed to the State.”<sup>426</sup>
185. The expressions “governmental authority” and “governmental powers” do not appear in the Treaty, though the expression “governmental authority” appears in the equivalent provision in the ILC Articles, Article 5<sup>427</sup> – to which the non-disputing party submission of the United States refers.<sup>428</sup> As the commentaries to ILC Article 5 make clear, and as Mason highlighted in the Amended Statement of Claim – “of particular importance will be not just the content of the powers, but the *way they are conferred*

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<sup>426</sup> **CLA-126**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2014GuHap9658 (Euijeongbu District Court, August 25, 2015); **CLA-127**, *National Pension Service v. Mayors of Yangju, Pocheon, Namyangju, Chuncheon and Seoguipo*, Decision, Case 2015Nu59343 (Seoul High Court, March 9, 2016). In response, Professor Kim speculates about what the Court meant “though it did not explicitly state as such,” by reference to another case concerning the lease for a golf course to which the Court did not refer and is of no relevance. Kim Report, ¶ 55. Professor Kim also speculates as to whether a claim in relation to the exercise of the state’s voting rights would be an “administrative” or “civil” claim though the decisions cited are in no way analogous even on a cursory review. Kim Report, ¶ 80.

<sup>427</sup> **CLA-166**, Commentary to the ILC Articles, Article 5.

<sup>428</sup> The expression “governmental powers” used in the *travaux préparatoires* is equally undefined. Amongst the varied examples cited by the United States in its non-disputing party submission is the power to “approve commercial transactions.” Given its market-shaping and market-regulating influence, the NPS’s approval or disapproval of commercial transactions is often decisive in practice, as it was in the present case. See US NDP Submission, ¶¶ 4-5.

*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.”*<sup>429</sup>

186. Korea fails to engage properly with any of these elements.
187. *First*, Korea suggests that Mason “focuses unduly on the sources of power granted to the NPS under Korean law”<sup>430</sup> – nonetheless, as the customary international law position illustrates, the way in which powers are conferred on an entity is “of particular importance.” In its non-disputing party submission, the United States equally emphasizes the act of delegation and observes that “[i]f the conduct of a non-governmental body falls outside the scope of the relevant delegation of authority,” such conduct is not captured by Article 11.1.<sup>431</sup>
188. Korea does not, and cannot dispute the governmental source and mode of delegation,<sup>432</sup> including of the powers exercised by the NPS that are impugned in the present case. The conditions upon which the power is delegated also highlight its governmental nature. Unlike commercial actors, the NPS is not free to exercise these powers at its discretion. As set out in the Amended Statement of Claim, the relevant legislation, regulations and guidelines promulgated by the government dictate how the NPS’s management powers may be exercised, including what kinds of assets the NPS may purchase, and in what amounts.<sup>433</sup> In relation to the NPS’s powers in relation to those assets, including voting powers, the guidelines are highly prescriptive. For example, the Voting Guidelines, issued by MHW committee, prescribe forty-two detailed rules on how votes are to be exercised.<sup>434</sup> The Operational Regulations equally dictate which officer or committee of the NPS may exercise voting rights.<sup>435</sup> That voting rights are to be exercised by the Experts Voting Committee, part of the Ministry of Health and

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<sup>429</sup> **CLA-166**, Commentary to the ILC Articles, Article 5, cmt. 6 (emphasis added).

<sup>430</sup> SOD, ¶ 287.

<sup>431</sup> US NDP Submission, ¶ 4.

<sup>432</sup> SOD, ¶ 288.

<sup>433</sup> *See, e.g.*, **C-6**, Management Guidelines, Articles 11(2) and 16; **CLA-151**, Enforcement Rules of the National Pension Fund Operational Regulations, Chapter IX.

<sup>434</sup> **C-75**, Voting Guidelines, Annex 1.

<sup>435</sup> **CLA-151**, Enforcement Rules of the National Pension Fund Operational Regulations, Article 40.

Welfare, in the event of any difficulty or uncertainty, equally demonstrates the governmental nature of the power.<sup>436</sup> As noted above, exercise of that power in respect of the State property in the Fund, pursuant to a determination by the NPS or the Experts Voting Committee, remains an act attributed to the State under Korean law.

189. *Second*, Korea equally downplays the purposes for which the relevant powers are to be exercised, again a consideration “of particular importance.” Korea does not dispute that the powers delegated to the NPS are to be exercised to “serve the public purpose of maximizing the financial welfare of the fund’s beneficiaries: Korean pensioners.”<sup>437</sup> This is the entire *raison d’être* of the powers’ existence and delegation to the NPS – to discharge the government’s social welfare obligations under the Korean constitution to each and to every one of its citizens, by “alleviat[ing] the burden on the insured persons [employees / pensions], especially the burden on the future generation.”<sup>438</sup> This is not merely an additional service the Korean government offers its people – participation is compulsory under the law if the relevant criteria under the National Pension Act are satisfied.<sup>439</sup>
190. *Third*, another consideration of particular importance in assessing whether the relevant powers are “governmental” is “the extent to which the entity is accountable to government for their exercise.”<sup>440</sup> Korea suggests that it in a commercial context it is standard practice to have “checks and balances.”<sup>441</sup> As set out above, the NPS’s management of the National Pension Fund is subject to the strict oversight of the National Assembly (the Korean legislature), the Board of Audit and Inspection, and the National Pension Fund Evaluation Committee, part of the Ministry of Health and Welfare.<sup>442</sup> Pursuant to the National Pension Fund Operational Regulations, the NPS

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<sup>436</sup> C-6, Management Guidelines, Article 17(5); C-75, Voting Guidelines, Article 8(2); CLA-151, Enforcement Rules of the National Pension Fund Operational Regulations, December 28, 2011, Article 40(2).

<sup>437</sup> SOD, ¶ 288.

<sup>438</sup> C-6, Management Guidelines, Article 4.

<sup>439</sup> CLA-157, Korean National Pension Act, Articles 6, 8, 9 and 88.

<sup>440</sup> CLA-166, Commentary to the ILC Articles, Article 5, cmt. 6.

<sup>441</sup> SOD, ¶ 289.

<sup>442</sup> See *supra* ¶ 160.j).

is mandated to report on the exercise of its voting rights to the Fund Operation Committee (which sits above the Evaluation Committee), and to the Minister of Health and Welfare on at least a monthly basis.<sup>443</sup>

191. As the present case demonstrates, that is not some distant, indirect threat. As detailed above, [REDACTED]

[REDACTED]<sup>444</sup> The report of the auditor appointed by the Minister of Health and Welfare is indeed a source of some of the most damaging revelations of misconduct in this case.<sup>445</sup>

192. *Fourth*, as Korea emphasizes, the content of the power itself is also relevant. However, when understood in its proper context, the NPS’s management of State property cannot be considered “purely commercial conduct.” As set out in the Amended Statement of Claim, the NPS is the largest institutional investor in the country with 7% of the total market capitalization of listed Korean companies (valued at over \$581 billion).<sup>446</sup> Korea asserts that the market-shaping and regulating impact of the NPS is somehow analogous to “a private hedge fund, for example, with a large stake in an influential Korean company.”<sup>447</sup> But it is not just the immense size of the NPS, but it is the governmental imprimatur with which the NPS acts, and which it is understood to act in the market, that transforms the nature of its conduct and the relevant powers. As the Fund Management Guidelines recognize: “Because the national pension is *a system for all citizens* and the amount of the Fund accumulation *constitutes a significant part of*

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<sup>443</sup> **R-117**, National Pension Fund Operational Regulations, May 26, 2015, Article 37.

<sup>444</sup> **C-174**, Transcript of Court Testimony of [REDACTED], Case 2017Gohap34-2017Gohap183 (Seoul Central District Court, May 8, 2017), p. 27.

<sup>445</sup> See *supra* § III.B.3.

<sup>446</sup> ASOC, ¶ 156; **C-113**, Chung Seung-hwan and Cho Jeehyun, *NPS raises stakes in Korean Inc., giving it more power to influence companies*, PULSE (February 10, 2020).

<sup>447</sup> SOD, ¶ 290.

*the national economy, it must be managed in consideration of the ripple effect on the national economy and the domestic financial market.”*<sup>448</sup>

193. *Fifth*, as noted in the Amended Statement of Claim, it was precisely the influence arising from these powers that the President and Minister sought to target, and their improper interference and exploitation of these powers affirms their governmental nature.<sup>449</sup>
194. *Sixth*, the authorities cited by Korea are again of no assistance to the Tribunal and bear no resemblance to the present case:
- a. As detailed further above, the tribunal in *Bayindir*<sup>450</sup> was concerned with a contractual dispute between an investor and the Pakistani National Highway Authority. It concluded, *inter alia*, that “Pakistan can reasonably justify the expulsion by Bayindir’s poor performance...with the consequence that the expulsion must be seen in the framework of the contractual relationship, not as an exercise of sovereign power” and that “Pakistan’s contractual explanation was reasonable enough to disprove Bayindir’s allegations in connection with the misuse of the terms of the Contract.”<sup>451</sup> Pakistan was in any event held responsible under the principles of ILC Article 8.<sup>452</sup>
  - b. *Jan de Nul*<sup>453</sup> likewise involved a contractual dispute, between an investor and the Suez Canal Authority (“SCA”), an entity with “an independent budget”

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<sup>448</sup> C-6, Management Guidelines, Article 4 (emphasis added).

<sup>449</sup> ASOC, ¶ 156 (emphasis added); **RLA-160**, *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, April 4, 2016, (“These powers were exercised “to give effect to the” improper and corrupt “superior policy decisions dictated by the higher governmental spheres.”).

<sup>450</sup> **RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009.

<sup>451</sup> **RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶¶ 461, 482.

<sup>452</sup> **RLA-119**, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Award, August 27, 2009, ¶ 125.

<sup>453</sup> **RLA-112**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008.

comprised of “private funds.”<sup>454</sup> The dispute concerned the entry into and performance of a dredging contract, a matter which had been the subject of domestic court proceedings over “about ten years.”<sup>455</sup> In a very brief analysis, the tribunal concluded that the SCA’s “conduct in the course of the performance of the Contract,” including the rejection of a request for extra compensation under the Contract,<sup>456</sup> was not governmental in nature, and was not attributable to the State.<sup>457</sup> The conduct of other entities was nevertheless held to be attributable to Egypt.<sup>458</sup>

#### 4. The NPS’s Internationally Wrongful Conduct was at the Instruction, Direction or Control of the Korean State

195. In the further alternative, Mason’s Amended Statement of Claim demonstrated that the conduct of the NPS in perfecting the corrupt scheme to approve the merger and transfer value to the ■ Family was at the instruction, direction or control of the Korean State further to principles of customary international law, reflected in Article 8 of the ILC Articles.<sup>459</sup> As shown in Section IV.C.1 above, the inclusion of Article 11.1 of the FTA does not displace customary international law rules of State responsibility – any suggestion otherwise is highly “questionable.”<sup>460</sup>
196. Korea’s Statement of Defence denies that the NPS’s conduct was at the instruction, direction or control of the Korean State, including on the basis that “[t]here is nothing to suggest Korea directed or controlled each of the individual votes cast by twelve

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<sup>454</sup> **RLA-112**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶ 161.

<sup>455</sup> **RLA-112**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶ 43.

<sup>456</sup> **RLA-112**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶ 78.

<sup>457</sup> **RLA-112**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶ 169.

<sup>458</sup> **RLA-112**, *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, November 6, 2008, ¶ 175.

<sup>459</sup> ASOC, ¶¶ 157-159.

<sup>460</sup> **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW* (2018), p. 68.

members of the NPS’s Investment Committee.”<sup>461</sup> Korea’s case relies on a clear misapplication of the relevant test to the present circumstances.

197. Perhaps most egregiously and fundamentally, Korea mischaracterizes the scale at which the analysis of the relevant instruction, direction or control in relation to a “specific operation” is required to be established. The concept of a “specific operation” exists in contrast to “general control” or “overall control” of a non-State entity<sup>462</sup> – the latter relevant in the context of a *de facto* organ under Article 4 of the ILC Articles. It does not demand evidence of specific instructions or directions in relation to every action taken by an individual pursuant to that specific operation. A useful analogy can be drawn from international humanitarian law, from which the concept has been generated and explored. Under ILC Article 8, it is not sufficient for a State to have “overall control” over an armed militia, by way of involvement in funding or general planning. The relevant question is whether the State instructed, directed or controlled a specific (military) operation that contravened international humanitarian law. It is absurd to suggest that evidence of instructions or directions to each individual member of a militia to fire upon a specific individual or individuals would be necessary to establish State responsibility for genocide.
198. In the present circumstances, the “specific operation” for the purposes of Article 8 of the ILC Articles, is the NPS’s approval of the Merger. It is patent, from the detail set out in the Amended Statement of Claim and in Sections III.B and III.C above, that the instructions and/or directions issued, and/or the control exercised by the President, the Minister of Health and Welfare, and their respective subordinates in exercise of (and abuse) of their ostensible authority, were clearly aimed at “achieving [that] particular

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<sup>461</sup> SOD, ¶ 294.

<sup>462</sup> **RLA-171**, Csaba Kovács, *ATTRIBUTION IN INTERNATIONAL INVESTMENT LAW* (2018), p. 70 (“What matters is the State’s effective control of the specific operation and not the State’s exercise of overall control over the entity. The latter broader test informs the nature of the entity and may thus weigh in a finding that the entity is a *de facto* State organ under ILC Article 4”).

result,” and did in fact achieve that result.<sup>463</sup> This was not mere “consultation on operation or policy matters” as Korea seems to suggest.<sup>464</sup>

199. The particular means to achieve the result employed by the NPS and its employees, in particular CIO ██████, in furtherance of those instructions and/or directions is irrelevant. In any event, the supervisory Minister and his subordinates clearly understood the interference with the NPS’s processes that was required, including having the Investment Committee decide upon the Merger in contravention of the Voting Guidelines, stacking the Investment Committee, manipulating the materials provided to the Committee and directing the Investment Committee members to vote in favor of the Merger.<sup>465</sup>

**5. There is No Applicable Principle of Customary International Law That Bars State Responsibility for Commercial Acts**

200. Finally, Korea has fabricated a free-standing principle of customary international law that it asserts “arises strictly on the merits as a complete threshold answer to Mason’s claims” – that is, that a State cannot responsible be responsible for what Korea contends is a “purely commercial act.”<sup>466</sup> Put simply, this principle has no basis in the FTA or customary international law. Equally, it has no application to Mason’s claims in relation to the Korean government’s wrongful interference in relation to the Merger.

201. *First*, as Korea appears to acknowledge, the principle it alleges has no basis in the FTA.<sup>467</sup> Indeed, it is inconsistent with the terms of the FTA. The FTA’s scope extends to “measures” and “treatment” attributable to Korea.<sup>468</sup> As the United States has clarified in its submissions on the content of Article 11.1(3), “[t]he text of Article 11.1.3(a) does not draw distinctions based on the type of conduct at issue.”<sup>469</sup> It is

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<sup>463</sup> **CLA-166**, Commentaries on the ILC Articles, Article 8, cmt. 6.

<sup>464</sup> SOD, ¶ 293.

<sup>465</sup> *See supra* § III.B.4.

<sup>466</sup> SOD, ¶ 299.

<sup>467</sup> SOD, ¶ 303.

<sup>468</sup> *See, e.g.* **CLA-23**, Treaty, Articles 11.1, 11.3, 11.4, 11.5.

<sup>469</sup> US NDP Submission, ¶ 3.

patently illogical that the treaty would permit conduct, that on Korea's view, cannot entail a substantive breach of the treaty, to be attributed to it for jurisdictional purposes.

202. *Second*, as explained further above in Section IV.C.1, the position under the FTA mirrors the position under customary international law.<sup>470</sup> In its extract of the commentaries to the ILC Articles, Korea conveniently omits the preceding sentence, cited approvingly in the United States' non-disputing party submission, that "[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*."<sup>471</sup> In support of this proposition, the commentaries note that "[t]he irrelevance of the classification of the acts of State organs as *iure imperii* or *iure gestionis* was affirmed by all those members of the Sixth Committee who responded to a specific question on this issue from the Commission." As the extract continues, "the entry into or breach of a contract by a State organ is nonetheless an act of the State for the purposes of article 4, and it might in certain circumstances amount to an internationally wrongful act."<sup>472</sup> In relation to conduct attributable to the State by virtue of its instruction, direction or control, the commentaries to the ILC Articles clarify that "it does not matter that the person or persons involved are private individuals *nor whether their conduct involves 'governmental activity*."<sup>473</sup>
203. *Third*, the jurisprudence cited by Korea does not support the existence of such a principle, let alone a principle Korea characterizes as "well-established."<sup>474</sup> Korea constructs this principle from a hodge-podge of decisions dealing with the concept of contractual breaches by a State actor – as Korea concedes "[t]he cases expounding this principal refer principally to breaches of contract."<sup>475</sup> Indeed, these authorities stand for the uncontroversial principle that, in the absence of an umbrella clause, a mere contractual breach by a State, without something more, does not in and of itself involve

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<sup>470</sup> See *supra* § IV.C.1.

<sup>471</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 6; US NDP Submission, n. 3.

<sup>472</sup> **CLA-166**, Commentaries on the ILC Articles, Article 4, cmt. 6; see, e.g., **CLA-68**, *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL, Award, August 12, 2016.

<sup>473</sup> **CLA-166**, Commentaries on the ILC Articles, Article 8, cmt. 2 (emphasis added).

<sup>474</sup> SOD, ¶ 303.

<sup>475</sup> SOD, ¶ 303.

a substantive breach of the treaty’s protections.<sup>476</sup> The principle goes no further than that. Korea’s assertion that the complete absence of any authority in support of its radically extended principle “in no way limits the field of commercial conduct to which the principle applies” highlights the fallacy of its claim.<sup>477</sup>

204. In any event, Korea’s application of this new principle relies on a complete mischaracterization of Mason’s claim. Mason’s claim concerns the abuse of authority by the highest powers of the Korean government and their improper interference with governmental process to ensure the transfer of value to the ■ Family. This is not a dispute about “purely commercial conduct,” as set out above in Section IV.C.3, a simple shareholder’s dispute, nor a dispute arising out of Korea’s and/or Mason’s contract with SC&T as its shareholder. Korea’s attempts to reduce the claim to such have no merit.

## **V. KOREA VIOLATED THE FTA’S MINIMUM STANDARD OF TREATMENT AND NATIONAL TREATMENT STANDARDS**

### **A. Mason Did Not Assume the Risk That Korea Would Covertly Interfere with the Merger Through a Corrupt, Criminal Scheme**

205. Unable to dispute the facts of its wrongdoing, Korea seeks to defend the claims on the grounds that, according to Korea, Mason “assumed [...] the significant risk that [the Merger] would be approved[,]”<sup>478</sup> and that Mason itself is to blame for the losses it has suffered as a result of the merger being approved because Mason’s investment was a “speculative gamble.”<sup>479</sup> Korea’s defence is misconceived.
206. *First*, Mason could not possibly have assumed the risk of Korea’s wrongdoing. Mason presumed, as any investor was entitled to expect, that Korea’s government and officials would act in accordance with Korea’s own laws. Mason did not know, and could not have known, that Korea’s President and other officials would secretly subvert the NPS’s vote. These facts only became known to Mason years later, following Korea’s criminal

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<sup>476</sup> As the tribunal in *Almås* summarized, the “question is whether action purportedly taken under a contract is properly referable to it or is a disguised abuse of public authority,” **RLA-161**, *Kristian Almås and Geir Almås v. The Republic of Poland*, UNCITRAL, Award, June 27, 2016, ¶ 282.

<sup>477</sup> SOD, ¶ 303.

<sup>478</sup> SOD, ¶ 314.

<sup>479</sup> SOD, ¶ 6 and § V.A.1.

investigations and prosecution of those involved in the scheme.<sup>480</sup> Thus, Korea cannot seriously suggest that Mason assumed the risk of Korea's officials' criminal misconduct.

207. *Second*, Mason's claim does not arise out of any "bad investment decisions" or concern the materialization of any "ordinary commercial risks."<sup>481</sup> Criminal conduct at the highest levels of the government is not an "ordinary commercial risk," nor is failure to predict such unprecedented conduct a "bad investment decision." Had the Blue House and MHW not interfered with the NPS's vote, the NPS would not have approved the Merger, the Merger would have been rejected,<sup>482</sup> and as demonstrated in Section VI.B below in relation to Mason's loss and damages resulting from Korea's wrongdoing, Mason's investments in SC&T and SEC would have been profitable.

208. *Third*, Korea's reliance on *Maffezini v. Spain*, *Oxus v. Uzbekistan*, *Waste Management v. Mexico II* and *Invesmart v. Czech Republic* is inapposite. Each of these cases concerned claims for compensation for the materialization of known and assumed *ordinary commercial* risks or business mismanagement for which the investor was found to be responsible, not the risk of unknown covert criminal interference by government officials. Specifically:

- a. In *Waste Management II* and *Maffezini*, the tribunals held that the investments failed as a result of "bad business judgments"<sup>483</sup> or the failure of the investors' business plan, rather than any wrongdoing by the respondent States. Mason's losses are not the result of any failures in "business judgment" or the inadequacy of any business plan; they are the result of Korea's criminal interference with the Merger approval process. Thus, unlike *Waste Management II* and *Maffezini*,

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<sup>480</sup> See § III.A above.

<sup>481</sup> SOD, ¶ 309.

<sup>482</sup> SOD, ¶ 309.

<sup>483</sup> **RLA-85**, *Emilio Agustín Maffezini v. Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, November 13, 2000, ¶ 64; **CLA-19**, *Waste Management II v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 114.

this case is not one in which the investor’s poor business judgment is to blame for the losses.

- b. In *Oxus v Uzbekistan*, the claimant knew that its proposed concession scheme would require an amendment of the Uzbek legal framework. The tribunal therefore held that the claimant assumed the risk “of not being able to convince the Uzbek Government of the attractiveness and feasibility of this scheme and/or to convince it to introduce the necessary legal changes.”<sup>484</sup> Here, Mason did not invest in the hope of being able to convince the government to make any changes to the applicable legal framework or to grant Mason any additional rights. Rather, Mason assumed no more than that the Korean government would act in accordance with the law.
- c. Likewise, the facts of this case bear no relation to those of *Invesmart v. Czech Republic*. In that case, the tribunal dismissed the investor’s claim because the investor was seeking compensation for the Czech Republic’s decision not to extend State aid to a Czech Bank. The tribunal held that when Invesmart made its investment, it may have “hoped” that the State would extend State Aid, but assumed the risk that it would not because this was a discretionary policy decision.<sup>485</sup> The tribunal found that this possibility was known and assumed by the investor. Here, Mason was not hoping to receive any kind of help from the Korean government. Instead, Mason merely acted in the reasonable and natural expectation that Korea would not unlawfully interfere with the Merger vote.

209. Thus, none of the awards invoked by Korea support its “assumption of risk” argument.

210. Finally, Korea’s attempt to depict Mason’s investment as a “singularly risky gamble” is inapposite.<sup>486</sup> Even if this characterization were at all accurate (which it is not), the level of commercial risk involved in the investment would not absolve Korea from its liability under the FTA. As noted at paragraphs 207 and 208 above, any conceivable

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<sup>484</sup> **RLA-157**, *Oxus Gold plc v. Republic of Uzbekistan*, UNCITRAL, Final Award, December 17, 2015, ¶ 332.

<sup>485</sup> **RLA-118**, *Invesmart, B. V. v. Czech Republic*, UNCITRAL, Award, June 26, 2009 ¶¶ 338, 347-51, 426-27.

<sup>486</sup> SOD, ¶ 92.

commercial risks that Mason assumed in its investment, including the risk that SC&T's shareholders would approve the merger through a fair vote did not materialize; what did materialize was the Korean government's unlawful interference with the vote.

211. In any event, Mason's investment was not a "speculative gamble." The commercial risks taken by Mason in making this investment were reasonable and based on research, analysis and sound business judgment. It was particularly reasonable for Mason to expect the vote to be rejected in circumstances in which independent shareholder advisories strongly cautioned against the merger, the economic terms of the merger were highly prejudicial to SC&T and the NPS had recently voted against a similar proposed value-extractive merger with respect to its investment in the SK group. In particular:

- a. KGCS, the leading proxy advisor in Korea, and the advisor specifically engaged by the NPS to advise it on the Merger, issued a report urging the NPS to oppose the Merger.<sup>487</sup> The leading international proxy advisor, ISS Special Situations Research, also issued a scathing review of the Merger, advising all SC&T shareholders to vote against it. ISS warned that "[v]oting for this transaction on the current terms, by contrast, permanently locks in a valuation disparity which materially exceeds any short-term downside risk. A vote AGAINST the transaction, despite any short-term downside risk, is therefore warranted."<sup>488</sup>
- b. As Mason's analysts noted in their contemporaneous modeling, the share price of SC&T accounted for no more than the value of SC&T's minority holding in SEC. SC&T's core business in construction and trading had significant value which was not reflected in the share price. In contrast, Cheil was trading at a significant overvalue. In these circumstances, it was reasonable for Mason to expect at least one third of the voting shareholders – acting rationally and in the

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<sup>487</sup> **CLA-14**, ██████████ Seoul High Court, pp. 14-15; **C-12**, Ken Kurson, *Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting*, OBSERVER (July 13, 2015); **C-85**, 황장진, *Pension fund decides on Samsung merger*, KOREA HERALD (July 10, 2015), p. 3.

<sup>488</sup> **C-9**, ISS Report, p. 2 (emphasis added).

ordinary course – to reject the proposed merger, which would have deprived SC&T’s shareholders of the value of their shares.

- c. As demonstrated in Section III.A, this outlook was reinforced by the NPS’s decision with respect to the SK Merger. In that case, less than one month before the Merger, the Experts Voting Committee had rejected the merger proposal between two companies of the SK conglomerate.<sup>489</sup> The Korean government, Mason, and the public all recognized this vote to be a clear precedent for the Merger at the time.<sup>490</sup>

212. Thus, contrary to Korea’s attempts to cast aspersions on Mason and its investment, Mason’s investment was founded on sound analysis undertaken by Mason through its research.

213. For these reasons, Mason did not assume the risks associated with Korea’s wrongdoing. Nor did Mason’s investment fail because of any error in business judgment.

**B. Korea’s Conduct Violates the Minimum Standard of Treatment Under Customary International Law Minimum Standard of Treatment**

214. In its Amended Statement of Claim, Mason established that Korea’s unlawful breached the customary international law minimum standard of treatment, which, as Article 11.5 of the FTA expressly acknowledges, includes the obligations to provide fair and equitable treatment (“FET”) and full protection and security (“FPS”). Korea’s criminal scheme to transfer billions of dollars in value from SC&T’s shareholders such as Mason for the benefit of the ■ Family, driven by corruption, fell far short of Korea’s international legal obligations by any standard.

215. Korea now seeks to escape liability for the consequences of its scheme by arguing that its measures were somehow insufficiently egregious in order to violate the minimum standard of treatment.<sup>491</sup> Korea’s argument is hopeless. Korea’s measures were, by their nature, shocking and egregious. Korea has not sought to put forward, and cannot

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<sup>489</sup> See ¶¶ 45-46 above.

<sup>490</sup> See ¶¶ 45-46 above.

<sup>491</sup> SOD, ¶¶ 311- 314.

advance any rational justification for the Blue House and MHW's interference with the Merger vote, nor are its *ex post facto* attempts to justify the NPS's vote credible.<sup>492</sup>

216. In the sections that follow, Mason corrects Korea's attempts to misconstrue its obligation of fair and equitable treatment expressly under the FTA (*Section 1*), and demonstrates that Korea's conduct in this case amounts to a violations of the customary international law FET standard (*Section 2*) and Korea's obligations to provide full protection and security (*Section 3*).

**1. The Minimum Standard of Treatment Protected Mason's Investment Against Manifestly Arbitrary, Grossly Unjust or Idiosyncratic Acts, Among Other Forms of "Unfair and Inequitable" Conduct**

217. Article 11.5 of the FTA requires Korea to accord Mason's investments "fair and equitable treatment" and "full protection and security" in accordance with customary international law:

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in

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<sup>492</sup> See § III.E above.

accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.<sup>493</sup>

218. Korea has accepted in the parallel Elliott Arbitration that “the applicable formulation of the [FTA]’s minimum standard of treatment is that set out by the Waste Management [II] Tribunal.”<sup>494</sup>

219. The *Waste Management II* tribunal described the minimum standard of treatment as follows:

[T]he minimum standard of treatment of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct that is *arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory* and exposes the claimant to *sectional or racial prejudice* or involves a *lack of due process leading to an outcome which offends judicial propriety*—as might be the case with [ . . . ] a complete lack of transparency and candour in an administrative process.<sup>495</sup>

220. The *Waste Management II* tribunal’s articulation is widely regarded as the applicable standard. As commentators have noted:

[T]he dictum of the Tribunal in *Waste Management II* has achieved wide acceptance by subsequent tribunals as a useful statement of the standard in its contemporary application, irrespective of the position that they have taken on the connection between the treaty standard and general or customary international law.<sup>496</sup>

221. Thus, Korea and Mason appear to agree that, at a minimum, the FET standard under customary international law requires States (i) not to act arbitrarily or grossly unfairly,

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<sup>493</sup> **CLA-23**, Treaty, Article 11.5(1) & 11.5(2)(a)(b).

<sup>494</sup> **C-183**, *Elliott Associates v. Korea*, PCA Case No. 2018-51, Statement of Defence, September 27, 2019, ¶ 495.

<sup>495</sup> **CLA-19**, *Waste Management Inc. v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2014, ¶ 98 (emphasis added).

<sup>496</sup> **CLA-84**, Campbell McLachlan QC, Laurence Shore & Matthew Weiniger QC, *INTERNATIONAL ARBITRATION* (2nd ed, Oxford Univ. Press), ¶¶ 7.175-7.177.

(ii) not to engage in conduct that completely lacks in due process or (iii) not to act discriminatorily.

222. Nonetheless, in its Defence in this case, Korea contends that “it is only in the case of aggravated and flagrant State misconduct” – a “high threshold of severity and gravity,” “gross[] unfair[ness],” “gross denial of justice,” or “manifest arbitrariness” – that a State may be held internationally responsible for breaching the minimum standard of treatment.<sup>497</sup> Korea bases this revision of the applicable standard on the 1927 *Venable* and *Neer* decisions. Multiple tribunals have already rejected this same argument by other respondent States. For example:

- a. The *ADF v United States* tribunal rejected the notion that customary international law is a “static photograph of the minimum standard of treatment of aliens as it stood in 1927.”<sup>498</sup> Rather, “both customary international law and the minimum standard of treatment of aliens it incorporates [ . . . ] are constantly in a process of development.”<sup>499</sup>
- b. The *Mondev* tribunal observed that “to the modern eye, what is unfair and inequitable need not equate with outrageous or the egregious.”<sup>500</sup> It also noted that today’s minimum standard of treatment “cannot be limited to the content of customary international law as recognized in arbitration decisions in the 1920s,”<sup>501</sup> and that it was “unconvincing to confine the meaning of ‘fair and

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<sup>497</sup> SOD, ¶ 348.

<sup>498</sup> **CLA-87**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶ 179.

<sup>499</sup> **CLA-87**, *ADF Group Inc. v. United States of America*, ICSID Case No. ARB(AF)/00/1, Award, January 9, 2003, ¶ 179.

<sup>500</sup> **RLA-31**, *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶ 115-19 (“The United States itself accepted that Article 1105(1) is intended to provide a real measure of protection of investments, and that having regard to its general language and to the evolutionary character of international law, it has evolutionary potential.”), ¶ 119.

<sup>501</sup> **RLA-31**, *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶ 116 (emphasis added); (“that the standard adopted in Article 1105 was that as it existed in 1994, the international standard of treatment, as it had developed to that time [ . . . ] like all customary international law, the international minimum standard has evolved and can evolve . . . [ . . . ] Moreover in their written submissions [ . . . ] both Canada and Mexico expressly accepted this point”), ¶ 124; (“But in its view, there can be no doubt that, by interpreting Article 1105(1) to prescribe the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party

equitable treatment’ . . . of foreign investments to what [that term] – had [it] been current at the time – might have meant in the 1920s when applied to the physical security of an alien,” since BIT’s “have influenced the content of rules governing the treatment of foreign investment in current international law.”<sup>502</sup>

- c. In *Bilcon v Canada* (on which Korea relies), the tribunal rejected Canada’s attempt to raise the applicable standard based on *Neer*, observing that “NAFTA awards make it clear that the international minimum standard is not limited to conduct by host states that is outrageous. The contemporary minimum international standard involves a more significant measure of protection.”<sup>503</sup>
- d. The *Pope & Talbot v. Canada* tribunal also interpreted “Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be ‘egregious’, ‘outrageous’ or ‘shocking’ or ‘otherwise extraordinary.’”<sup>504</sup>
- e. Even the *Glamis* tribunal (on whose decision Korea relies, but which has been criticized by other tribunals)<sup>505</sup> acknowledged that “it is entirely possible,

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under NAFTA, the term ‘customary international law’ refers to customary international law as it stood no earlier than the time at which NAFTA came into force.”), ¶ 125.

<sup>502</sup> **RLA-31**, *Mondev v. United States*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, ¶¶116-117.

<sup>503</sup> **CLA-3**, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶ 435.

<sup>504</sup> **CLA-12**, *Pope & Talbot Inc. v. The Government of Canada*, UNCITRAL, Award on the Merits, April 10, 2001, ¶ 118.

<sup>505</sup> **CLA-16**, *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23 Award, June 29, 2012, ¶ 216; **CLA-3**, *Clayton and Bilcon of Delaware, Inc. v. Government of Canada*, UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, March 17, 2015, ¶¶ 434-435.

however that, as an international community, we may be shocked by State actions now that did not offend us previously.”<sup>506</sup>

223. Faced with the overwhelming weight of authority, Korea argues that the Tribunal should disregard the decisions of prior tribunals because those decisions are not acceptable sources of international law.<sup>507</sup> This contention too is without merit. The decisions of tribunals interpreting the same customary international law FET standard recorded in other treaties (such as in NAFTA) in substantially similar terms are valuable and persuasive sources of guidance for the interpretation of the standard under the FTA:
- a. As acknowledged by Korea and as explained by the United States in its Non-Disputing Party Submission, “decisions of international courts and arbitration tribunals interpreting ‘fair and equitable treatment’ as a concept of international law [ . . . ] can be relevant for determining ‘State practice’ when they include an examination of such practice.”<sup>508</sup>
  - b. A recent six-year study of the International Law Commission on the accepted sources of customary international law noted that the decisions of international courts and tribunals are acceptable sources for determining customary international law, and indeed offer “valuable guidance” in this regard.<sup>509</sup>
  - c. Similarly, Prof. Reisman has explained that “[w]hen parties to a treaty agree that a tribunal may render binding decisions on the interpretation or application of that treaty, the decisions of that tribunal constitute, for the States concerned,

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<sup>506</sup> **RLA-48**, *Glamis Gold, Ltd. v. United States of America*, UNCITRAL, Award, June 9, 2009, ¶ 627.

<sup>507</sup> SOD, ¶ 334.

<sup>508</sup> SOD, ¶ 359; US NDP Submission, Article 11.5, ¶ 15 (internal citation omitted).

<sup>509</sup> **CLA-196**, International Law Commission, International Law Commission Report on the Work of the Seventieth Session (A/73/10) (2018), p. 149 (“Decisions of courts and tribunals on questions of international law, in particular those decisions in which the existence of rules of customary international law is considered and such rules are identified and applied, may offer valuable guidance for determining the existence or otherwise of rules of customary international law”).

both State practice and—thanks to the requirement of explicit ratio-cination in terms of international law—*opinio juris*.”<sup>510</sup>

224. For these reasons, Korea’s attempt to overstate the threshold for violations of the customary international law FET standard are without merit.
225. In any event, it is unclear how bribery and corruption at the highest levels of the government for the benefit of local power players and to the detriment of foreign investors is not egregious, grossly unfair and manifestly arbitrary even under the more stringent standard put forward by Korea.
226. Finally, Korea contends Article 11.5 is not applicable in this case because Mason was not accorded any “treatment” by Korea. This argument too is misconceived.
227. *First*, as explained in Mason’s Amended Statement of Claim,<sup>511</sup> the word “treatment,” read in accordance with its ordinary and natural meaning includes any measure that has an effect upon investors or their investments.<sup>512</sup> As the *Corn Products v Mexico* tribunal noted, any other interpretation “would be the triumph of form over substance.”<sup>513</sup> Korea’s conduct clearly had a severe economic impact on Mason and its investments in the Samsung Shares, as Mason has already established and addresses further in Section VI below.<sup>514</sup>
228. *Second*, even if the word “treatment” were to be read restrictively as Korea suggests, Korea cannot escape the fact that the singular intent of the Blue House and MHW’s scheme was to deprive investors in SC&T, such as Mason, of billions of dollars in value for the benefit of the ■■■ Family.<sup>515</sup> The harm to Mason was both an inevitable and necessary consequence of the Blue House and MHW’s unlawful interference with the

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<sup>510</sup> **CLA-168**, W. Michael Reisman, *Canute Confronts the Tide: States versus Tribunals and the Evolution of the Minimum Standard in CUSTOMARY INTERNATIONAL LAW*, 30 ICSID Review 616-622 (Fall 2015).

<sup>511</sup> ASOC, ¶ 220.

<sup>512</sup> **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 119.

<sup>513</sup> **CLA-6**, *Corn Products International, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, January 15, 2008, ¶ 119.

<sup>514</sup> See § VI.A below.

<sup>515</sup> See ¶ 133 above.

NPS's vote, and indeed was the very objective of that conduct. Thus, the NPS's vote was abused and subverted specifically in order to carry out the scheme, to the detriment of Mason and its investment. For this reason, Korea cannot absolve itself from liability on the basis that the NPS was, under normal circumstances, entitled to vote its shares without regard for Mason's interests.

229. *Third*, there is substantial evidence that Korea in fact knew that Mason, among other foreign shareholders in SC&T, would be harmed by its scheme and that this may give rise to ISDS claims. For example:

- a. The Blue House's view that "the National Pension Service should be actively used against overseas hedge funds' aggressive attempts to interfere in management rights."<sup>516</sup>
- b. Various Blue House documents considered how to "defend management rights against overseas hedge funds," and even recorded that the "NPS should be actively utilized against aggressive management right interference by foreign hedge funds."<sup>517</sup>
- c. In early July 2015, CIO ██████ called ██████████, Senior Secretary for Economic Affairs at the Blue House, and told him that "the MHW is pressuring me to decide on the Samsung Merger in the Investment Committee instead of

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<sup>516</sup> C-20, Myo-Ja Ser, *Park's paper trail grows longer, more detailed, Korea*, JOONGGANG DAILY (July 21, 2017), p. 1.

<sup>517</sup> C-178, Park Su-hyeon, *Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)*, YTN (July 20, 2017), p. 1); see also C-179, Jeong Si-haeng, *[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including 'Fostering Conservative Organization' 'Intervention in the NPS's Voting Rights,'* CHOSUN BIZ (July 20, 2017), p. 2.

sending it to the Experts Voting Committee. I am worried that we may be enmeshed in an Investor-State Dispute.”<sup>518</sup>

230. Accordingly, contrary to Korea’s arguments, Korea’s measures clearly did amount to “treatment” of Mason and its investment.

**2. Korea’s Conduct Amounts to Unfair and Inequitable Treatment, in Violation of the MST on Multiple Counts**

231. Korea’s conduct at issue in this case is unfair and inequitable by any standard.

232. As Mason established in its Amended Statement of Claim and in Section III above, the facts giving rise to these claims have led to the impeachment of President [REDACTED], to the criminal convictions of the Korean officials involved and their sentencing to lengthy custodial sentences. The NPS has self-investigated its conduct and confirmed that its voting procedures were subverted, its financial analyses of the terms of the Merger included a “fabricated synergy effect,”<sup>519</sup> and its personnel was ordered to destroy the documentation relating to the calculation of the Merger ratio and synergies immediately before the prosecutors raided the NPS’s offices.<sup>520</sup> In these circumstances, Korea cannot seriously contend that its conduct was fair or equitable.

233. In the sections that follow, Mason addresses Korea’s attempts to deny that its conduct was arbitrary and grossly unfair, lacked completely in due process and transparency, and was discriminatory against Mason and its investments.

a. Korea’s Interference with the Merger Was Arbitrary and Grossly Unfair

234. Korea does not dispute the ICJ’s definition and guidance on what amounts to “arbitrary” conduct, namely that “[a]rbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law [ . . . ]. It is a wilful disregard of due process

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<sup>518</sup> CLA-15, [REDACTED] Seoul High Court, p. 88-89 (emphasis added). See also C-96, Don-seop Lee, *Why Blue House Considered ISD Prior to Samsung Merger*, BUSINESS WATCH (June 15, 2017), p. 2.

<sup>519</sup> C-26, NPS Audit of SC&T-Cheil Merger, p 2.

<sup>520</sup> C-26, NPS Audit of SC&T-Cheil Merger, p. 3; see ¶ 80 above.

of law, an act which shocks, or at least surprises, a sense of judicial propriety.”<sup>521</sup> However, ignoring the fact that its officials’ conduct breached Korea’s own criminal laws and has given rise to numerous criminal convictions and custodial sentences, Korea claims that (i) Mason has failed “to prove that the alleged conduct of Ms. ■■■, Mr. ■■■ or any officials of the Blue House or the MHW was arbitrary,”<sup>522</sup> and (ii) the NPS’s decision on the vote “was made for legitimate economic purposes, consistent with NPS policies and procedures.”<sup>523</sup> Neither argument passes muster.

235. *First*, for the reasons set out in Section III.B above, Mason has amply satisfied its burden of proving that the conduct of President ■■■, Minister ■■■ and all other government officials convicted of criminal offenses was “arbitrary.” None of Korea’s attempts to distance itself from the findings of its own courts or the NPS’s audit of its conduct, or to suggest benign explanations for its officials’ conduct, is credible or reconcilable with the evidence (which has only grown with disclosure).
236. President ■■■’s and Minister ■■■’s interference with the NPS’s vote in order to ensure that the Merger would be approved was dictated by their desire, fueled by corruption, to benefit the ■■■ Family to the detriment of SC&T’s foreign shareholders. The Korean courts have described the Merger as the most important piece in Samsung’s succession plan.<sup>524</sup> They have also found that President ■■■ was bribed by ■■■ for her support to that same succession plan.<sup>525</sup> Specifically, the Seoul High Court found, in no uncertain terms, that “[t]here was a quid pro quo relationship between the funding [1.6 billion won] that ■■■ and others provided . . . and his implicit request for assistance with [ . . . ] inheriting control of the group; and overcoming the obstacles posed to management by foreign investors.”<sup>526</sup> The most recent indictment of ■■■, produced

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<sup>521</sup> **CLA-104**, *Elettronica Sicula SpA (ELSI) (United States v. Italy)*, ICJ Judgment, July 20, 1989, ¶ 128.

<sup>522</sup> SOD, ¶ 356.

<sup>523</sup> SOD, ¶ 354.

<sup>524</sup> **CLA-15**, ■■■ Seoul High Court, p. 86 (“[T]he Merger, which is considered to be the most essential piece of the succession plan, thus was implemented.”).

<sup>525</sup> ASOC, ¶ 69.

<sup>526</sup> **C-106**, Kim Min-kyoung and Ko Han-sol, *Appeals Court sentences Park Geun-hye to 25 years and fine of 20 bil. won*, HANKYOREH (August 25, 2018), p. 2.

against Korea’s objections through disclosure, further explains that the corrupt *quid pro quo* relationship between the █████ Family and President █████ had been set into motion before the Merger with the specific aim of enlisting President █████’s assistance in approving it. More specifically, █████ and his associates informed President █████ of their “intent” to sponsor a horseback riding organization of importance to the President and to offer “financial support” to one of her associates “in order to induce the President’s cooperation” in support of the Merger.<sup>527</sup> Korea’s current president, █████ has also confirmed that Minister █████ acted wrongfully and “at the best of the Blue House” to “force an approval vote for the [M]erger.”<sup>528</sup> For these reasons, the Tribunal should reject Korea’s attempts to deny that President █████, Minister █████ and the other officials’ involved acted on the basis of legal standards or for legitimate purposes. The evidence that such conduct consisted of egregious and illegal acts designed to favor the interests of █████ to the detriment of SC&T’s shareholders is overwhelming, as Mason explained in detail in Section III above.

237. *Second*, for the reasons set out in Section III.B above, the Tribunal should reject Korea’s attempts to justify the NPS’s conduct and vote on an *ex post facto* basis. The evidence is clear that NPS’s vote in favor of the Merger lacked any legitimate purpose and bears all of the hallmarks of arbitrariness:

- a. The NPS knew that the Merger approval would cause the NPS, and thus Korea’s pension-holders, a loss of at least KRW 2 trillion (\$1.6 billion) even under the manipulated Merger benchmark ratio.<sup>529</sup> Thus, at the MHW’s behest, the NPS Research Team was forced to fabricate synergies in order to disguise the losses that the NPS and other SC&T’s shareholders would suffer.<sup>530</sup>
- b. The NPS’s vote was induced by the fraudulent modelling of its Research Team, as the minutes of the NPS Investment Committee meeting approving the Merger show and as the Korean courts have confirmed. The record is clear that █████

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<sup>527</sup> C-188, █████ Indictment.

<sup>528</sup> C-168, Oh Won-seok, *Moon Jae-in: Grounds for Impeachment Have Become Clearer with Special Investigation*, JOONGANG ILBO (March 6, 2017).

<sup>529</sup> CLA-14, █████ Seoul High Court, p. 56.

<sup>530</sup> CLA-13, Prosecutor v. █████, pp. 14-15, 53, 62.

[REDACTED]

[REDACTED] <sup>531</sup> [REDACTED]

[REDACTED]

[REDACTED] Therefore,

Korea’s assertion that the NPS Investment Committee voted in support of the Merger for “legitimate economic purposes” falls to be rejected.

- c. Korea subverted the NPS’s own rules that were in place in order to protect against this type of interference. At the MHW required, the Experts Voting Committee was prevented from voting on the Merger because the MHW and CIO [REDACTED] knew that the Experts Committee would have rejected the Merger (*see* Section III.B.2 above).
  
- d. The MHW’s conduct, and the Investment Committee’s vote, violated the NPS’s rules, including Article 4 of the NPS’s Management Guidelines, under which the MHW was required to “operate the fund in compliance with” principles of profitability, stability, public interest, liquidity, and management independence.<sup>532</sup> Further, Article 34 of Annex I to the Voting Guidelines expressly required the NPS to vote “against” any merger proposal that could reasonably have been expected to damage shareholder value.
  
- e. The arbitrariness and impropriety of Korea’s conduct is also underscored by the evidence that the NPS sought to cover its tracks (*see* Section III.D above). For example, had the NPS’s decision been at all justifiable, [REDACTED]  
[REDACTED]  
[REDACTED] <sup>533</sup> nor would the NPS

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<sup>531</sup> C-145, Unedited Minutes of the Investment Committee Meeting, July 10, 2015, pp. 5, 7-9.  
<sup>532</sup> C-6, Management Guidelines, Article 4.  
<sup>533</sup> Cf. C-145, Unedited Minutes of the Investment Committee Meeting, July 10, 2015 with R-201, NPSIM Management Strategy Office, 2015-30<sup>th</sup> Investment Committee Meeting Minutes, July 10, 2015.

have needed to destroy the documents relating to the calculation of the merger ratio and synergies immediately before prosecutors raided the NPS's offices.<sup>534</sup>

238. Korea's actions are manifestly arbitrary and egregious. None of Korea's attempts to justify its actions *ex post facto* or provide a false narrative that its officials acted for any proper reasons has any merit. Korea's measures amount to violations of the minimum standard of treatment under customary international law, including the fair and equitable treatment standard.

b. Korea's Acts Were Completely Lacking in Due Process, Including for Total Lack in Transparency and Candor in the Administrative Process

239. As Mason explained in its Amended Statement of Claim, customary international law requires that any form of government decision-making in which the State's decisions affect the rights of the investor or the investment be adopted in accordance with "due process."<sup>535</sup> Due process is absent where the decision-making completely lack candor or transparency, or the administrative process is otherwise unfair. Similarly, due process is violated where a State bases its decisions on inappropriate or irrelevant considerations.<sup>536</sup>

240. Despite all the evidence, Korea argues that the "vote was duly considered by the NPS's Investment Committee in accordance with the Fund Operational Guidelines and Voting Guidelines."<sup>537</sup> However, as demonstrated in Section III.B above, the evidence of Korea's willful and whole disregard of proper procedure (including documents produced by Korea in disclosure) is conclusive. In short:

- a. The NPS's procedures required the Experts Voting Committee to vote on the Merger. As explained in Section III.B.2, the Management Guidelines mandated a vote by the Experts Voting Committee. Those guidelines were followed by

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<sup>534</sup> C-26, NPS Audit of SC&T-Cheil Merger; see ¶ 80 above.

<sup>535</sup> CLA-201, Andrew Newcombe and Lluís Paradell, *Chapter 6 – Minimum Standards of Treatment in LAW AND PRACTICE OF INVESTMENT TREATIES*, p. 245.

<sup>536</sup> CLA-201, Andrew Newcombe and Lluís Paradell, *Chapter 6 – Minimum Standards of Treatment in LAW AND PRACTICE OF INVESTMENT TREATIES*, p. 245.

<sup>537</sup> SOD, ¶ 354.

the NPS with respect to the SK Merger vote just one month prior when the Experts Voting Committee rejected the Merger in question.<sup>538</sup>

- b. All the main actors involved knew that they were breaching the proper and legally mandated voting procedures, and that the failure to follow the proper procedure was the result of the Korean government's interference.<sup>539</sup> Acknowledging the gross impropriety of the MHW's subversion of the NPS's proper procedure, the MHW sought to limit any discussion of its interference within the NPS. As the Korean courts have found, when CIO █████ asked whether he could relay to his team that the derogation from the proper procedure was due to pressure from the MHW, MHW Pension Bureau Chief █████ made clear that this should not be discussed, even if it was an open secret within the NPS.<sup>540</sup>
- c. The Korean government suppressed and neutralized all attempts to resist its subversion of the NPS's voting process. When CIO █████ made a final attempt to persuade MHW Pension Bureau Chief █████ that the vote should be put to the Experts Voting Committee, the Bureau Chief ordered everyone present during the discussion out of the room and made it clear that it was Minister █████'s order to have the Investment Committee approve the Merger and, as a result, the order had to be executed.<sup>541</sup> When the Chairman of the Experts Voting Committee decided to call a meeting of the Experts Voting Committee to discuss the Merger, after it had already been approved, Minister █████, with the help of two MHW officials, silenced any dissent.<sup>542</sup>
- d. The subversion of the NPS internal processes permeated every aspect of the decision-making process, including the calculation of the benchmark Merger ratio and the purported synergy effect of the Merger.<sup>543</sup> The NPS Research

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<sup>538</sup> See § III.B.2 above.

<sup>539</sup> See § III.B.2 above.

<sup>540</sup> **CLA-14**, █████ Seoul High Court, pp. 14, 80. See ¶ 42 above.

<sup>541</sup> **CLA-14**, █████ Seoul High Court, pp. 31-32. See ¶ 53 above.

<sup>542</sup> **CLA-14**, █████ Seoul High Court, pp. 41-42. See ¶¶ 69-72 above.

<sup>543</sup> See ¶¶ 57-61 above.

Team was not free to calculate these figures independently. When the benchmark merger ratio calculated by the NPS Research Team was not sufficient to offset the losses caused by the Merger, CIO █████ ordered the team to fabricate synergies notwithstanding the objections of the Research Team that such synergies could not rationally be justified.<sup>544</sup>

241. Further, as explained in Section III above, Korea’s subversion of the NPS procedures was anything but transparent. The existence and extent of Korea’s misconduct was only revealed later, through NPS’s internal audit and the criminal trials of the Government officials and Samsung executives involved in the corrupt scheme. Korea’s lack of transparency had real consequences for Mason. As Mr. Garschina explains in his Fourth Witness Statement: “We did not foresee the possibility that our investment thesis would be flouted by a criminal scheme. Had we known, or even suspected, that, we would not have invested hundreds of millions of our investors’ money in Samsung.”<sup>545</sup>

242. For these reasons, Korea’s gross due process violations and complete lack of transparency in its decision-making amount to further violations of Korea’s obligation to treat Mason’s investment in accordance with the minimum standard of treatment under the Treaty.

c. Korea Discriminated Against Mason and its Investment

243. Finally, as the *Waste Management II* tribunal explained, treatment that “is discriminatory and exposes the claimant to sectional or racial prejudice” falls below the

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<sup>544</sup> See ¶ 61 above.

<sup>545</sup> Garschina, ¶ 16, CWS-7.

minimum standard of treatment.<sup>546</sup> In light of all the evidence, Korea cannot credibly deny that the discriminatory nature of its conduct also falls foul of the Treaty's standard.

244. As established in Section III above (and addressed in Section V.C. below with respect to Korea's breaches of the National Treatment standard), the evidence shows that:

- a. Korea saw the Merger as a battleground between (i) foreign investors, which the MHW viewed as "predatory" entities, and (ii) domestic companies.
- b. Minister █████ and CIO █████'s conduct was animated by their anti-foreign views. As the Seoul District Court determined in its decision to convict them, Minister █████ and CIO █████ were both driven by strong anti-foreign sentiment at the time of the Merger.<sup>547</sup>
- c. After the Merger was accomplished, President █████ explicitly admitted that she had interfered with the Merger because she considered that "[t]he corporate governance of Samsung Group is vulnerable to threats from foreign hedge funds [ . . . ] a crisis of Samsung Group is a crisis of the Republic of Korea."<sup>548</sup> On July 27, 2015, she reiterated the message that it was necessary "to come up with systematic countermeasures against foreign capital."<sup>549</sup> Thus, in the eyes of President █████ and the Korean government, Samsung and the Republic of Korea were two sides of the same coin and foreign investors were an obstacle to eliminate.
- d. The Korean government found support among those seeking to influence Korean shareholders in SC&T by expressing overt prejudice and discrimination against American investors. For example, █████, Chairman of the Korean Financial Investment Association, publicly stated that a vote against the

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<sup>546</sup> See also ASOC, ¶¶ 193-195.

<sup>547</sup> **CLA-13**, Prosecutor v. █████, pp. 56, 65-67 (when discussing the grounds for sentencing, the Court factored that "there was a strong public sentiment in the midst of the controversy over the national wealth outflow by the foreign speculative fund that NPS should play a role of the so-called 'white knight'" p. 66, and that there was "the public expectation for NPS to counter attacks from the foreign speculative fund." p. 67).

<sup>548</sup> **CLA-15**, █████ Seoul High Court, p. 102.

<sup>549</sup> **CLA-15**, █████ Seoul High Court, pp. 92-93.

Merger would be “akin to surrender to a foreign ‘vulture’ fund.”<sup>550</sup> Further, multiple Korean press outlets sought to explain away ISS’s negative report on the Merger, suggesting that “ISS, like Elliott, is founded upon Jewish money [ . . . ] ISS’s opposition to the merger can be interpreted along the lines of Jewish alliance,” and “[t]he fact that Elliott and ISS are both Jewish institutions cannot be ignored[.]”<sup>551</sup>

245. Korea attempts to explain all of this evidence away, and to dismiss its officials’ blatant and intentional discrimination as somehow warranted by Elliott’s (not Mason’s) allegedly aggressive investment approach.<sup>552</sup> Korea’s argument is smokes and mirrors. For one, the evidence is clear that Korea’s interference with the Merger vote was not some misguided attempt to protect Korea’s national interests, but criminal favoritism for the benefit of █████ Family paid for by bribes and other favors. And even assuming that Korea’s actions were protectionist and not simply criminal, Korea offers no basis (other than speculation not borne out by the evidence) for subjecting Mason to the same treatment as Elliott. Contrary to Korea’s theories, Mason is unrelated to Elliott and did not coordinate its investment with Elliott.<sup>553</sup> Nor does Mason adopt the same investment strategy or philosophy. Indeed, Korea adduces no evidence that Mason in any way tried to promote an “outflow of national wealth” from Korea.<sup>554</sup>
246. For these reasons, none of Korea’s attempts to deny that it breached the minimum standard of treatment by acting discriminatorily against Mason and its investments has any merit.

### 3. Korea’s Central Involvement in the Criminal Scheme Against SC&T’s Shareholders also Amounts to Violations of the FPS Standard

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<sup>550</sup> C-8, Gee-hyun Suk, *Hwang defends Samsung against ‘vulture’ fund*, KOREA HERALD, (June 14, 2015), p. 1.

<sup>551</sup> C-12, Ken Kurson, *Spat Between Samsung and NYC Hedge Fund Takes Nasty Detour Into Jew-Baiting*, OBSERVER (July 13, 2015), p. 3.

<sup>552</sup> SOD, ¶ 435.

<sup>553</sup> See § II.B above; see also Garschina, ¶ 11, CWS-7.

<sup>554</sup> CLA-13, Prosecutor v. █████, pp. 16-17, 55-56; CLA-14, █████, Seoul High Court, pp. 84-85.

247. As Mason established in its Amended Statement of Claim, Korea’s measures also fell short of the minimum standard of treatment because they amounted to a failure to accord Mason’s investments “full protection and security,” as expressly required by the Treaty.<sup>555</sup> Far from protecting Mason and its investments from the criminal scheme instigated by the █████ Family, Korea, through the Blue House, MHW and various high ranking officials played a central and determinative role in the scheme by subverting the Merger vote. Faced with these facts, Korea seeks to argue that the FPS standard does not extend beyond the protection of physical assets, and that Korea’s failings in this case do not amount to a sufficiently grave or manifest lack of diligence in the protection of Masons’ investments. Korea’s defences are without merit.

a. The FPS standard requires Korea to protect all covered investments under the FTA, not only physical assets

248. Contrary to Korea’s contentions, neither the FTA nor international law restricts the FPS standard to the provision of ‘physical security’.

249. *First*, the FTA contains no language limiting the FPS standard to physical security. In the absence of specific limiting language (such as, for example, the language found in the Comprehensive Economic and Trade Agreement (“CETA”), which specifically states that the FPS standard under CETA refers to the obligation relating to the “*physical security of investors and covered investments*”),<sup>556</sup> there is no reason why the FPS standard should not extend to any measure that deprives an investment of protection and security, as several tribunals have confirmed.<sup>557</sup>

250. *Second*, contrary to Korea’s argument, the reference to “the level of police protection required under customary international law” under the FTA<sup>558</sup> does not limit the FPS

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<sup>555</sup> See ASOC, § V.B.6.

<sup>556</sup> See **CLA-189**, CETA, Article 8.10(5), which provides that the FPS standard “refers to the party’s obligations relating to the *physical security of investors and covered investments*” (emphasis added).

<sup>557</sup> **CLA-100**, *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, ¶ 612 (Kühn C, Schwebel & Hándl (dissenting) (CME I); **CLA-92**, *Azurix Corp v Argentina*, ICSID Case No ARB/01/12, Award, July 14, 2006, ¶ 406; **CLA-5**, *Compañía de Aguas del Aconquija SA and Vivendi Universal v Argentina*, ICSID Case No ARB/97/3, Award, August 20, 2007, ¶ 7.4.15.

<sup>558</sup> **CLA-23**, Treaty, Article 11.5.2(b).

standard to physical security either. Korea’s own citations to dictionary definitions of “police” undermine its argument. None of those definitions limits the meaning of “police” to the force responsible solely for the protection of “physical property.” To the contrary, the OED, for example, defines “police” as “the civil force of a national or local government, responsible for the prevention and detection of crime and the maintenance of public order and enforcing the law, including preventing and detecting crime.”<sup>559</sup> The definition makes no reference to the police being responsible solely for the protection of “physical” property or persons. Korea’s own investigation and prosecution of the criminal scheme at issue in this case – obviously not limited to “physical” property or assets – is a quintessential exercise of the police powers of the State and further undermines Korea’s argument.

251. *Third*, contrary to Korea’s contentions,<sup>560</sup> there is no established rule of customary law limiting the full protection and security standard to physical assets. Rather, tribunals have noted that there is no reason in principle why the standard should not extend to the security of non-physical assets, especially when the applicable treaty protects covered investments that include intangible assets. For example, the *National Grid v Argentina* tribunal, in examining a claim under a treaty which applied to a broad range of investments including “intangible assets” confirmed that there is “no rationale for limiting the application of a substantive protection of the Treaty to [ . . . ] physical

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<sup>559</sup> **R-330**, Oxford English Dictionary, definition of “*Police*,” accessed October 29, 2020.

<sup>560</sup> SOD, ¶ 383.

assets.”<sup>561</sup> Contrary to Korea’s contentions, that reasoning applies with equal force under the FTA.

252. *Fourth*, the application of the FPS standard beyond physical security would not render the reference to the FET standard in Article 11.15 “superfluous.”<sup>562</sup> As the commentary cited by Korea confirms, the FET and FPS standard serve two distinct purposes:

In contrast to fair and equitable treatment, however, full protection and security is typically concerned not with the process of decision-making by the organs of the State. Rather, it is concerned with failures by the State to protect the investor’s property from actual damage caused by either miscreant State officials, or by the actions of others, where the State has failed to exercise due diligence. It is thus principally concerned with the exercise of police power.<sup>563</sup>

253. Neither of the distinct purposes of the FET and FPS standards would be undermined or subsumed completely in the other if FPS were to apply to the protection of non-physical assets.

254. For these reasons, Korea’s attempts to limit the FPS standard to the protection of “physical” property is without merit.

b. Korea’s failure to protect Mason’s investments, and Korea’s central involvement in the criminal scheme, amounts to a grave and manifest lack of diligence

255. Finally, Korea disputes that its failure to prevent the criminal scheme perpetrated against Mason’s investment was sufficiently egregious to fall short of the FPS standard under customary international law, which Korea seeks to define by reference to the

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<sup>561</sup> **CLA-125**, *National Grid plc v Argentine Republic*, UNCITRAL, Award, November 3, 2008, ¶ 187; see also **CLA-17**, *Siemens AG v Argentina ICSID No. ARB/02/8*, Decision on Jurisdiction, August 3, 2004, ¶ 303; **CLA-107**, *Enron Creditors Recovery Corp. and Ponderosa Assets, L.P. v. Argentine Republic* (formerly known as *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*), ICSID Case No. ARB/01/3, Award, May 22, 2007, ¶ 286.

<sup>562</sup> SOD, ¶ 383.

<sup>563</sup> **CLA-84**, Campbell McLachlan QC, Laurence Shore & Matthew Weiniger QC, *INTERNATIONAL ARBITRATION* (2nd ed, Oxford Univ. Press), ¶ 7.282.

*Neer* and *Venable* decisions from the 1920s.<sup>564</sup> Korea’s argument finds no support under international law.

256. *First*, for the reasons addressed above, Korea’s attempt to rely on customary international law as it was understood nearly a century ago is unfounded.<sup>565</sup> Like the customary international law FET standard, the FPS standard has evolved, and the level of protection reasonably expected by investors in the 21<sup>st</sup> century is different to that expected in the 1920s.<sup>566</sup>

257. *Second*, Korea’s argument is belied by the actual facts. President [REDACTED], Minister [REDACTED] and other government officials subverted the NPS’s vote in order to deprive Mason and SC&T’s other shareholders of billions of dollars in value, for the benefit of the [REDACTED] Family. Korea’s contention that “neither Korea nor the NPS owed any duty to account for, or to, Mason in the conduct Mason impugns in this case”<sup>567</sup> is premised on Korea’s refusal to accept reality, and its attempt to recast the narrative as one in which the NPS merely exercised its voting rights as a shareholder in SC&T. It did not. As demonstrated in Section III.B above, at the direction of multiple government officials, the NPS derogated from its internal rules and cast a vote designed to reach the outcome required by the Korean government.

258. *Finally*, regardless of the applicable standard, Korea’s failings in this case, which resulted in the impeachment and imprisonment of its former President and other high ranking officials, are so manifestly egregious that they easily rise to the level of international delinquency. Foreign investors in Korea were entitled to expect that the Korean government would protect their investments from criminal interference, and at the very least that the government would not itself partake in and enable such criminal interference. As Mason has established, far from protecting Mason’s investments from interference by the [REDACTED] Family, the NPS and corrupt individuals at the highest level of

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<sup>564</sup> SOD, ¶¶ 391-397.

<sup>565</sup> See ¶ 222 above.

<sup>566</sup> See ¶ 222 above.

<sup>567</sup> SOD, ¶ 396.

government actively participated in the criminal acts that caused Mason and its investments substantial economic harm.

259. Korea cannot, therefore, credibly dispute that its measures breached the minimum standard of treatment under customary international law, including treatment in accordance with Korea's FET and FPS obligations under Article 11.5.

**C. Korea's Scheme to Advance the Interests of the ■ Family at the Expense of Mason and Other Foreign Shareholders Was Discriminatory and Violates the National Treatment Standard**

**1. By Subverting the Merger Vote for the Benefit of the ■ Family, Korea Treated the ■ Family More Favorably Than Mason**

260. Korea also violated the national treatment standard set forth in Article 11.3 of the FTA by discriminating against Mason and its investment in favor of the ■ Family.<sup>568</sup> Article 11.3 provides as follows:

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

261. As commentators have noted in relation to the purpose of the national treatment standard, the "achievement of a level playing field between foreign and local investors has long been a major objective of investment treaty law."<sup>569</sup> Korea deliberately undermined the playing field in Korea in order to benefit one of Korea's most powerful

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<sup>568</sup> ASOC, § V.C.

<sup>569</sup> **CLA-84**, Campbell McLachlan QC, Laurence Shore & Matthew Weiniger QC, *INTERNATIONAL ARBITRATION* (2nd ed, Oxford Univ. Press), ¶ 7.268.

families, the ■ Family, in breach of Korea’s commitment to treat foreign investors such as Mason no less favorably than domestic investors.

262. In its Defence, Korea seeks to escape liability for its discriminatory measures by arguing that its measures did not amount to “treatment” of Mason, that the ■ Family is not an appropriate comparator to Mason, that Mason was treated just as unfavorably as certain other Korean investors, and that Korea did not intend to discriminate against Mason on the basis of nationality.<sup>570</sup> None of these arguments has any merit.

a. Korea’s discriminatory measures amounted to “treatment” of Mason

263. Contrary to Korea’s argument, Mason was unquestionably accorded “treatment” by Korea’s discriminatory measures.

264. As commentators and tribunals have confirmed, in this context, “treatment” “is a broad concept, comprising the aggregate of measures undertaken by the State that bear upon the investor’s business activity.”<sup>571</sup> There is no basis for reading “treatment” restrictively as Korea’s suggests, nor can there be any serious question that Korea’s measures amounted to “treatment” of Mason and its investments on these facts. As explained in Section V.B above in the context of Korea’s breaches of the minimum standard of treatment, Korea’s measures, including its subversion of the Merger Vote had a direct and severe bearing on Mason’s investment in the Samsung Group, and indeed specifically targeted SC&T and its shareholders, including Mason.<sup>572</sup>

265. Korea’s argument that the impact of its measures on Mason’s investment somehow did not concern the “establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments” as required under Article 11.3 is also specious. The Merger vote was the most critical decision arising in connection with Mason’s investment in the Samsung Shares. By interfering with the Merger vote in order to favor the interests of the ■ Family over Mason’s, Korea directly interfered

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<sup>570</sup> SOD, § V.C.3.

<sup>571</sup> **CLA-84**, Campbell McLachlan QC, Laurence Shore & Matthew Weiniger QC, *INTERNATIONAL ARBITRATION* (2nd ed. Oxford Univ. Press), ¶ 7.277, citing **CLA-87**, *ADF Group Inc v United States of America* (Award) ICSID Case No ARB(AF)/00/1, Award, January 9, 2003, ¶¶ 152–53.

<sup>572</sup> See § VI.A.2 below.

with Mason’s “management,” “conduct” and “operation” of its investment in the Samsung Shares.

b. The [REDACTED] Family is an appropriate comparator to Mason

266. The [REDACTED] Family is an appropriate comparator to Mason because both the [REDACTED] Family and Mason were in “like circumstances.”

267. The Parties agree that the identification of a comparator in “like circumstances” for purposes of national treatment is an “inherently fact-specific analysis.”<sup>573</sup> As the tribunal in *Pope and Talbot v. Canada* observed, the meaning of the term “like circumstances” is “context dependent” and has “no unalterable meaning across the spectrum of fact situations.”<sup>574</sup> As a result, “the application of the like circumstances standard will require evaluation of the entire fact setting,” including the “character of the measures under challenge.”<sup>575</sup>

268. Korea argues that Korean shareholders in SC&T that did not hold shares in Cheil at the time of the Merger are “more alike.”<sup>576</sup> Korea’s argument is meritless. The evidence shows that:

a. Both Mason and the [REDACTED] Family were investors and shareholders in SEC and SC&T.

b. Both Mason and the [REDACTED] Family were interested in the outcome of the same proposed transaction. The [REDACTED] Family, as a unit, sought to preserve and increase its control over the Samsung Group through the Merger.<sup>577</sup> Because the [REDACTED]

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<sup>573</sup> **CLA-31**, *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case No. ARB/12/39, Award, July 26, 2018, ¶ 1191; **RLA-147**, *Apotex Holdings Inc. v. United States of America*, ICSID Case No. ARB/(AF)/12/1, Award, August 25, 2014, ¶ 8.15.

<sup>574</sup> **CLA-129**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, ¶ 75.

<sup>575</sup> **CLA-129**, *Pope & Talbot Inc. v. Government of Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, ¶¶ 75-76.

<sup>576</sup> SOD, ¶ 420.

<sup>577</sup> **C-15**, Korea National Assembly Minutes, September 14, 2015, p. 35 (“As for the Samsung family’s attempts and efforts to increase their share, strengthen their control and defend their management rights, there is room for critique as to whether what they did was right or wrong, and we can examine whether it is legal or illegal, but for the NPS to have a part in this and cause losses to the NPS is a serious problem.”); p. 32 (They had no shares in Samsung C&T but 42%

Family held a greater share of Cheil shares than SC&T shares, the █████ Family (and █████ in particular) stood to gain if the Merger passed, whereas Mason stood to lose. While Mason’s investment was severely eroded through the Merger’s value transfer from SC&T to Cheil, the new generation of the █████ Family – the heir, █████, and his sisters – increased its overall holdings in the group and ultimately gained stronger control over the “crown jewel” of the Samsung Group, SEC.<sup>578</sup>

- c. Both Mason and the █████ Family were directly impacted by Korea’s measures. While Korea’s measures caused Mason to suffer substantial losses to the value of its investments, the █████ Family, conversely, made substantial gains as a result of the value transfer from SC&T to Cheil.
- d. Korea’s measures were adopted deliberately for the singular purpose of benefitting the █████ Family at the expense of Mason and SC&T’s other shareholders. After the Merger was announced, foreign hedge funds such as Mason were seen as an obstacle to be overcome in order for the Merger to be approved and the transfer of power and value within the █████ Family to succeed. In the eyes of the Korean government, the Merger became the battleground for two opposite factions, the █████ Family and the foreign hedge funds opposing the Merger. Through corruption and nationalistic preference, the Blue House, MHW and other officials involved in the criminal scheme to subvert the Merger vote chose to side with the █████ Family, over Mason. Korea’s argument that the Tribunal should select other Korean shareholders who happened also to be

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in Cheil Industries, so they merged the two companies and what happened? █████ now has 16.5 percent of shares in the new Samsung C&T, with Lee Bu-Jin and Lee Seo-Hyun each having 5.5 percent, and Lee Kun-Hee has 2.9 percent, increasing the Samsung family’s share to 30%). *See also*, C-196, NPS, Family Equity Ratio Based on Merger Ratios, undated.

<sup>578</sup> Garschina, ¶ 15, CWS-1. Market analysts and the international press also commonly use this expression to describe SEC’s position within the Samsung Group. *E.g.*, C-9, ISS Report, p. 10; C-121, Jonathan Cheng and Min-Jeong Lee, *Samsung Heir Apparent Jay Y Consolidates Power With Merger*, WALL STREET JOURNAL (May 26, 2015), p. 1.

impacted by Korea's measures, rather than the █████ Family as the appropriate comparator ignores these critical facts.

269. For these reasons, on the facts of this case, the █████ Family is the most appropriate comparator.

c. Korea treated Mason less favorably than the █████ Family

270. Korea does not deny that Mason was treated less favorably than the █████ Family. Nor could it. The facts establish that as a direct consequence of Korea's measures, the █████ Family successfully achieved a critical part of its succession plan, with █████ personally consolidating his holdings to 16.5% in New SC&T and the █████ Family collectively securing more than 30% in New SC&T.<sup>579</sup> The plan also enriched the █████ Family through the transfer of billions of dollars in value from SC&T's shareholders to Cheil's, including the █████ Family. In contrast, Mason suffered substantial losses to its investments in the Samsung Shares, as further explained in Section VI.B below.

271. Korea contends that Mason was not treated "less favorably than Korean investors in like circumstances" because certain Korean shareholders in SC&T were also prejudiced by Korea's measures.<sup>580</sup> Korea's attempt to rely on its own wrongdoing as against other shareholders is misconceived. Tribunals have confirmed that where a State has treated a domestic investor more favorably than a foreign investor, a State cannot rely on its own wrongs towards other domestic investors in order to excuse its conduct towards the foreign investor. In the words of the *ADM* tribunal, "[c]laimants and their investment are entitled to *the best level of treatment available to any other domestic investor* or investment operating in like circumstances [ . . . ]."<sup>581</sup> Thus, Korea's treatment of non-█████ Family Korean investors in SC&T does not absolve Korea from its obligation to accord Mason treatment no less favorable than the best level of

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<sup>579</sup> C-9, ISS Report, p. 12 ("The █████ Family, with a 23.2% stake [pre-Merger], is the largest shareholder of Cheil Industries, the de facto holding company of Samsung Group. Following the merger, he will own 16.5% of the merged entity, and up to 30.8% in concert with other family members.")

<sup>580</sup> SOD, ¶¶ 422-427.

<sup>581</sup> *CLA-90, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/5, Award, November 21, 2007, ¶ 205 (emphasis added).

treatment accorded to domestic investors. Such treatment was unquestionably that which Korea accorded to the █████ Family.

d. Korea's intentionally discriminated against Mason, as a foreign hedge fund

272. In its Defence, Korea seeks to explain away all of the evidence of its discriminatory intent, suggesting that it shows no more that Korea supported the Merger and that its officials held “justifiable reactions to the predatory conduct of a narrow class of U.S. hedge funds and the harm that conduct might cause the Korean economy.”<sup>582</sup> Korea’s submission is not credible in light of the evidence, which has only grown through disclosure.

273. For example:

- a. The Seoul District Court determined in its decision to convict Minister █████ and CIO █████ that they were both driven by strong anti-foreign sentiment at the time of the Merger.<sup>583</sup>
- b. The Blue House recorded in its documents that the “NPS should be actively utilized against aggressive management right interference by foreign hedge funds.”<sup>584</sup>
- c. The Blue House also considered measures that “domestic companies” should use to “defend management rights against overseas hedge funds.”<sup>585</sup>

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<sup>582</sup> SOD, ¶ 434.

<sup>583</sup> **CLA-13**, Prosecutor v. █████, pp. 56, 65-67 (when discussing the grounds for sentencing, the Court factored that “there was a strong public sentiment in the midst of the controversy over the national wealth outflow by the foreign speculative fund that NPS should play a role of the so-called ‘white knight’” p. 66; and that there was “the public expectation for NPS to counter attacks from the foreign speculative fund.”).

<sup>584</sup> **C-178**, Park Su-hyeon, *Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)*, YTN (July 20, 2017), p. 1; see also **C-179**, *[Breaking News] The 3rd Announcement of the Park Geun-hye Government Blue House Documents, Including ‘Fostering Conservative Organization’ ‘Intervention in the NPS’s Voting Rights’*, CHOSUN BIZ, July 20, 2017, p. 2.

<sup>585</sup> **C-178**, Park Su-hyeon, *Additional Briefing by Cheong Wa Dae [Blue House] on Documents of the Park Geun-hye administration (Transcript)*, YTN (July 20, 2017), p. 1; see also **C-179**, Jeong Si-haeng, *[Breaking News] The 3rd Announcement of the Park Geun-hye Government*

- d. The MHW prepared a report before the Merger vote titled “Difficulties if the Investment Committee Votes on the SC&T Merger” which referred to Elliott as foreign vulture fund, among the entire category of foreign funds, including Mason. CIO █████ pressured Investment Committee members to vote in favor of the Merger by threatening to have them depicted as Lee Wan-yong – a historical traitor in Korea’s history who had betrayed Korea by placing Korea under Japanese rule in 1910.<sup>586</sup>
- e. President █████ explicitly admitted that she had interfered with the Merger because she considered that “[t]he corporate governance of Samsung Group is vulnerable to threats from foreign hedge funds [ . . . ] a crisis of Samsung Group is a crisis of the Republic of Korea.”<sup>587</sup>

274. For these reasons, Korea cannot credibly deny that its President, the MHW and other officials involved were animated by an intent to discriminate against foreign funds, including Mason.

**2. Korea’s Discriminatory Measures are Not Excluded Under Annex II to the FTA**

275. Finally, Korea seeks to absolve itself from liability by arguing that its discriminatory measures fall outside the scope of the Tribunal’s jurisdiction because of Korea’s

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*Blue House Documents, Including ‘Fostering Conservative Organization’ ‘Intervention in the NPS’s Voting Rights,’* CHOSUN BIZ (July 20, 2017), p. 2.

<sup>586</sup> CLA-14, █████ Seoul High Court, p. 85.

<sup>587</sup> CLA-15, █████ Seoul High Court, p. 102.

reservations to the FTA, set forth in Annex II. Specifically, Korea relies on the following reservations:

- a. Korea’s “right to adopt or maintain any measure with respect to the transfer or disposition of equity interests or assets held by state enterprises or governmental authorities” (“**Equity Transfer Reservation**”).<sup>588</sup>
- b. Korea’s “right to adopt or maintain any measure with respect to [ . . . ] the following services to the extent that they are social services established or maintained for public purposes: income security or insurance, social security or insurance, social welfare, public training, health, and child care” (“**Social Services Reservation**”).<sup>589</sup>

276. Neither of these reservations applies to Korea’s measures in this case.

a. Korea cannot rely on the Equity Transfer Reservation

277. Korea’s reliance on the Equity Transfer Reservation is inapposite. The Equity Transfer Reservation concerns the State’s right to divest its equity interests in companies by way of transfer or disposition. Korea’s discriminatory measures were not “measures with respect to transfer or disposition of equity interests.”<sup>590</sup>

278. *First*, Mason does not claim for any discriminatory treatment relating to any decision by Korea to transfer or dispose of any equity interests. Rather, Mason’s claim concerns the Blue House, MHW and other officials’ criminal scheme to subvert the NPS’s vote on the merger for the benefit of the █████ Family. Such measures of the Blue House, MHW and other officials were not measures “with respect to the transfer or disposition

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<sup>588</sup> **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 3.

<sup>589</sup> **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 2.

<sup>590</sup> **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 3.

of equity interests or assets.”<sup>591</sup> Korea does not, and cannot contend otherwise. Korea’s objection falls to be dismissed for this reason alone.

279. *Second*, the NPS’s vote was not a measure “with respect to the transfer or disposition of equity interests or assets” either.<sup>592</sup> Clearly, the NPS did not transfer or dispose of any shares by voting. Nor did the Merger vote concern any proposed transfer or disposal. Rather, the merger merely consisted of an exchange of the existing shares in SC&T for the shares of a newly created entity. As such, the merger was not a “transfer or disposition” of equity interests either. Thus, even if it were appropriate to reduce Mason’s claims to the isolated acts of the NPS in voting for the merger as Korea suggests, Korea’s objection would still fail.

280. For these reasons, Korea’s measures do not fall within the Equity Transfer Reservation.

b. Korea cannot rely on the Social Services Reservation

281. Korea’s attempt to rely on the Social Services Reservation does not fare any better. In order to avail itself of that reservation, Korea must demonstrate that (i) its measures were adopted or maintained to provide “income security or insurance, social security or insurance, social welfare, public training, health and child care” and (ii) such measures were “established or maintained for public purposes.”<sup>593</sup> Korea cannot satisfy either requirement.

282. *First*, Mason’s claim does not concern the NPS’s provision of any social service. Mason’s claims arise out of the Blue House and MHW’s subversion of the NPS’s vote on the merger. The NPS voted for the Merger in breach of its fiduciary duties to Korea’s pension holders, and in violation of the NPS’s own mandatory rules on decision-

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<sup>591</sup> **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 3.

<sup>592</sup> **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 3.

<sup>593</sup> **CLA-23**, Treaty, Annex II: Non-Conforming Measures for Services and Investment, Korea Annex II, March 15, 2012, p. 2.

making. Korea cannot hide behind the veil of the social services reservation in order to absolve itself from liability in these circumstances.

283. *Second*, neither the Korean government nor the NPS acted “for public purposes.” The NPS voted for the Merger in order to serve the private interests of ██████, the ██████ Family and President ██████, in willful disregard of the interests of the Korean public. It is therefore particularly inappropriate for Korea to seek to rely on the a “public purpose” Social Services reservation in circumstances in which Korea’s measures undermined the interests of the members of the Korean public that this reservation was intended to protect.

284. Accordingly, Korea has failed to establish that the Social Services Reservation applies to its discriminatory measures in this case.

## **VI. MASON IS ENTITLED TO COMPENSATION**

285. Having established that Korea has no plausible defences on jurisdiction or liability, Mason now turns to Korea’s attempts to escape its obligation to compensate Mason for its losses caused by Korea’s unlawful measures.

286. In its Amended Statement of Claim, Mason established that by interfering with the Merger vote, Korea achieved the outcome Korea intended by its actions: the extraction of billions of dollars in value from SC&T’s shareholders, including Mason, and the transfer of that value to ██████ and Cheil’s other shareholders. Korea’s covert, criminal interference with that critical corporate governance decision of the Samsung Group also damaged Mason’s investment in SEC by undermining Mason’s investment thesis and thereby causing Mason to divest its shares prematurely shortly after the vote.<sup>594</sup> In accordance with well-established principles of international law, independent expert Dr. Duarte-Silva of CRA, whose valuation analysis is supported by the expert evidence of Prof. Daniel Wolfenzon of Columbia Business School, has quantified Mason’s losses suffered by reason of Korea’s breaches as no less than \$192.5 million.<sup>595</sup> Korea must

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<sup>594</sup> ASOC, § VI.

<sup>595</sup> ASOC, § VI.B; Duarte-Silva Report I; First Expert Report of Daniel Wolfenzon, June 12, 2020 (“**Wolfenzon Report I**”).

now be ordered to pay damages in this amount, plus interest, in order to effect full reparation for Korea's injury.

287. Korea nonetheless seeks to evade its obligation to compensate Mason by denying that Korea caused Mason any loss and claiming that any losses caused by Korea's breaches somehow "amount to zero."<sup>596</sup> Like its defences on the merits, Korea's arguments on damages are meritless. In this Section, Mason first addresses Korea's attempts to deny that its breaches caused Mason loss (**Section A**), and then addresses Korea's arguments disputing the quantification of Mason's losses (**Section B**). Finally, Mason turns to Korea's contention, unsupported under the FTA, international law or the facts, that the General Partner is not entitled to relief because it lacks a beneficial interest in the Samsung Shares (**Section C**).

#### **A. Korea's Breaches Caused Substantial Loss to Mason's Investments**

##### **1. Korea's Breaches Were the "But For" Cause of Mason's Losses**

288. The Parties agree that Mason must establish that Korea's breaches were the "but for" cause of Mason's claimed losses.<sup>597</sup> As Mason established in its Amended Statement of Claim and in Section III above, the evidence that Korea caused Mason loss, as a matter of *fact*, is overwhelming. Korea's own documents and criminal court judgments establish that Korea's President, Minister █████ and other high-ranking officials went to extraordinary lengths to subvert the NPS's vote and compel their desired outcome: the approval of the Merger for the benefit of █████ and his family.

289. Despite this evidence, Korea now argues that Korea's breaches were not the "but for" cause of Mason's losses because, according to Korea, there are hypothetical counterfactual scenarios in which the Merger might still have been approved even if Korea's officials had not interfered with the vote. Specifically, Korea speculates that (i) the NPS might still have voted in favor of the Merger, or (ii) if the NPS had not voted in favor of the Merger, a sufficient number of other investors who did not approve the Merger might have voted for it in reaction to the NPS's decision to vote against it.

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<sup>596</sup> SOD, ¶ 502.

<sup>597</sup> ASOC, ¶ 250; SOD, ¶ 441; **RLA-122**, *Chevron Corporation (U.S.A.) and Texaco Petroleum Corporation (U.S.A.) v. Republic of Ecuador [I]*, PCA Case No. AA 277, Partial Award on the Merits, March 30, 2010, ¶ 374.

In essence, Korea invites the Tribunal to find that Korea’s officials engaged in their criminal scheme for nothing, since, according to Korea, the Merger would likely have been approved without their interference. As a threshold matter, it is not open to Korea to speculate as to what might have occurred had Korea not breached the Treaty. Korea caused the loss as a matter of fact, as established in Section III above. In any event, Korea’s arguments are utterly speculative and unsubstantiated.

a. Korea mischaracterizes the applicable standard of proof for factual causation

290. Korea seeks to frame its arguments on causation by mischaracterizing the applicable standard of proof. Korea argues that “international law requires Mason to prove factual causation to a high standard of factual certainty.”<sup>598</sup> That is not the case. The standard of proof for factual causation is no greater than the “balance of probabilities” or “preponderance of evidence” standard. Numerous investment tribunals have confirmed this, and no tribunal has ever articulated any basis in principle as to why the standard should be higher for causation than for the merits. For example, in *Gold Reserve v Venezuela*, the tribunal found:

no support for the conclusion that the standard of proof for damages should be higher than for proving merits, and therefore is satisfied that the appropriate standard of proof is the balance of probabilities [ . . . ]. In the Tribunal’s view, all of the authorities cited by the Parties [ . . . ] accord with the principle that the balance of probabilities applies, even if some tribunals phrase the standard slightly differently.<sup>599</sup>

291. Unsurprisingly, in line with these observations, the tribunals in both of the awards cited by Korea, *Bilcon v Canada* and *Nordzucker v Poland*, applied the customary balance of probabilities standard. Those awards contain no suggestion that the tribunals saw any basis under international law to apply a more onerous standard. Most recently, the tribunal in *Tethyan Copper Company v. Pakistan* also rejected an attempt to suggest

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<sup>598</sup> SOD, ¶¶ 444-448.

<sup>599</sup> **RLA-148**, *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, September 22, 2014, ¶ 685; see also **CLA-177**, *Ioannis Kardassopoulos and Ron Fuchs v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, ¶ 229.

that a higher standard applied for causation and confirmed that the normal “balance of probabilities” standard applied.<sup>600</sup>

- b. Without Korea’s interference, the Merger would not have proceeded and Mason would not have suffered loss to its investment

292. Korea argues that Mason has not proven that, but for Korea’s measures, “the NPS would have voted differently or that the Merger would not have been approved.”<sup>601</sup> Specifically, Korea speculates that: (1) the NPS’s vote was not determinative of the outcome of the vote because, had the NPS announced it would vote against the merger, a greater number of other shareholders would have voted in favor<sup>602</sup>; (2) the NPS Investment Committee voted for the merger independently of any pressure exerted upon it by the Blue House and MHW<sup>603</sup>; and (3) the NPS might still have voted in favor of the merger even if the Blue House and MHW had not interfered with its decision-making.<sup>604</sup> Each of these contentions is unfounded and undermined by the evidence on the record.

- (1) The Merger would not have been approved without the NPS’s vote

293. Despite accepting that as a matter of simple arithmetic, the merger would have been rejected had the NPS voted against it or abstained,<sup>605</sup> Korea argues that “Mason’s argument invites speculation as to the contingent reactions to the NPS’s rejection of the

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<sup>600</sup> **CLA-187**, *TCC v Pakistan*, ICSID Case No. ARB/12/1, Award, July 12, 2019, ¶ 290, noting also that “a standard of “absolute certainty” would mean that damages would – almost certainly – never be awarded. There can hardly be absolute proof for a hypothetical situation.”

<sup>601</sup> SOD, ¶¶ 449-477.

<sup>602</sup> SOD, ¶ 449.

<sup>603</sup> SOD, § VI.B.2(b).

<sup>604</sup> SOD, § VI.B.2(a).

<sup>605</sup> SOD, ¶ 474, line 4 of Figure 5, which recognizes that “holding all else constant,” if the NPS had not voted in favor of the Merger, the Merger would not have been approved.

Merger by a set of third parties: the remaining SC&T shareholders that together held nearly 90% of SC&T voting rights.”<sup>606</sup> This argument is baseless.

294. *First*, Mason’s case on factual causation is based on the hard fact that had Korea not interfered with the Merger vote, the Merger would have been rejected. Korea’s interference with the Merger vote, in breach of the FTA, was the reason for Mason’s losses, as the undisputed analysis of the actual voting results proves.<sup>607</sup> The FTA’s requirement as to factual causation is thus demonstrably satisfied in this case. The question for the Tribunal is not whether, had Korea complied with the Treaty, third parties might have acted differently and caused Mason the loss for which Korea is in actual fact responsible. Rather, under the Treaty, Mason must only establish, on the balance of probabilities, that in actual fact, Mason’s losses were suffered “by reason of” Korea’s breaches of its obligations.”<sup>608</sup> Korea cannot seriously dispute that this requirement is met.
295. *Second*, even if it were open to Korea to rely on theoretical counter-factual situations in which Mason might have suffered the same loss even if Korea had complied with the FTA because of the hypothetical acts of third parties, the burden would be on Korea to prove that those hypotheticals would have actually materialized in the absence of Korea’s breaches. Korea provides no credible proof that had the NPS declared that it would be voting against the Merger, a sufficient number of third parties would have voted differently and caused the merger to proceed. Rather, Korea offers no more than a theoretical narrative as to what “might” or “may” have occurred, and bases its argument on the notion that the reactions of third parties “cannot be known” with certainty.<sup>609</sup>
296. Prof. Dow speculates that had Korea not partaken in a corrupt scheme with ██████ to ensure that the merger was approved, ██████ might have expended further efforts to

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<sup>606</sup> SOD, ¶ 471.

<sup>607</sup> See ¶¶ 74-76 above; see also Duarte-Silva Report I, ¶¶ 22-25; Duarte-Silva Report II, § IVA.1.

<sup>608</sup> **CLA-23**, Treaty, Article 11.16.

<sup>609</sup> SOD, ¶ 475: “undecided shareholders *might* have reacted to the NPS’s deciding to oppose the Merger, rather than support it, *cannot be known*, but *may* have changed the outcome” (emphasis added).

coopt third parties into voting for the merger.<sup>610</sup> There is no evidence to support this. To the contrary, the evidence confirms that [REDACTED] and his associates, who had the best possible knowledge of the likely voting intentions of shareholders, went to extraordinary lengths to persuade SC&T's shareholders to vote in favor of the merger despite the unfair merger ratio. Those efforts included SC&T's CEO personally "visiting" every retail investor who owned more than 2,000 shares, front page newspaper advertisements, door-to-door visits by hundreds of Samsung representatives, and the delivery of hand-written pleas and gifts to individual shareholders.<sup>611</sup> This was widely reported in the financial press and well-understood by analysts at the time.<sup>612</sup>

297. For these reasons, Korea's contention that the "NPS's vote was by no means determinative of the outcome of the broader vote of SC&T shareholders" is unsupported and inapposite. To the contrary, the evidence shows that the NPS's vote was necessary for, and determinative of, the outcome of the vote by SC&T's shareholders.

(2) The NPS would not have voted for the Merger in the absence of interference by the Blue House and MHW

298. Korea further speculates that had the Blue House and MHW not interfered with the NPS's decision-making, the NPS might still have voted for the Merger because there were "compelling objective reasons for the NPS to vote in favor of the Merger in the absence of any of Korea's alleged acts."<sup>613</sup> This hypothetical, too, is unsubstantiated and belied by the evidence on record.

299. *First*, had the NPS been at all likely to have voted for the Merger without interference from the Blue House and MHW (as Korea speculates), there would have been no reason for the Blue House and MHW to go to such extraordinary – criminal – lengths to subvert the NPS's decision-making. The Blue House and MHW officials perpetrated their

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<sup>610</sup> Expert Report of Professor James Dow dated October 30, 2020 ("**Dow Report**"), ¶¶ 142-145.

<sup>611</sup> See Duarte-Silva Report II, ¶ 40 & n. 51 and ¶ 59 & nn. 91-100; **CRA-29**, The Wall Street Journal, *Korea's Samsung Watershed*, July 20, 2015, p. 2; **CRA-176**, The Wall Street Journal, *Samsung Merger Allowed to Proceed, Court Rules*, July 16, 2015, p. 3.

<sup>612</sup> Duarte-Silva Report II, § II.A.1.a.

<sup>613</sup> SOD, ¶ 457.

wrongdoing precisely because they knew that had the NPS considered the matter in good faith, through its Experts Voting Committee, then the NPS would have voted against the Merger. Korea's own documents confirm that:

- a. In formulating its strategy to secure the NPS's affirmative vote for the Merger, the MHW profiled the "dispositions" of the members of the Experts Voting Committee and devised potential strategies to "induce" them to approve the Merger. The MHW concluded that had the Experts Voting Committee been asked to decide on the Merger, it would have voted against it, in line with its decision on the SK Merger taken just weeks before the Merger vote. The MHW arrived at that view in light of the fact that the Chairman of the Experts Voting Committee valued the Experts Voting Committee's independence and would therefore not allow the MHW to exert pressure on the Experts Voting Committee in order to secure the desired outcome of the vote.<sup>614</sup> Further, the MHW noted that the Chairman of the Experts Voting Committee revolted upon learning that the Experts Voting Committee had been sidelined in favor of the Investment Committee. For these reasons, the MHW knew that the only way to ensure that the NPS would vote in favor of the Merger was to divert the vote to the Investment Committee to decide on it and thereby remove any possibility of members of the Expert's Voting Committee raising objection to the Merger proposal."<sup>615</sup>
- b. The MHW knew that by placing the vote in the hands of the Investment Committee, the MHW could procure a vote in favor of the merger through CIO [REDACTED], over whom the MHW had substantial leverage. The MHW knew that CIO [REDACTED] could, in turn, influence the members of the Investment Committee, who were appointed by CIO [REDACTED]. As the MHW expected, CIO [REDACTED] duly complied with the MHW's directions and procured the fabrication of synergies in the NPS's valuation to support the Investment Committee's decision, and

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<sup>614</sup> See *supra* ¶ 44.

<sup>615</sup> See *supra* ¶ 44.

proceeded to contact members of the Investment Committee prior to its meeting to tell them that they would be criticized if they failed to vote for the Merger.

300. *Second*, contrary to Korea’s attempts to rationalize the merger *ex post facto*, there were no “compelling objective reasons for the NPS to vote in favor of the Merger.”<sup>616</sup> The Merger went against the NPS’s economic interests, and was therefore also prejudicial to the interests of the millions of Korean pension-holders who had entrusted their pensions to the NPS as their fiduciary (*see* Section III.E above), as the NPS itself concluded. None of Korea’s attempts now to suggest otherwise has any merit:

- a. Had the Merger been at all defensible economically on its own terms, there would have been no reason for the NPS to engage in the fraudulent fabrication of synergies in its modelling to support the Investment Committee’s decision. As addressed in Section III.E above, Korea cannot credibly deny the findings of its own criminal courts and of the NPS itself in relation to the fabrication of synergies. Nor can Korea explain why the NPS engaged in such conduct if the Merger were at all economically justifiable on its own merits.
- b. Korea seeks to rely on a press report dated July 10, 2015 quoting a member of the Expert Voting Committee, Mr. ██████████, as stating that the NPS should vote in favor of the Merger. Contrary to Korea’s argument, there is no evidence that Mr. ██████’s statement was a reflection of the views of the other Committee Members.
- c. Korea claims that the voting record of SC&T’s other shareholders “further refutes Mason’s premise that the Merger was so undesirable to SC&T shareholders that it would necessarily have been rejected by the NPS “but for” Korea’s conduct.”<sup>617</sup> That is not the case. The evidence establishes that a substantial proportion of other shareholders were co-opted into voting in favor of the Merger against their own economic interests as part of the ██████ Family’s succession plan.<sup>618</sup> Faced with this fact, Korea suggests that because four shareholders which it describes as “large and sophisticated institutional

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<sup>616</sup> SOD, ¶ 457.

<sup>617</sup> SOD, ¶ 453.

<sup>618</sup> *See* Duarte-Silva Report II, ¶ 40 & n. 51.

investors” voted in favor of the Merger, it might have been rational for the NPS to do so too. Korea’s reliance on the votes of those shareholders is misplaced. Korea “presumes” that these votes reflected some form of “investment vetting process,”<sup>619</sup> but produces no evidence to support this theory. In any event, the voting and investment process of these other shareholders cannot readily be identified with the NPS that is subject to separate regulatory regimes, such as the Management Guidelines and the Voting Guidelines which do not apply to those other shareholders.

301. Finally, Korea asserts that “either committee could have approved the Merger without Korea’s alleged conduct and in full compliance with the applicable guidelines”<sup>620</sup>. This argument, too, is meritless. As explained in further detail by Dr. Duarte-Silva in his expert reports:

- a. It was clear that the Merger would generate a loss to SC&T shareholders, including the NPS, notwithstanding that the NPS held some shares in Cheil.<sup>621</sup> This is because the NPS held a smaller stake in Cheil than in SC&T. Accordingly, the NPS was a clear net economic loser from the Merger.
- b. Korea adduces no evidence that any hypothetical benefit to other entities in the Samsung group from the Merger would have justified the Merger from the NPS’s perspective.<sup>622</sup>
- c. The increase in the stock market price of SC&T and Cheil upon the merger announcement does not mean the Merger was beneficial to the companies. SC&T was already trading at a significant undervalue to its fair market value, and the share price of SC&T increased merely to match the price that was offered for its shares by Cheil. That price was still significantly below the fair market value of SC&T.<sup>623</sup> And after the Merger was unexpectedly approved,

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<sup>619</sup> SOD, ¶ 454.

<sup>620</sup> SOD, ¶ 455.

<sup>621</sup> Duarte-Silva Report I, ¶¶ 46-50; Duarte-Silva Report II, § II.A.1.b.

<sup>622</sup> See Duarte-Silva Report II, § II.A.1.a.

<sup>623</sup> See Duarte-Silva Report II, § II.A.2.b.i.

the share price of SC&T (as well as SEC) dropped precipitously, reflecting the market's dim view of the Merger.<sup>624</sup>

302. Further, contrary to Korea's contentions, the Seoul District Court's decision dismissing Elliott's injunction against the Merger<sup>625</sup> does not legitimate or confirm the fairness of the Merger. As Mason explained at paragraph 93 above, the Korean courts, in the litigation before them seeking to enjoin or invalidate the merger, merely addressed the narrow issue of whether the statutory formula had been applied. Further, the Korean courts did not have the benefit of knowledge of the full scope of Korea's wrongdoing or Samsung's associated stock price manipulation.<sup>626</sup>

303. For these reasons, the evidence is clear that the NPS did not approve, and would not have approved of the merger in the absence of interference from the Blue House and the MHW.

(3) The Blue House and the MHW caused the NPS Investment Committee to vote in favor of the Merger

304. Finally, Korea claims that Mason has not proven that the NPS Investment Committee voted in favor of the Merger because of the undue pressure exerted upon it by Minister █████, CIO █████ and other officials.<sup>627</sup> But the evidence is clear that the Investment Committee would not have voted for the merger in the absence of such pressure.

305. *First*, had the MHW not interfered with the NPS's voting procedures and diverted the vote from the Experts Voting Committee to the Investment Committee, the NPS would have rejected the Merger. It is therefore irrelevant whether the individual Investment Committee members voted as a result of pressure from Korea or otherwise. None of those Committee members should even have been able to vote on the Merger. Specifically. As Mason established in Section III.B.2 above, the officials tasked with executing President █████'s orders ensured that the vote was taken away from the Experts Voting Committee and brought to the Investment Committee. As █████

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<sup>624</sup> See ¶ 92 above.

<sup>625</sup> SOD, ¶ 455.d.

<sup>626</sup> See ¶ 93 above.

<sup>627</sup> SOD, ¶¶ 458-470.



overwhelming.<sup>633</sup> Here too the Seoul High Court established, to the criminal standard of proof, that “the Investment Committee was induced to approve the Merger by [ . . . ] CIO [REDACTED]’s pressure on individual members of the Investment Committee.”<sup>634</sup> Korea cannot now credibly distance itself from this finding.

308. Finally, as addressed in Section III.B.3 and III.B.4 above, Korea’s theory that the Investment Committee somehow took an “independent” decision on the Merger vote and was not influenced by the MHW and CIO [REDACTED]’s interference is belied by the evidence of the MHW and CIO [REDACTED]’s attempts to cover their tracks and sanitize the NPS’s disclosures to the public. Such attempts included, for example, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]<sup>635</sup> There would have been no reason for any officials to seek to cover their tracks if the Investment Committee’s decision on the Merger vote had been independent and proper.

309. Thus, contrary to Korea’s contention, the Investment Committee’s vote does not sever the chain of causation and all of Korea’s attempts to dispute factual causation fall to be rejected.

## 2. Korea’s Breaches Were the Proximate Cause of Mason’s Losses

310. Korea’s arguments on legal causation fare no better. As explained in Mason’s Amended Statement of Claim, and as addressed further below, the evidence establishes that Korea’s breaches were the proximate cause of Mason’s losses to its investments because such loss were not only foreseeable by Korea, they were intended. Korea’s interference with the Merger achieved its very objective: the transfer of billions of dollars from SC&T shareholders, such as Mason, to [REDACTED] and Cheil’s other shareholders, and the assumption of control by [REDACTED] over the Samsung Group at the expense of corporate governance and minority shareholders. For the reasons set out in

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<sup>633</sup> See § III.B.4 above.

<sup>634</sup> CLA-15, [REDACTED] Seoul High Court, p. 103.

<sup>635</sup> Cf. C-145, Unedited Minutes of the Investment Committee Meeting, July 10, 2015 with R-201, NPSIM Management Strategy Office, 2015-30<sup>th</sup> Investment Committee Meeting Minutes, July 10, 2015.

the following sections, none of Korea's attempts to absolve itself from liability on grounds of lack of legal causation has any merit.

a. Korea mischaracterizes the applicable requirement of proximate causation

311. Like its case on factual causation, Korea's arguments on proximate causation are also premised on a mischaracterization of the law. Korea agrees that the applicable requirement for legal causation is "proximity" or "foreseeability."<sup>636</sup> However, Korea argues that Mason must also establish that Korea's breaches were the "dominant" or "underlying" causes of Mason's losses,<sup>637</sup> because, according to Korea, "[i]n practice, the concept of proximate cause has been applied so as to recognize that where an alleged treaty breach was not the 'dominant,' 'operative' or 'underlying' cause of its loss, there is no causal link sufficient to trigger a State's obligation to pay compensation for losses."<sup>638</sup> There are no such requirements under the FTA or international law.

312. The requirement of legal causation derives from Article 11.16(a)(ii) of the Treaty, which provides a right to compensation for a breach with respect to losses incurred "by reason of, or arising out of, that breach."<sup>639</sup> As the United States has noted in its Non-Disputing Party submission, the legal causation requirement arising from that language is that of "proximit[y]."<sup>640</sup> In practice, tribunals have observed that in order to assess whether this requirement is met, the tribunal must examine the chain of causation from the perspective of the injuring party, and consider whether the injury was "foreseeable" through successive links. For example:

- a. The *Lemire v Ukraine* tribunal explained that "offenders must be deemed to have foreseen the natural consequences of their wrongful acts, and to stand responsible for the damage caused. Proximity and foreseeability are related concepts: a chain of causality must be deemed proximate, if the wrongdoer

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<sup>636</sup> SOD, ¶¶ 441-442.

<sup>637</sup> See SOD, ¶ 479-483.

<sup>638</sup> SOD, ¶ 479.

<sup>639</sup> US NDP Submission, ¶ 35.

<sup>640</sup> US NDP Submission, ¶ 38.

could have foreseen that through successive links the irregular acts finally would lead to the damage.”<sup>641</sup>

- b. In the *Angola* case, the Portuguese-German Arbitral Tribunal observed that this requirement derives from the principle that “[i]t would not be equitable to let the injured party bear those losses which the author of the initial illegal act has foreseen and perhaps even intended, for the sole reason that, in the chain of causation, there are some intermediate links.”<sup>642</sup>

313. Contrary to Korea’s submission, there is no requirement that the wrongful act be the “last, direct act, the immediate cause” of the claimed loss.<sup>643</sup> As confirmed by the ILC Articles and their commentary, “[o]ften two separate factors combine to cause damage” and “in such cases, the injury in question was effectively caused by a combination of factors, only one of which is ascribed to the responsible State.”<sup>644</sup> Having regard to the ILC Articles and their commentary, the tribunal in *CME v. Czech Republic* confirmed that international law does not “support the reduction or attenuation of reparation of concurrent causes, except in cases of contributory fault.”<sup>645</sup> Further, drawing on principles of municipal tort law, the tribunal observed that:

It is the very general rule that if a tortfeasor’s behaviour is held to be a cause of the victim’s harm, the tortfeasor is liable to pay for all of the harm so caused, notwithstanding that there was a concurrent cause of that harm and that another is responsible for that cause ... In other words, the liability of a tortfeasor is not affected vis-à-vis the victim by the consideration that another is concurrently liable.<sup>646</sup>

314. Similarly, rejecting any requirement that the wrongful act be the “last, direct act, the immediate cause” of the claimed loss, the *Lemire v Ukraine* tribunal explained that “[i]f

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<sup>641</sup> **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 170.

<sup>642</sup> **CLA-202**, *Recueil des Sentences Arbitrales*, Volume II, July 31, 1928, p. 1031.

<sup>643</sup> SOD, ¶ 483, citing **RLA-87**, *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, ¶ 234.

<sup>644</sup> **CLA-166**, *Commentaries on the ILC Articles*, Article 31, cmt 12.

<sup>645</sup> **CLA-100**, *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, ¶ 583.

<sup>646</sup> **CLA-100**, *CME Czech Republic BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award, September 13, 2001, ¶ 581, citing J.A. Weir, *Complex Liabilities*, in

it can be proven that in the normal cause of events a certain cause will produce a certain effect, it can be safely assumed that a (rebuttable) presumption of causality between both events exists, and that the first is the proximate cause of the other.”<sup>647</sup>

315. The ICJ and numerous other tribunals have applied these principles to also reject attempts by respondents to rely on alleged concurrent causes of the loss in order to evade responsibility to compensate. For example:

- a. In the *Corfu Channel* case, the ICJ held Albania liable to Great Britain for all damage caused to British warships as a result of mines laid by Yugoslavia. The Court found that the mines were likely laid by Yugoslavia, but could not have been laid without the knowledge of the Albanian Government. Accordingly, while Yugoslavia was also at fault, this did not absolve or diminish Albania’s obligation to compensate Great Britain.<sup>648</sup>
- b. In *Hulley v Russia*, finding that the loss claimed was caused by Russia’s breaches, the claimant’s conduct and the conduct of third parties, the tribunal confirmed that Russia was liable under the principles set out in the ILC Articles and their Commentary, noting that “[a]s the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage.”<sup>649</sup>
- c. In *Saluka v Czech Republic*,<sup>650</sup> the tribunal held the State liable for the investor’s losses where the State had “contributed” to the financial distress of a bank by spreading negative information about it at the same time as the press

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INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 41 (A. Tunc ed., 1983) and ¶¶ 582–85.

<sup>647</sup> **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010, ¶ 169.

<sup>648</sup> **CLA-174**, *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4.

<sup>649</sup> **CLA-176**, *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 226, Interim Award on Jurisdiction and Admissibility, November 30, 2009, ¶ 1774.

<sup>650</sup> **CLA-41**, *Saluka v Czech Republic*, UNCITRAL, Partial Award, March 17, 2006, ¶¶ 480-481.

independently published negative articles on the bank. The tribunal dismissed the State's attempt to rely on the press articles as the cause of the losses.

316. For these reasons, as confirmed by the overwhelming weight of authority, Korea cannot evade its obligation to compensate Mason for its losses by arguing that there were other links in the chain of causation, or that Korea's breaches were only one of multiple causes of the loss. Indeed, having regard to the intentional and egregious nature of Korea's breaches, it is particularly inapposite for Korea to seek to rely on the alleged remoteness of Mason's losses.<sup>651</sup>

b. Mason has established proximate causation with respect to all of its claimed losses

317. Korea's argument that Mason has failed to establish proximate causation is also meritless. The burden of proving that the chain of causation is severed by a relevant, unforeseeable intervening act falls squarely on Korea.<sup>652</sup> Korea has not come close to discharging that burden.

(1) By enabling the Merger at an undervalue to SC&T, Korea knowingly deprived Mason of the fair market value of its SC&T shares

318. Mason's losses in the value of its SC&T shares were the known, intended and expected consequence of Korea's breaches. The Blue House and the MHW foresaw—and intended—that by subverting the NPS's vote in favor of the Merger, the Merger would be approved at a merger ratio set to extract value from Mason and SC&T's other shareholders, for the benefit of the ■ Family.<sup>653</sup> As Mason established in its

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<sup>651</sup> As many municipal tort laws such as English law recognize, as a matter of policy, defendants guilty of fraud are liable for all of the actual consequences of their wrongdoing even if they are unforeseeable (See **CLA-184**, *Smith New Court Securities Ltd v Citibank NA* [1997] A.C. 254). All that is required is that the loss was caused by the fraud (See **CLA-175**, *Doyle v Olby (Ironmongers)* [1969] 2 QB 158).

<sup>652</sup> **CLA-186**, *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Trading Ltd. v. Republic of Kazakhstan*, SCC Case No. V116/2010, Award, December 19, 2013, ¶¶ 1330-1332; **CLA-117**, *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Award, March 28, 2011, ¶ 163.

<sup>653</sup> See § III.B.1 above.

Amended Statement of Claim, it was clear that the merger would generate a loss to SC&T shareholders, including Mason.<sup>654</sup> For example:

- a. Investors, market analysts and independent shareholder advisories commenting on the proposed merger at the time observed that the merger was grossly unfair, prejudicial to SC&T's shareholder and would result in a value transfer from SC&T's shareholders to Cheil's shareholders.<sup>655</sup> For example, Glass Lewis cautioned that "available trading data suggests the selected exchange ratio [ . . . ] is *profoundly unattractive for SCT investors and exceedingly advantageous for Cheil.*"<sup>656</sup> Likewise, the KCGS specifically advised the NPS that "the merger ratio *fails to provide a sufficient reflection of the asset value . . . of SC&T,*"<sup>657</sup> and ISS warned SC&T's shareholders that "[v]oting for this transaction on the current terms, . . . *permanently locks in a valuation disparity.*"<sup>658</sup>
- b. As a matter of objective economic analysis, the merger ratio was set by SC&T and Cheil at a level that was highly unfavorable to SC&T.<sup>659</sup> As explained in detail in the expert reports of Dr. Duarte-Silva and Prof. Wolfenzon, the Merger Announcement was issued on a date at which SC&T's shares traded at a significant discount to its Net Asset Value (or Sum of the Parts ("SOTP") Value). Contrary to Prof. Dow's claims that SC&T's stock price necessarily reflected its intrinsic, Net Asset Value at all times, the share price of SC&T was severely depressed, and the share price of Cheil substantially inflated, because the market was concerned that SC&T and Cheil might try to effect a value transfer in the future through an unfair merger. The market therefore priced in that threat, which would not have materialized had Korea not interfered with the

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<sup>654</sup> ASOC, § III.B.

<sup>655</sup> Duarte-Silva Report I, ¶¶ 48-49; Duarte-Silva Report II, ¶ 48.

<sup>656</sup> **C-83**, Glass Lewis & Co. LLC, Proxy Paper - Samsung C&T Corp. (July 1, 2015), p. 5 (emphasis added).

<sup>657</sup> **C-192**, KCGS, Report on Analysis of Agenda Items of Domestic Listed Companies (2015) – Samsung C&T, July 3, 2015, p. 3.

<sup>658</sup> **C-9**, ISS Report, p. 2.

<sup>659</sup> Duarte-Silva Report I, ¶¶ 46-50.

Merger vote, in breach of the Treaty.<sup>660</sup> Further, as demonstrated in Section III above, SC&T manipulated its share price by withholding material information, thereby further depressing the share price.<sup>661</sup>

- c. The NPS knew, and agreed that the Merger ratio was unfair. The evidence from Korea’s own documents of the gross unfairness and value-extractive nature and purpose of the Merger has only grown with disclosure, as explained in further detail in Section III above. For example, in a report prepared on July 8, 2015, the NPS confirmed its understanding that the “Merger was decided *upon when the relative ratio* of the companies’ share prices *was the lowest*,”<sup>662</sup> and that the consequence of this timing was that the Merger ratio was uniquely harmful to SC&T shareholders.<sup>663</sup>

319. Faced with the inescapable conclusion that Mason’s claimed loss to the value of its shares in SC&T was the known and intended outcome of Korea’s breaches, Korea makes two arguments that take its case no further.

- a. Korea first argues that Korea should be absolved of its responsibility to compensate because the “Merger was itself conceived and approved by the management and boards of each company, both private, far from implicating any duty of the Korean state,”<sup>664</sup> and the “same is true for the terms of the Merger, including the Merger Ratio.”<sup>665</sup> This argument is misconceived. Even the *Lauder v Czech Republic* award (on which Korea relies) recognizes that in order to sever the chain of causation, the acts of third parties must be “so unexpected and so substantial as to have to be held to have superseded the initial

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<sup>660</sup> See Duarte-Silva Report II, § II.A.

<sup>661</sup> See ¶ 29 above.

<sup>662</sup> C-144, NPSIM, Key Information Regarding the Merger of Cheil Industries and Samsung C&T, July 8, 2015, p. 5 (emphasis in original).

<sup>663</sup> C-144, NPSIM, Key Information Regarding the Merger of Cheil Industries and Samsung C&T, July 8, 2015, p. 6 (emphasis in original).

<sup>664</sup> SOD, ¶ 484.

<sup>665</sup> SOD, ¶ 485.

cause and therefore become the main cause of the ultimate harm.”<sup>666</sup> Far from being in any way “unexpected,” the Merger and its ratio were of course well-known and understood by the MHW, the Blue House and the NPS in the perpetration of their unlawful conduct. The actions of SC&T, Cheil and their management in proposing the Merger and setting its ratio (by selecting the date of the announcement and thus fixing the ratio in accordance with the statutory formula) does not, therefore, in any way sever the chain of causation.

- b. Korea then claims that “Mason’s losses are too far removed from Korea’s alleged ‘subversion’ of NPS procedures” because the “NPS did not, by its internal procedures, assume any duty to safeguard the economic fortunes of other shareholders in Fund investments”<sup>667</sup> This argument too is without merit, not least because it is based on Korea’s continued mischaracterization of the facts. Mason is not seeking to hold the NPS responsible for losses arising from any legitimate exercise of the NPS’s voting rights as a shareholder in the ordinary course. Rather, Mason seeks to recover losses suffered as a result of the Blue House, the MHW and the NPS’s criminal scheme to transfer billions of dollars of value from SC&T to Cheil, to the detriment of SC&T’s shareholders including Mason. Because the losses claimed are the actual, foreseeable and intended consequences of Korea’s actions, the proximity requirement is satisfied.

320. In sum, the proximity requirement is amply established on these facts with respect to Mason’s losses to its shares in SC&T. Korea cannot escape its obligation to compensate Mason for such losses, which Korea knowingly and intentionally caused.

- (2) Korea’s approval of the merger invalidated Mason’s investment thesis and caused Mason to divest its SEC shares prematurely

321. Korea relies on the same meritless contentions to argue that Mason’s loss to its investment in SEC was not the proximate result of Korea’s breaches. Korea’s

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<sup>666</sup> **RLA-87**, *Robert S. Lauder v. Czech Republic*, UNCITRAL, Final Award, September 3, 2001, ¶ 234; see also, e.g. **CLA-200**, John Sherman Myers, *Causation and Common Sense*, 5 U. MIAMI L. REV. 238, 249 (1951).

<sup>667</sup> SOD, ¶¶ 493-498.

arguments are equally unfounded with respect to Mason's investment in shares in SEC.<sup>668</sup> Mason's decision to sell its shares in SEC shortly after Korea breached the Treaty did not sever the chain of causation.

322. As Mason established in its Amended Statement of Claim,<sup>669</sup> by interfering with the SC&T-Cheil merger, Korea undermined the fundamental premise of Mason's investment in the Samsung Group and caused Mason to liquidate its investment. Specifically, Mason had invested on the reasonable expectation that the intrinsic value of the Samsung Group would be unlocked through corporate governance reforms over time. As Mr. Garschina explains in his Fourth Witness Statement, "the Merger between Cheil and SC&T became the litmus test for whether meaningful change was truly underway in Korea,"<sup>670</sup> and Mason believed that "in the summer of 2015, the Korean market was finally moving towards an economically rational, foreign investor-friendly climate that would allow the Merger to pass or fail on its own merits."<sup>671</sup> By interfering with the Merger vote and causing it to be approved, Korea invalidated Mason's investment thesis and caused Mason to liquidate all of its positions in SEC shortly after the Merger vote. Mason's decision followed naturally from the wrongful acts for which Korea was responsible and was the direct consequence of them.
323. Moreover, Mason's losses to its investment in SEC were in fact reasonably foreseeable by Korea: Korea knew, or ought to have known, that by altering the outcome of the Merger vote with respect to SC&T and taking part in ██████'s corrupt scheme, its measures would have broader ramifications for investors in other Samsung group companies, including the group's "crown jewel," SEC.<sup>672</sup> Indeed, Korea's officials

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<sup>668</sup> Korea makes the same argument with respect to Mason's alternative claim in relation to SC&T, in which Mason seeks to recover its trading losses (*i.e.*, the difference between the price at which Mason purchased its SC&T shares and the price at which Mason sold them shortly after Korea's breaches). The argument is meritless for the same reasons. As Mr. Garschina's evidence and the documentary record establishes, Mason would not have sold its shares in SC&T at that time or at that value had Korea complied with the Treaty: its losses were the direct result of the wrongful acts for which Korea is responsible.

<sup>669</sup> ASOC, § A.3.

<sup>670</sup> Garschina, ¶ 9, CWS-7.

<sup>671</sup> Garschina, ¶ 16, CWS-7.

<sup>672</sup> Garschina, ¶ 15, CWS-1. Market analysts and the international press also commonly use this expression to describe SEC's position within the Samsung Group. *E.g.*, C-9, ISS Report, p. 10;

knew that the entire aim of the scheme instigated by █████, and the real purpose of the SC&T-Cheil merger, was to facilitate the succession within the █████ Family and to allow the █████ Family to increase its control over the Samsung Group as a whole, including SEC (in which SC&T held a substantial stake).

324. Thus, Korea interfered with the NPS's vote and caused the Merger to be approved knowing that this would be highly detrimental to the Group's corporate governance. Korea's contentions of lack of legal causation in relation to Mason's claims with respect to its losses in SEC are therefore without merit.

(3) The General Partner's lost incentive allocation was also foreseeable by Korea

325. Finally, Korea's arguments as to the alleged lack of proximity between Mason's losses and Korea's breaches are also without merit with respect to the General Partner's lost incentive allocation. Such losses follow naturally and obviously from the egregious acts of wrongdoing with which this case is concerned. Korea knew, or ought to have known that by causing losses to hedge funds invested in SC&T and SEC, which included Mason, Korea would cause such funds losses of the remuneration they would have earned from those investment had those investments been successful.

**B. Korea has Failed to Put Forward Any Credible Objections to Mason's Quantification of Its Losses**

326. Korea does not dispute that, once causation is established, the Tribunal must issue an award of damages in an amount that would "as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed."<sup>673</sup> Nor does Korea dispute that in order to quantify the amount of damages payable, the Tribunal must assess Mason's losses by examining Mason's actual financial situation after Korea's

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C-121, Jonathan Cheng and Min-Jeong Lee, *Samsung Heir Apparent Jay Y Consolidates Power With Merger*, WALL STREET JOURNAL (May 26, 2015), p. 1.

<sup>673</sup> CLA-1, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17.

breaches and comparing it with the one that would likely have prevailed had Korea complied with the FTA (*i.e.*, the “but for” counterfactual).<sup>674</sup>

327. However, Korea seeks to escape its obligation to effect full reparation by claiming that Mason’s losses “amount to zero,” or that any losses were the result of Mason’s failure to “mitigate” such losses by making new investments in other Korean listed companies. Korea’s arguments are misconceived. Korea’s entire approach to valuation is premised on Korea’s continued denial of the facts of its wrongdoing, and its refusal even to engage with the required valuation of Mason’s financial position “but for” Korea’s breaches, on the grounds that, according to Korea, the valuation exercise would involve “subjectivity” or “assumptions.”<sup>675</sup>
328. As Mason explains in **Section 1** below, tribunals have roundly rejected similar attempts by respondents to take advantage of their own wrongs by asserting that zero loss has been suffered because there is uncertainty in the “but for” scenario. As demonstrated in **Section 2** below, Korea has failed to put forward any credible alternative evidence of its own as to Mason’s losses, or any valid critiques of the independent valuations on which Mason relies. The Tribunal should therefore proceed to award Mason damages in the amounts quantified by Dr. Duarte-Silva of CRA for each of Mason’s heads of

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<sup>674</sup> See ASOC, ¶ 241; see also **CLA-118**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007; **CLA-94**, *BG Group Plc v. Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007; **CLA-145**, *Unión Fenosa Gas, SA v. Arab Republic of Egypt*, ICSID Case No. ARB/14/4, Award, August 31, 2018; **CLA-128**, *Novenergia II – Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v. Kingdom of Spain*, SCC Arbitration Case No. 2015/063, Final Award, February 15, 2018; **CLA-124**, *Murphy Exploration & Production Co. International v. Republic of Ecuador*, UNCITRAL, PCA Case No. AA434, Award, May 6, 2016; **CLA-142**, *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, July 6, 2012; **CLA-16**, *Railroad Development v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012; **CLA-8**, *Joseph Charles Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, January 14, 2010; **CLA-138**, *Schneider v. Kingdom of Thailand*, UNCITRAL, Award, July 1, 2009. See further **CLA-146**, *White Industries Australia Ltd v. Republic of India*, UNCITRAL, Final Award, November 30, 2011; **CLA-169**, Sergey Ripinsky & Kevin Williams, *DAMAGES IN INTERNATIONAL LAW* (British Institute of International and Comparative Law, 2015), pp. 88-90.

<sup>675</sup> See, e.g., SOD, ¶¶ 502; 519; 523; 535; 536; 538 and 540; and Dow Report, ¶ 30; 42; 95; 99; 107; 165; 168; 179; 229; 233; 245; 246.

losses, plus interest. Those amounts, together with interest as of the date of this Reply, are as follows:<sup>676</sup>

Damages	Value	Interest to date	Value with interest
<b>Mason’s loss with respect to its investment in SC&amp;T</b>	\$147.2 million	\$48.0 million	\$195.2 million
<b>Mason’s loss with respect to its investment in SEC</b>	\$44.2 million	\$10.3 million	\$54.5 million
<b>General Partner’s lost incentive allocation</b>	\$.92 million	\$0.2 million	\$1.1 million

**1. Korea Cannot Take Advantage of Its Own Wrongs in Order to Deny Mason Compensation**

329. At the outset, Prof. Dow and Korea’s attempt to discredit Mason’s damages as “too speculative and uncertain as to be compensable under international law”<sup>677</sup> falls to be rejected for what it is: an attempt to take advantage of Korea’s own wrongs and evade Korea’s obligations to compensate Mason for the losses caused.

330. By definition, unlike the claimant’s actual financial position following the respondent’s breaches, the counterfactual “but for” financial scenario to be modelled as part of the valuation exercise is uncertain. For this reason, while, as addressed in Section VI.A.1.a above, the existence of loss caused by the breaches falls to be proven by the claimant on the balance of probabilities, international law has long recognized that “the certainty rule applies to only the fact of damages, not to the amount of damages.”<sup>678</sup> In line with this principle, in rejecting similar attempts by respondent States to take advantage of

<sup>676</sup> Duarte-Silva Report II, Table 1.

<sup>677</sup> SOD, ¶ 525.

<sup>678</sup> See, e.g., **CLA-185**, *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, May 20, 1992, ¶¶ 214-215; **CLA-5**, *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, August 20, 2007, ¶ 8.3.16; **CLA-143**, *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, May 29, 2003, ¶ 190.

uncertainties in the “but for” counterfactual created by the State’s own breaches, the *Kardassopoulos v. Georgia* and *Sapphire Petroleum* tribunals held that:

It is not necessary to prove the exact damage suffered in order to award damages. On the contrary, when such proof is impossible, particularly as a result of the behaviour of the author of the damage, it is enough for the judge to be able to admit with sufficient probability the existence and extent of the damage.<sup>679</sup>

331. Similarly, the *Gemplus v Mexico* tribunal observed that:

[A]s a general legal principle, when a respondent has committed a legal wrong causing loss to a claimant (as found by a tribunal), the respondent is not entitled to invoke the burden of proof as to the amount of compensation for such loss to the extent that it would compound the respondent’s wrongs and unfairly defeat the claimant’s claim for compensation ....<sup>680</sup>

332. And in the words of the *Gavazzi v. Romania* tribunal:

Under international law, there is thus by now a well-established and well-known jurisprudence constante to the effect that, however difficult, an international tribunal must do its best to quantify a loss provided that it is satisfied that some loss has been caused to the claimant by the wrongdoing of the respondent. The alternative of simply dismissing the claim for want of sufficient proof is not regarded as a fair or appropriate result.<sup>681</sup>

333. Here, too, the Tribunal should dismiss Korea’s attempt to evade its responsibility to compensate Mason for alleged want of sufficient proof. The Tribunal’s task is to assess the evidence on the record and award damages by making “the best estimate that it can of the amount of the loss, on the basis of the available evidence.”<sup>682</sup> As explained in Section VI.B.2 below, the estimations of Mason’s losses are based on independent

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<sup>679</sup> **CLA-177**, *Kardassopoulos v. Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, March 3, 2010, ¶ 229 (quoting the ad hoc tribunal in **CLA-183**, *Sapphire International Petroleum Ltd. v. National Iranian Oil Co.*, Award, March 15, 1963, 35 I.L.R. 136, ¶¶ 187-188).

<sup>680</sup> **CLA-114**, *Gemplus, S.A. et al. v. United Mexican States*, ICSID Case Nos. ARB(AF)/04/3 & ARB(AF)/04/4, Award, June 16, 2010, ¶¶ 13-92.

<sup>681</sup> **CLA-178**, *Marco Gavazzi and Stefano Gavazzi v. Romania*, ICSID Case No. ARB/12/25, Excerpts of the Award, April 18, 2017, ¶ 124.

<sup>682</sup> **CLA-177**, *Kardassopoulos v. Georgia*, Award, ¶ 594.

assessments, themselves conducted on the basis of on reasonable and conservative assumptions.

**2. Korea and Prof. Dow's Critiques of CRA's Valuation of Mason's Losses are Without Merit**

334. In its Amended Statement of Claim, Mason established, on the basis of independent valuations performed by Dr. Duarte-Silva, that Mason suffered the following losses by reason of Korea's breaches:<sup>683</sup>

- a. Damage to Mason's investment in SC&T: Dr. Duarte-Silva assesses Mason's loss with respect to SC&T as the difference between the value of those shares but for Korea's measures that enabled the merger (i.e., the "but for value") and the value of those shares with the measures (i.e., the "actual value"). But for Korea's measures, Mason's shares in SC&T would have been worth \$311.9 million. As a result of Korea's measures, Mason's shares in SC&T were worth \$164.7 million. Accordingly, Mason should be awarded the difference, equal to **\$147.2 million**, for its loss.<sup>684</sup>
- b. Damage to Mason's investment in SEC: Similarly, Dr. Duarte-Silva assesses Mason's loss with respect to its SEC shares as the difference between the proceeds Mason would have received for the sale of its shares in SEC had Mason sold them for Mason's target price in accordance with its investment thesis and contemporaneous modelling, and the proceeds actually received when Mason sold its shares shortly after Korea's interference with the merger. Had Mason been able to execute on its strategy, it would have sold its shares in SEC for a total of \$129.4 million. Instead, as a result of Korea's measures, Mason sold its shares much earlier than it would have done had it been able to carry out its investment strategy, for \$84.4 million. Korea must therefore

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<sup>683</sup> ASOC, § VI.B.

<sup>684</sup> ASOC, § VI.B.1.

compensate Mason for the difference, **\$44.2 million** (after adjusting the actual sale proceeds to the date of the *but for* sale).<sup>685</sup>

- c. General Partner's lost incentive allocation: By causing damage to the value of Mason's shares in SC&T and to Mason's investment in SEC, Korea caused the General Partner loss by reducing the returns on which the General Partner is entitled to an incentive allocation. Mason's CFO, Derek Satzinger, assessed the lost incentive allocation as **\$1.1 million**.<sup>686</sup>

335. As the Second Expert Reports of Dr. Duarte-Silva and Prof. Wolfenzon comprehensively demonstrate, Prof. Dow has failed to put forward any critiques warranting any reductions to Mason's assessment of its losses to its investments in SEC and SC&T. Mason addresses Prof. Dow's principal arguments in summary below.

- a. CRA's independent valuation provides a reliable measure of Mason's loss to its investment in SC&T

336. Mason's loss with respect to its shares in SC&T were quantified by Dr. Duarte-Silva in his first report. In summary:

- a. *First*, Dr. Duarte-Silva estimated the fair market value of Mason's shares in SC&T *but for* the violations by valuing each of the underlying businesses and other assets held by SC&T on a standalone (non-merged) basis, on July 17, 2015. In order to conduct this valuation, known in valuation theory as SOTP valuation, Dr. Duarte-Silva selected an appropriate methodology for valuing each part of SC&T in accordance with the International Valuation Standards, including the comparable transactions method for interest in unquoted businesses and the stock market valuation method for interests in quoted companies where appropriate. On the basis of this approach, Dr. Duarte-Silva

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<sup>685</sup> ASOC, § VI.B.2.

<sup>686</sup> ASOC, § VI.B.3.

estimated that the fair market value of Mason's shares in SC&T but for Korea's measures would have been \$311.9 million.<sup>687</sup>

b. *Second*, Dr. Duarte-Silva estimated the fair market value of Mason's shares in SC&T *with* the violations by reference to the share price of SC&T on the stock market immediately after the Merger vote, on July 17, 2015. Accordingly, Dr. Duarte-Silva estimated that the fair market value of Mason's shares in SC&T immediately following Korea's breaches was \$164.7 million.<sup>688</sup>

c. *Third*, Dr. Duarte-Silva subtracted the fair market value of Mason's shares in SC&T with the merger from the fair market value but for the merger. Accordingly, Dr. Duarte-Silva assessed Mason's loss in the fair market value of its shares in SC&T as **\$147.2 million**.<sup>689</sup>

337. Korea and Prof. Dow seek to dispute this straightforward assessment by raising three lines of argument, none of which has any merit.

- (1) CRA's reliance on the SOTP methodology for valuing the *but for* value of Mason's shares is standard and appropriate

338. Prof. Dow argues that it is inappropriate to value the but for value of Mason's shares using the standard SOTP methodology, and that such value should instead be measured as the actual share price on the stock market as of July 16, 2015, before the vote.<sup>690</sup> As a consequence of this circular calculation, Prof. Dow claims that Mason's loss amounts to zero. Prof. Dow's argument is deeply flawed.

339. *First*, the SOTP methodology adopted by Dr. Duarte-Silva, and supported by Prof. Wolfenzon, is both standard and appropriate as a matter of valuation theory, and widely used in practice to value shares in conglomerates such as SC&T.<sup>691</sup> In fact, SOTP was

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<sup>687</sup> Duarte-Silva Report I, § V.A.

<sup>688</sup> Duarte-Silva Report I, § V.A.

<sup>689</sup> Duarte-Silva Report I, § V.C.

<sup>690</sup> SOD, §§ VII.B and VII.C.

<sup>691</sup> See Duarte-Silva Report I, ¶ 27; Wolfenzon Report I, ¶ 22.

the method that was actually used in practice by virtually all market analysts in their valuations of SC&T,<sup>692</sup> by the NPS,<sup>693</sup> and by Cheil.<sup>694</sup>

340. *Second*, contrary to Prof. Dow’s claims, Dr. Duarte-Silva’s SOTP methodology is not “subjective” or “unreliable.”<sup>695</sup> As the SOTP method’s wide acceptance in financial literature and practice around the world confirms,<sup>696</sup> the method is reliable<sup>697</sup> and, like any valuation methodology, it requires an expert to exercise judgment based on reliable data and reasonable assumptions. It is for this reason that valuation in legal proceedings is generally addressed through expert opinion rather than by submission by counsel or documentary exhibits alone.
341. *Third*, Prof. Dow’s reliance on the actual stock market price of SC&T to value the but for fair market value of SC&T is based on Prof. Dow’s refusal to accept, in spite of all of the evidence, that the stock market price of SC&T was depressed by both the threat of the predatory merger and deliberate market manipulation. As Dr. Duarte-Silva and Prof. Wolfenzon explain in their reports, since Cheil’s IPO, the stock market was deeply concerned that SC&T would become the subject of a value-extractive merger as part of the ■■■ Family’s attempt to gain greater control over the Samsung group and in connection with the family succession plan.<sup>698</sup> As a consequence, as Dr. Duarte-Silva explains and demonstrates quantitatively in his Second Report, “consistent with the

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<sup>692</sup> See Duarte-Silva Report I, ¶ 27.

<sup>693</sup> Duarte-Silva Report II, ¶ 63; **CRA-234**, Research Team, National Pension Service Investment Management, Report on Fair Valuation of Cheil Industries / Samsung C&T, July 10, 2015, pp. 5, 7.

<sup>694</sup> Duarte-Silva Report II, ¶ 63; **CRA-40**, Cheil IPO filing, December 5, 2014, (Translated ver.) pp. 100-103.

<sup>695</sup> Dow Report, ¶¶ 26, 229.

<sup>696</sup> See Wolfenzon Report I, Ex. 9, Tim Koller, Marc Goedhart & David Wessels, *Chap. 17: Valuation by Parts*, in *VALUATION: MEASURING AND MANAGING THE VALUE OF COMPANIES* (6th ed. Wiley & Sons 2015), p. 7803. See also, e.g. Wolfenzon I, Ex. 18, Belen Villalonga, Note on Sum-Of-The-Parts Valuation, Harv. Bus. School, 9-209-105, February 13, 2009 (“Villalonga 2009”), p. 1 (“This method of valuing a company by parts and then adding them up is known as Sum-Of-The-Parts (SOTP) valuation and is commonly used in practice by stock market analysts and companies themselves.”).

<sup>697</sup> See Duarte-Silva Report II, ¶ 63; Wolfenzon Report I, ¶ 22.

<sup>698</sup> Duarte-Silva Report I, ¶¶ 46-52; Wolfenzon Report I, § VI; Duarte-Silva Report II, ¶¶ 70-76; Wolfenzon Report II, ¶ 35.

market's notion that Cheil's shareholders might receive a value transfer from SC&T's shareholders, SC&T's shares routinely traded below SC&T's fair market value by approximately the same amount as Cheil's shares traded above Cheil's fair market value."<sup>699</sup> Dr. Duarte-Silva thus confirms that "[b]y causing the Merger's approval, Korea permanently locked in this value transfer and deprived SC&T's shareholders, including Mason, of the fair market value of their shares."<sup>700</sup>

342. Further, while Prof. Dow accepts that where material information is withheld, the stock market value of an equity may not accurately reflect its fair market value,<sup>701</sup> Prof. Dow rejects the plain evidence that ██████ and Samsung deliberately manipulated the share prices of SC&T and Cheil in the lead-up to the Merger announcement and vote, and asserts that there is "no evidence" of such manipulation.<sup>702</sup> In fact, since disclosure, despite Korea's efforts to resist producing any documents from its own investigations into the manipulation of the share prices of SC&T and Cheil, the evidence has only grown:

- a. SC&T front-loaded bad news that would depresses SC&T share price.<sup>703</sup>
- b. Conversely, SC&T deliberately delayed the announcement of good news that would increase SC&T's share price, including SC&T's securing of significant residential housing projects,<sup>704</sup> and a major construction project contract in Qatar project on May 13, 2015 until July 28, 2015 (i.e., after the Merger Vote).
- c. The SC&T and Cheil boards rushed to approve the Merger before the news of

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<sup>699</sup> Duarte-Silva Report II, ¶ 7.

<sup>700</sup> Duarte-Silva Report II, ¶ 7; *See also* Duarte-Silva Report II, § II.2.b.i.

<sup>701</sup> Dow Report, ¶ 96.

<sup>702</sup> Dow Report, ¶ 25.

<sup>703</sup> **C-184**, *Samsung Group planned to manipulate market prices ahead of Cheil/Samsung C&T merger*, HANKYOREH (November 28, 2019), p. 2 ("Noting that 'negative influences on stock prices are reflected in first quarter performance or pre-reflected in stock prices based on market opening before the merger board meeting is announced,' Samsung called for "supporting stock prices by concentrating positively influencing factors in July/ August after the merger board meeting is held."").

<sup>704</sup> **C-184**, *Samsung Group planned to manipulate market prices ahead of Cheil/Samsung C&T merger*, HANKYOREH (November 28, 2019), p. 2 ("[A]fter the merger decision, [SC&T] announced plans that July to supply 10,994 apartment units in Seoul.").

a fire at a Cheil warehouse causing KRW 28 billion in losses became public and negatively affected Cheil stock price.<sup>705</sup>

d. The timing and methods of the announcement of Cheil subsidiary Samsung Bioepis' IPO on the NASDAQ were manipulated to inflate Cheil's share price upwards.<sup>706</sup>

e. Samsung's executives engaged in an accounting fraud to inflate the value of Cheil subsidiary Samsung Biologics, "cook[ing] the books to aid [REDACTED]'s succession of control of the group."<sup>707</sup>

343. For these reasons, Prof. Dow has failed to advance any credible reasons to reject the SOTP valuation method in favor of the stock market method. As the commentary on which Korea relies confirms, international courts and tribunals have long shown "a certain skepticism" towards the usefulness of prices of stocks and shares of a company

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<sup>705</sup> **C-187**, [Exclusive] Approval for merger was fast tracked the day after fire broke out at Cheil Industries, MBC (June 11, 2020).

<sup>706</sup> **C-185**, [Exclusive] Samsung Personnel Testifies 'Utilize Bioepis in the SC&T Merger, Led by the Future Strategy Office,' HANKYOREH (May 4, 2020), p. 14; **C-186**, Lim Jae-woo and Kim Jung-pil, Prosecutors say arrest warrant for Lee Jae-yong was not reaction to his request for investigation review board, HANKYOREH (June 5, 2020); **C-134**, Samsung, Plan to Announce the Listing of Samsung Bioepis, June 2015, p. 1 [REDACTED]

<sup>707</sup> **C-180**, Choi Hyun-june and Kim Nam-il, [News analysis] Samsung Biologics' accounting fraud both begins and ends with Lee Jae-yong's succession of the group, HANKYOREH (November 15, 2018) ("South Korean regulators' findings that Samsung BioLogics engaged in "deliberate accounting fraud" is expected to have serious ramifications for the trial of Samsung Electronics Vice Chairman Lee Jae-yong and the overall management structure in the Samsung Group. Since this means that books were cooked to aid Lee's succession of control of the group . . . "); **C-182**, Song Jung-a and Edward White, Samsung heir's top aide questioned over suspected cover-up, FINANCIAL TIMES (June 11, 2019), p. 2 ("South Korea's financial regulator last year ruled that Samsung BioLogics in 2015 inflated the value of affiliate Samsung Bioepis by \$3.9bn. Critics have said that was done to bolster the value of then-parent Cheil Industries to facilitate its \$8bn merger with Samsung C&T, which held a key stake in Samsung Electronics."); **C-150**, Samsung, Appraisal Issues Regarding Bio/Biogen's Call Option, November 10, 2015; **C-151**, Samsung, Accounting Issues Regarding Bio/Biogen's Call Option, November 18, 2015, [REDACTED]

for valuation purposes,<sup>708</sup> and “[s]tock prices are likely not appropriate when a subjective–concrete valuation is warranted in order to achieve full reparation.”<sup>709</sup>

344. Here, full reparation would clearly not be achieved by awarding Mason zero damages on the basis of Prof. Dow’s circular and tortuous logic that the best measure of the *but for* value of Mason’s shares is the actual stock market value before the Merger vote. The stock price of SC&T was weighed down primarily by the threat of a predatory merger which would have dissipated – as Mason had correctly predicted – had Korea not interfered with the merger in breach of the treaty.<sup>710</sup> Full reparation requires that Mason be compensated by reference to the true, intrinsic value of its shares, which Mason would have realized had Korea not locked in the discount to the SC&T’s SOTP value.

(2) Prof. Dow’s criticisms of the workings of CRA’s SOTP valuation are without merit

345. No doubt recognizing that his attempts to discredit Dr. Duarte-Silva’s reliance on the widely-adopted SOTP methodology fall to be rejected, Prof. Dow also seeks to critique the workings of Dr. Duarte-Silva’s valuation. Here, too, Prof. Dow’s criticisms are without merit.

346. *First*, Prof. Dow’s claim that Dr. Duarte-Silva’s reliance on stock market prices for valuing SC&T’s listed holdings is somehow inconsistent with Dr. Duarte-Silva’s selection of the SOTP method for valuing SC&T is inapposite.<sup>711</sup> As Dr. Duarte-Silva explains, in the absence of any indication that the stock prices of the public companies

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<sup>708</sup> **RLA-163**, Irmgard Marboe, *Calculation Of Compensation And Damages in INTERNATIONAL INVESTMENT LAW* (2nd ed., Oxford Univ. Press 2017), ¶ 5.04.

<sup>709</sup> *Id.*, ¶ 5.12.

<sup>710</sup> Duarte-Silva Report II, § II.2.

<sup>711</sup> SOD, ¶ 523; Dow Report, ¶¶ 99, 205(c).

in which SC&T held shares were unreliable, it is appropriate to rely on the listed share prices as a measure of the value of SC&T's listed holdings.<sup>712</sup>

347. *Second*, contrary to Prof. Dow's assertions,<sup>713</sup> Dr. Duarte-Silva values SC&T's stakes in privately-held companies in a reasonable and conservative manner, consistent with how analysts contemporaneously valued SC&T's SOTP: using the valuations applied by SC&T itself in its financial statements.<sup>714</sup> For SC&T's stake in Samsung Biologics, Dr. Duarte-Silva uses a valuation that is below the average of valuations selected by Prof. Dow himself (after correcting for errors in his presentation of the valuation data), and is therefore demonstrably conservative.<sup>715</sup>
348. *Third*, Prof. Dow's claim that a 30% discount to Dr. Duarte-Silva's SOTP valuation of SC&T should be applied because SC&T is a holding company within a Korean family business group is unsupported by the literature on the valuation of *chaebols*, as Prof. Wolfenzon, a specialist in this academic field, confirms in his expert reports.<sup>716</sup> In particular, contrary to Prof. Dow's claims, far from supporting the imposition of any such discount to Dr. Duarte-Silva's SOTP valuation, the literature, including Prof. Wolfenzon's own research, confirms that there is no "generalized" or applicable holding company discount in Korea.<sup>717</sup> Other research, ignored by Prof. Dow, suggests that there may also be reasons to apply a premium to SOTP valuations of holding companies.<sup>718</sup>
349. Finally, Korea and Prof. Dow's attempt to dispute that SC&T would have been on a path to reach its intrinsic value but for Korea's breaches<sup>719</sup> is belied by Korea's own evidence. As one of the NPS's documents revealed through disclosure confirm, the NPS itself believed that SC&T's share price would "skyrocket" in the event the Merger

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<sup>712</sup> Duarte-Silva Report II, ¶¶ 169-172.

<sup>713</sup> SOD, § VII.B.1 and Dow Report, § IV.D.2

<sup>714</sup> See Duarte-Silva Report II, ¶ 172.

<sup>715</sup> Duarte-Silva Report II, ¶¶ 173-178.

<sup>716</sup> Wolfenzon Report I, § VII; Wolfenzon Report II, § II.

<sup>717</sup> Wolfenzon Report II, ¶¶ 66-69.

<sup>718</sup> Wolfenzon Report II, ¶¶ 5-7.

<sup>719</sup> SOD, ¶ 523; Dow Report, ¶ 214.

were rejected. Specifically, the NPS considered that [REDACTED]

[REDACTED]<sup>720</sup> Further, as Dr. Duarte-Silva observes, Prof. Dow himself considers that SC&T traded in an efficient market, and on that basis, “SC&T’s share price would have risen immediately upon the rejection of the Merger in order to reflect SC&T’s fair market value without the threat of the Merger.”<sup>721</sup>

350. For these reasons, none of Korea and Prof. Dow’s critiques of the workings of CRA’s SOTP valuation has any merit.

(3) By purchasing its SC&T shares after the merger announcement, Mason did not assume the risk of Korea’s cover, criminal interference with the merger

351. Finally, Korea and Prof. Dow argue that because Mason purchased its shares in SC&T after the merger announcement, Mason “assumed the risk of the Merger (and thus the potential harm of the Merger Ratio) when it invested in SC&T”<sup>722</sup> and should therefore be denied compensation. Like Korea’s purported defence to liability based on Mason’s alleged “assumption of risk,” Korea’s reliance on the same argument in relation to quantum is misconceived.

352. As explained in Section V.A above, Mason did not assume, and could not have assumed the risk of Korea’s breaches. The limited and reasonable risk taken by Mason – that, without unlawful interference by Korea, SC&T’s shareholders might approve the merger despite its prejudicial terms – did not materialize. The merger was approved because of Korea’s interference. Had Korea not interfered with the Merger vote, the merger would not have been approved.

353. The fallacy in Korea and Prof. Dow’s argument is brought into sharp focus by their own reliance on the *Rosinvest v Russia* award. In that case, the tribunal awarded a lower amount of damages than claimed in light of the fact that the claimant had made its investment when “[t]he market was fully informed of *Respondent’s likely action* in

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<sup>720</sup> C-174, Transcript of Court Testimony of [REDACTED] Case 2017Gohap34/2017Gohap183 (Seoul Central District Court, May 8, 2017), pp. 15-16 (emphasis added).

<sup>721</sup> Duarte-Silva Report II, ¶¶ 11, 118-119.

<sup>722</sup> SOD, ¶ 531.

respect of Yukos from July 2004.”<sup>723</sup> Unlike the claimant and the market in *Rosinvest*, neither Mason nor the market had any reason to expect Korea’s likely action in respect of the Merger vote. To the contrary, by their nature, Korea’s measures were covert, and were only revealed when discovered through the criminal investigations leading to the convictions of Korea’s President, Minister █████ and other high ranking officials. Thus, as Mr. Garschina confirms in his evidence, “[w]e did not foresee the possibility that our investment thesis would be flouted by a criminal scheme. Had we known, or even suspected, that, we would not have invested hundreds of millions of our investors’ money in Samsung.”<sup>724</sup>

354. For these reasons, none of Korea and Prof. Dow’s critiques of Dr. Duarte-Silva’s SOTP valuation of Mason’s losses in SC&T has any merit. The Tribunal is respectfully requested to adopt the independent valuation of Mason’s losses of Dr. Duarte-Silva and to award Mason **\$147.2 million** in damages for its losses in the value of its SC&T shares.

b. Korea has failed to undermine CRA’s quantification of Mason’s loss in its investment in SEC

355. Korea and Prof. Dow’s critiques of the quantification of Mason’s loss in its investment in SEC are also misconceived.

356. Dr. Duarte-Silva values Mason’s loss with respect to SEC as the difference between the “but for” proceeds that Mason would have received from its sale of its SEC shares at its target price, and the actual proceeds from Mason’s sale of its SEC shares shortly after the Merger vote. On this basis, Dr. Duarte-Silva concludes that Mason suffered damages of **\$44.2 million**.<sup>725</sup>

357. Unable to dispute the validity of Dr. Duarte-Silva’s calculations or his modelling of the “but for” scenario based on Mr. Garschina’s evidence, Korea and Prof. Dow argue that

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<sup>723</sup> **CLA-38**, *RosInvestCo UK Ltd. v. The Russian Federation*, SCC Case No. V079/2005, Award, September 12, 2010, ¶ 665.

<sup>724</sup> Garschina, ¶ 16, **CWS-7**.

<sup>725</sup> Duarte-Silva Report I, § VII.

Mr. Garschina's expectation that "the SEC share price would have reached Mason's "price target" is speculative and unwarranted."<sup>726</sup> This argument is without merit.

358. *First*, Mason's model was neither flawed nor overly optimistic. As Dr. Duarte-Silva observes, Mason's modelling was only 8% higher than the median price target established by analysts at the time.<sup>727</sup> It was therefore substantially in line with the views of independent analysts.
359. *Second*, even if (contrary to the above) Mason's model were "subjective" or flawed, Prof. Dow's criticisms of Mason's modelled price target are misplaced. The validity of Mason's model, and the reasonableness of Mason's price target is irrelevant to the assessment of Mason's loss. What matters is that Mason would have sold its shares for the target price but for Korea's breaches. The evidence of SEC's actual share price movement shows that even despite Korea's breaches, the share price of SEC reached Mason's price target in 2017.<sup>728</sup> It is therefore exceedingly likely that, but for Korea's interference with the Merger vote, that price target would also have been reached by that date, if not earlier.
360. Finally, Korea contends that Mason has suffered no loss because, according to Korea, the SC&T-Cheil merger had no impact on the value of Mason's SEC shares,<sup>729</sup> and Mason "decided to abandon its own investment thesis"<sup>730</sup> rather than sell its shares under compulsion by Korea. This argument too is inapposite. Korea's interference with the SC&T-Cheil merger directly impacted Mason's investment in SEC by causing Mason to divest its shares in SEC prematurely. In the words of Mr. Garschina, "the Merger between Cheil and SC&T became the litmus test for whether meaningful change was truly underway in Korea."<sup>731</sup> Had Korea not interfered with the SC&T-Cheil vote, the merger would have been rejected, and Mason would not have divested shortly after the vote. By interfering with the Merger vote, Korea undermined Mason's

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<sup>726</sup> SOD, ¶ 535.

<sup>727</sup> Duarte-Silva Report II, ¶¶ 19, 203.

<sup>728</sup> Duarte-Silva Report II, ¶¶ 197, 202-204.

<sup>729</sup> SOD, ¶ 542; Dow Report ¶¶ 77, 196.

<sup>730</sup> SOD, ¶ 544.

<sup>731</sup> Garschina, ¶ 9, CWS-7.

investment thesis and caused Mason to sell all of its shares in SEC before they reached Mason's price target.

361. For these reasons, the Tribunal is respectfully requested to award Mason damages with respect to its investment in SEC of **\$44.2 million** as quantified by Dr. Duarte-Silva.

c. The General Partner is entitled to claim its lost incentive allocation

362. Korea raises two criticisms with the calculation of the lost incentive allocation suffered by the General Partner, which relate to an errant additional addback which appears in the calculation spreadsheets but not in Mr. Satzinger's witness statement, and the conceptual approach to dealing with the allocation of profits to investors that have left the fund since Korea's wrongdoing. Prof. Dow does not separate the impact of these two criticisms on the incentive allocation in his assessment.

363. Mr. Satzinger has clarified that the errant addback was inadvertent and has recalculated the General Partner's lost incentive allocation with that correction. The corrected figure is **\$917,156**.

364. As Dr. Duarte-Silva explains in his Second Report, the second (conceptual) criticism and the proposed correction prepared by Prof. Dow "are both deeply flawed," noting that the approach "bring[s] in facts to support mutually inconsistent positions" and that there is "no feasible scenario – actual or hypothetical – in which [Prof. Dow's purported] allocation of profits can occur."<sup>732</sup> As Dr. Duarte-Silva demonstrates, taking Prof. Dow's approach to its logical conclusion actually increases the incentive allocation claimable by the General Partner (to **\$2.2 million**) rather than reducing it.<sup>733</sup>

### 3. Korea's So-Called "Mitigation" Arguments are Frivolous

365. Korea argues that Mason's compensation should be reduced to zero because Mason ought to have "mitigated" its losses by investing the proceeds from its sale of its SC&T

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<sup>732</sup> Duarte-Silva Report II, ¶ 217.

<sup>733</sup> Duarte-Silva Report II, ¶ 220.

and SEC shares in other Korean companies, or by not selling Mason’s shares in SEC until January 2017.<sup>734</sup> These so-called “mitigation” arguments are misconceived.

366. As the commentary to the ILC Articles cited by Korea makes clear, the duty to mitigate requires no more than the victim of a wrongful act acting “reasonably when confronted by the injury.”<sup>735</sup> It does not require the injured party to make new investments in order to offset its losses caused by the State. This would require a wronged investor to expose itself to further risk by re-investing its funds in the territory of the State that had committed the treaty violation. Such a course of action would be anything but reasonable, and is not required under international law.
367. In relation to Korea’s damage to Mason’s SC&T shares, the damage was incurred immediately upon the passing of the vote, when the discount to SC&T’s fair market value was locked in.<sup>736</sup> As Dr. Duarte-Silva observes, “[i]f Prof. Dow means that “mitigation” could have been achieved after the vote by investing in other companies, that is economically unjustified and fallacious. That would be equivalent to arguing that one can mitigate the effects of theft by investing and earning profits on the remaining amount. It simply does not pass common sense, let alone economic logic.”<sup>737</sup>
368. Similarly, Mason could not have taken any further steps to “mitigate” its loss in relation to SEC. Korea’s interference with the Merger vote undermined Mason’s investment thesis in relation to SEC, thereby undermining the premise for Mason’s models of SEC.<sup>738</sup> Accordingly, as a direct and reasonable reaction to the approval of the Merger caused by Korea’s breaches, Mason divested its SEC shares shortly after the Merger Vote results were announced.<sup>739</sup> Clearly, it would not have been reasonable or prudent

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<sup>734</sup> SOD, ¶ 551.

<sup>735</sup> **CLA-166**, International Law Commission’s Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries (2001), Article 31, cmt. 11; *see also*, **CLA-128**, *Hrvatska Elektroprivreda d.d. v. Republic Slovenia*, ICSID Case No. ARB/05/24, Award, December 17, 2015, ¶ 215.

<sup>736</sup> Duarte-Silva Report II, ¶ 7 and § II.2.b.i.

<sup>737</sup> Duarte-Silva Report II, ¶ 222.

<sup>738</sup> Garschina, ¶ 16, CWS-7.

<sup>739</sup> Garschina, ¶¶ 22-24, CWS-5.

for Mason to hold its shares in SEC in the absence of a belief in the investment thesis in reliance on which Mason invested in SEC.

369. Finally, even if Korea's arguments as to mitigation had any merit, any failure to mitigate would not absolve Korea from its obligation to compensate, but would merely reduce the amount of damages by the amount Korea can prove Mason could have avoided through reasonable mitigating steps.<sup>740</sup> Korea has failed to prove that Mason could have avoided any parts of its losses in this case.

370. For these reasons, Korea's "mitigation" arguments should be dismissed.

#### 4. Korea Cannot Credibly Object to Mason's Entitlement to Interest in Accordance with Korea's Own Commercial Judgment Rate

371. In its Amended Statement of Claim, Mason established that it is entitled to be adequately compensated for its loss under the international law principle of full reparation.<sup>741</sup> This principle requires the payment of interest at an appropriate rate in order to meet the standard of compensation set by the *Chorzów Factory* case.<sup>742</sup> Korea does not dispute this principle, but denies that its own standard commercial judgement rate of 5% per annum is appropriate and proposes that interest be award at Korea's borrowing rate (around 2.01% as of 2015).<sup>743</sup> Korea's position is unpersuasive.

372. *First*, Korea cannot credibly deny the reasonableness of the rate payable in its own courts. Korea does not even attempt to do so. Numerous other tribunals have considered it reasonable and appropriate to award interest at the commercial judgment rate of the host State, adding, where necessary, an uplift to account for inflation. For

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<sup>740</sup> See, e.g., **RLA-91**, *Middle East Cement Shipping and Handling Co. S.A. v. Republic of Egypt*, ICSID Case No. ARB/99/6, Award, April 12, 2002, ¶¶ 168-169, confirming that the burden of proof resting squarely on the respondent; **CLA-197**, *Irmgard Marboe, Calculation of Compensation and Damages in INTERNATIONAL INVESTMENT LAW* (2nd ed, Oxford Univ. Press 2017), ¶ 3.256, noting that any proven failure to mitigate reduces the amount of compensation payable by the amount that would have been mitigated had the reasonable mitigation steps been taken.

<sup>741</sup> ASOC, § VI.B.4.

<sup>742</sup> **CLA-1**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17; See also **CLA-118**, *LG&E v. Argentine Republic*, ICSID Case No. ARB/02/1, Award, July 25, 2007, ¶ 104.

<sup>743</sup> SOD, ¶ 555; Dow Report, ¶ 289.

example, the *SPP v Egypt* tribunal awarded the claimant interest at the Egyptian legal interest rate of 5%, but increased the amount by an “inflation factor” in order to ensure that the investor was not prejudiced by high inflation between the date of the treaty violation and the award.<sup>744</sup> The *Amco Asia v Indonesia* tribunal ordered payment of interest at a rate of 6% by dereference to the Indonesian legal interest rate.<sup>745</sup> And the *CME v Czech Republic* tribunal awarded interest at the Czech interest rate of 10% per annum.<sup>746</sup>

373. *Second*, Korea’s commercial judgment rate is in line with, and indeed below the rate selected by other tribunals awarding interest in international investment disputes where the rate selected was not based on the domestic judgment rate. By way of further examples, in *UP and C.D Holding v. Hungary*, the tribunal found that a rate of EURIBOR + 6.01% was justified,<sup>747</sup> and the *Micula* tribunal awarded an interest rate of ROBOR +5%, compounded on a quarterly basis.<sup>748</sup>
374. Finally, while Korea does not dispute Mason’s right to compound interest, it argues that the compounding should be yearly, rather than monthly. Again, Korea fails to rely on any legal authority or principle to support its contention. Tribunals have dismissed similar arguments seeking to elongate the compounding period and considered it appropriate to award interest compounded on a monthly basis.<sup>749</sup> Here, too, in the absence of any compelling objection, the Tribunal should award compound interest based on a monthly compounding interval.

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<sup>744</sup> See **CLA-185**, *Southern Pacific Properties v Egypt*, Award of May, 20 1992, ¶¶ 223, 237.

<sup>745</sup> **CLA-170**, *Amco Asia Corp v Indonesia (Amco I)*, ICSID Case No. ARB/81/1, Award, dated November 20, 1984, ¶ 281.

<sup>746</sup> **CLA-172**, *CME v Czech Republic*, Final Award on Damages, March 14, 2003, ¶ 631.

<sup>747</sup> **CLA-188**, *UP and C.D Holding Internationale v. Hungary*, ICSID Case No. ARB/13/35, Award, October 9, 2018, ¶¶ 596-599.

<sup>748</sup> **RLA-47**, *Ioan Micula, Viorel Micula and others v. Romania*, ICSID Case No. ARB/05/20, Final Award, December 11, 2013, ¶¶ 1271-1272.

<sup>749</sup> For example, the *Metalclad v Mexico* and *Maffezini v Spain* tribunals ordered post-award interest on a monthly compounded basis. See **RLA-85**, *Emilio Agustín Maffezini v Spain*, Award of November 13, 2000, ¶¶ 96-97 and **CLA-9**, *Metalclad v Mexico*, Award, August 30, 2000, ¶ 131, both awarding post-award interest at 6% per annum compounded monthly.

## 5. Mason is Entitled to Payment of an Award in US Dollars

375. Korea objects to Mason being awarded compensation in US dollars, the currency of Mason's nationality. Korea offers no legal principle or authority to support its objection. As the *Siemens v Argentina* tribunal explained, full reparation would not be achieved by awarding damages in the currency of the host state and exposing the investor to currency risks between the date of the wrongful act and payment of the award.<sup>750</sup> Awarding compensation in Korean Won would expose Mason to the risk of currency depreciation until payment of the award, a risk to which Mason would not have been exposed but for Korea's breaches. In order to avoid Mason receiving less than full reparation because of such a risk, Mason should be awarded damages in US dollar.

### C. The General Partner is Entitled to Full Compensation for Its Losses to Its Investment in SC&T and SEC

376. Finally, Korea seeks to reduce the compensation payable by disputing its obligation to compensate the General Partner beyond its lost incentive allocation because, according to Korea, "a claimant can only claim loss to its beneficial interests."<sup>751</sup> The Tribunal rejected Korea's argument as an objection to "standing" at the Preliminary Objections phase, and, so too here should reject it as a basis for excusing Korea from its obligation to provide full compensation.

377. As the Tribunal has already found, the General Partner qualifies for protection under the FTA because the General Partner was an investor and made a covered investment. As of the date of the Merger vote, the General Partner legally owned and controlled 1,951,925 common voting shares of SC&T and 52,466 common voting shares of SEC.<sup>752</sup> The Tribunal confirmed this in its Decision on Preliminary Objections and

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<sup>750</sup> See **RLA-104**, *Siemens AG v The Argentine Republic* (ICSID Case No. ARB/02/8), Award, February 6, 2007, ¶ 361.

<sup>751</sup> SOD, ¶ 511.

<sup>752</sup> ASOC, ¶ 108.

found that “the General Partner owned and controlled the Samsung Shares and made an investment in accordance with Article 11.28 of the FTA.”<sup>753</sup>

378. Under the express terms of the FTA, the General Partner is now entitled to compensation for all loss and damage to its investment in the Samsung Shares “owned and controlled” by the General Partner. Under international law, the quantum of such compensation must “wipe out all the consequences of the illegal act.”<sup>754</sup> Limiting the General Partner’s damages to its lost incentive allocation would not give effect to that principle, embodied in the seminal *Chorzów Factory* decision. There is no exception to the *Chorzów Factory* principle absolving a respondent from its obligation to make full reparation merely because the investor had an obligation to account for a share of the economic benefit of the investment to a third party. What happens to the returns on the investment, or to the damages awarded, does not impact the amount of compensation payable under international law. This was clearly recognized by the PCIJ in *Chorzów Factory*, which expressly confirmed that any liabilities to third parties that the claimant may have do not impact on the compensation payable:

This principle ... has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in respect of the Chorzow undertaking is therefore equivalent to the total value—but

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<sup>753</sup> Decision on Respondent’s Preliminary Objections, ¶ 311(a).

<sup>754</sup> **CLA-1**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17, p. 47.

to that total only—of the property, rights and interests of this Company in that undertaking, without deducting liabilities.<sup>755</sup>

379. Similarly, as the *Bridgestone v Panama* tribunal observed, “what happens to the fruits of an investment after they have been harvested does not impact on the value of those fruits.”<sup>756</sup>

380. For these reasons, which Mason addressed in the preliminary issues phase<sup>757</sup> and develops further below, Korea’s attempt to dispute or limit this trite principle in order to escape its obligation to provide full compensation for its wrongful acts is without merit.

**1. The FTA Does Not Support the Imposition of Any Extraneous Limitation on the General Partner’s Entitlement to Full Compensation**

381. Korea’s objection to the General Partner’s damages claim remains premised on a limitation that has no place in the FTA. Under the FTA, Korea undertook to compensate investors for losses suffered to their investments, which Article 11.28 defines as “every asset that an investor *owns or controls*, directly or indirectly, that has the characteristics of an investment. . . .”<sup>758</sup> As noted above, the Tribunal has determined that the General Partner both owned and controlled the Samsung Shares as of the date of the Merger Vote.<sup>759</sup>

382. Under the FTA, the General Partner is therefore entitled to full compensation for Korea’s damage to all investments owned and controlled by the General Partner as of the date of Korea’s breaches.<sup>760</sup> No further requirements are imposed under the FTA. And as the tribunal in *Waste Management, Inc. v. United Mexican States* made clear,

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<sup>755</sup> **CLA-1**, *Case Concerning the Factory at Chorzów (Germany v. Poland)*, Decision on the Merits, September 13, 1928, PCIJ, Rep. Series A, No. 17, p. 31.

<sup>756</sup> **CLA-28**, *Bridgestone Licensing Services, Inc. and Bridgestone Americas, Inc. v. Republic of Panama*, ICSID Case No. ARB/16/34, Decision on Expedited Objections, December 13, 2017.

<sup>757</sup> See Mason’s Counter-Memorial, § VI; Rejoinder on Korea’s Preliminary Objections, §§ VI-IX; and Transcript of Hearing on Preliminary Objections, October 2, 2019. For the avoidance of doubt, Mason relies on its prior submissions on this issue in full.

<sup>758</sup> **CLA-23**, Treaty, Article 11.28 (emphasis added).

<sup>759</sup> Decision on Respondent’s Preliminary Objections, ¶ 311(a).

<sup>760</sup> See ¶ 378 above.

“[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.”<sup>761</sup>

383. Faced with this insurmountable hurdle, Korea seeks to rely on Article 11.16(1). According to Korea, that article “embodies the general principle of international law that grants standing and relief only to an owner of a beneficial interest.”<sup>762</sup> This is hopeless. Article 11.16(1) embodies no such principle. It provides as follows:

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached (A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Section A, (B) an investment authorization, or (C) an investment agreement; and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach, [ . . . ]

384. Contrary to Korea’s strained and illogical reading, Article 11.16(1) merely provides a right for investors to make claims with respect to their “local” enterprises for losses suffered directly by those enterprises. Such claims are commonly known as

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<sup>761</sup> **CLA-19**, *Waste Management II v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 85.

<sup>762</sup> SOD, ¶ 510.

“derivative” claims, and are distinct from an investor’s right to claim for indirect losses. As commentators have noted, the article, based on the US’s model treaty, “creates a derivative right of action, allowing an investor to claim for losses or damages suffered not directly by it, but by a locally organized company that the investor owns or controls.”<sup>763</sup> Thus, far from imposing a qualification on the right to claim compensation for any loss to an investment that is “owned or controlled” by an investor pursuant to Article 11.28, the expression “on its own behalf” in Article 11.16(1)(a) is used to make provision for the right to bring a derivative claim “on behalf of an enterprise of the respondent” in 11.16(1)(b), which is not otherwise provided for under the Treaty.

385. The United States shares this understanding. In its Non-Disputing Party Submission in *SD Myers v. Canada*, it explained with respect to substantially similar provisions in the NAFTA (Articles 1116 and 1117) that these articles “serve distinct purposes,” with the first providing recourse to an investor for its own damage, and the second permitting an investor to bring a claim on behalf of an investment for loss or damage suffered by that investment.<sup>764</sup> Unsurprisingly, the United States has not suggested otherwise in its Non-Disputing Party Submission in the present case.
386. For these reasons, Korea’s argument remains utterly unsupported by the Treaty. Korea’s interpretation would require the Tribunal to read in a requirement that simply is not there, and that conflicts with the *lex specialis* provided for under Article 11.28 as to the relationship between a covered investor and the assets with respect to which relief can be sought.<sup>765</sup> As Prof. Douglas has observed, in these circumstances, “other possible contenders [for the requisite relationship between the claimant and its

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<sup>763</sup> **CLA-48**, L. Caplan and J.K. Sharpe: *Commentaries on Selected Model Investment Treaties*, in OXFORD COMMENTARIES ON INTERNATIONAL LAW (Chester Brown ed, OSAIL 2013), p. 825.

<sup>764</sup> **CLA-39**, *S.D. Myers, Inc. v. Government of Canada*, UNCITRAL, Submission of the United States of America, September 18, 2001, ¶ 6.

<sup>765</sup> As the tribunal made clear in **CLA-19**, *Waste Management II v. United Mexican States (II)*, ICSID Case No. ARB(AF)/00/3, Award, April 30, 2004, ¶ 85 (“[w]here a treaty spells out in detail and with precision the requirements for maintaining a claim, there is no room for implying into the treaty additional requirements, whether based on alleged requirements of general international law in the field of diplomatic protection or otherwise.”). See also **CLA-42**, *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. The Argentine Republic*, ICSID Case No. ARB/09/1, Award, July 21, 2017, ¶ 475 (“[t]he provisions of the Treaty supersede principles of customary international law unless those principles are general principles of international law in the nature of jus cogens.”).

investment] must be excluded. Among them is the suggested requirement of beneficial ownership.”<sup>766</sup> Korea’s attempt to introduce such a requirement where none exists must therefore be dismissed.

**2. Korea’s Authorities Provide No Support for Korea’s Purported Limitation on the General Partner’s Entitlement to Full Compensation**

387. No doubt recognizing that its limitation is nowhere to be found under the FTA, Korea, in the alternative, asserts that such a limitation arises as a “general principle of international law.” Korea has failed to establish the existence of any such “general principle,” and tribunals have rightly rejected attempts to limit compensation on this basis. Further, the limited authorities on which Korea relies are distinguishable on the facts.

a. Korea’s limitation is not recognized as a “general principle of international law”

388. Korea cannot establish that its limitation is a recognized “general principle of international law.” As the authorities examined by the Tribunal during the preliminary objections phase already established, the existence of any third party with an ultimate economic entitlement to the benefit of the investment is not relevant under international law in the absence of a specific requirement in the treaty. For example, the *Saba Fakes v. Turkey* tribunal noted that:

[T]he division of property rights amongst several persons or the separation of legal and beneficial ownership is commonly accepted in a number of legal systems, be it through a trust, a fiducie or any other similar structure. Such structures are in no way indicative of a sham or a fraudulent conveyance, and no such presumption should be entertained without convincing evidence to the contrary. The separation of legal title and beneficial ownership rights does not deprive such ownership of the characteristics of an investment within the meaning of the ICSID Convention or the Netherlands-Turkey BIT. Neither the ICSID Convention, nor the BIT make any distinction which could be

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<sup>766</sup> CLA-49, Zachary Douglas, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS (Cambridge University Press, 2009), pp. 190-191.

interpreted as an exclusion of a bare legal title from the scope of the ICSID Convention or from the protection of the BIT.<sup>767</sup>

389. Similarly, the tribunal in *Von Pezold v. Zimbabwe* confirmed that beneficial ownership was not a relevant requirement:

The next ground of challenge is that the von Pezold Claimants have not proved beneficial ownership. The Tribunal can find no requirement that beneficial ownership be proven in either the Swiss or German BITs, and sees no basis on which such a requirement should be read into the BITs. In the present case, the Tribunal finds that the Claimants have provided prima facie evidence of legal ownership which has not been rebutted and this is sufficient to establish jurisdiction.<sup>768</sup>

390. Likewise, in *Flemingo v Poland*, the tribunal held that:

With regard to Respondent's alternative submission that only "the ultimate beneficiary of the investment" would be entitled to the Treaty's protection, the Tribunal observes that, as between Claimant and the ultimate beneficiary of the investment, there are indeed three layers of companies (*see* paragraph 106 above). However, the Tribunal notes again that the Treaty did not expressly provide for the limitation of treaty protection to the ultimate beneficiary of the investment and, therefore, such a restriction cannot be read into it.<sup>769</sup>

391. In light of these and other authorities submitted by the parties, the Tribunal aptly observed in its Decision on Preliminary Objections that "there are two major schools of thought on the implications of a split between legal and beneficial ownership in international investment case law and scholarly writings."<sup>770</sup> A controversial, divisive doctrine, eschewed by eminent tribunals and scholarly writers (including, notably, Prof.

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<sup>767</sup> **CLA-40**, *Saba Fakes v. Republic of Turkey*, ICSID Case No. ARB/07/20, Award, July 14, 2010, ¶ 134.

<sup>768</sup> **CLA-27**, *Bernhard von Pezold and Others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, July 28, 2015, ¶ 314.

<sup>769</sup> *See also* **CLA-68**, *Flemingo Dutyfree Shop Private Limited v. Republic of Poland*, UNCITRAL Award, August 12, 2016, p. 65.

<sup>770</sup> Decision on Respondent's Preliminary Objections, ¶ 166.

Douglas<sup>771</sup>) can hardly be elevated to the level of a “general rule of international law.” The Tribunal should reject Korea’s argument for this reason alone.

- b. The decisions on which Korea relies are distinguishable on their facts and do not support the limitation Korea seeks to impose in this case

392. Korea rests its argument primarily on the Annulment Committee’s decision in *Occidental v Ecuador*.<sup>772</sup> As Mason submitted in the Preliminary Objections phase, the Annulment Committee’s decision does not support Korea’s argument. To the contrary, the Annulment Committee made clear that international law provides no bar to recovery of damages merely because a third party has a contractual interest deriving from the investment, as is the case for the General Partner here.
393. In *Occidental*, the claimant (“OEPC”) had transferred 40% of its interest in an oil block to a third party (“AEC”) pursuant to a farmout agreement, including “the complete bundle of “rights and obligations” which formed OEPC’s legal position under that Contract.”<sup>773</sup> OEPC was also obliged to act “as AEC shall direct ‘as if AEC were a party to [the claimant’s investment contract] owning legal title to a 40% interest in such Contract.’”<sup>774</sup> The purpose of this “nominee” arrangement was to circumvent restrictions on outright transfers absent ministerial consent under Ecuadorian law. The Committee concluded that “it was AEC who actually controlled a 40% share in the [investment],”<sup>775</sup> and that Occidental had already, in essence, been compensated for its 40% interest by receiving \$180 million for it when it had sold it to AEC by entering

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<sup>771</sup> **CLA-49**, Zachary Douglas, *THE INTERNATIONAL LAW OF INVESTMENT CLAIMS* (Cambridge University Press, 2009), pp. 190-191.

<sup>772</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015.

<sup>773</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 198.

<sup>774</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 208, citing to clause 2.01 of the Farmout Agreement.

<sup>775</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 205.

into the farmout agreement.<sup>776</sup> By that transaction, AEC became the “beneficial owner and controller” of the 40% interest.<sup>777</sup>

394. The General Partner and Limited Partner’s positions are clearly distinguishable from those of OEPC and AEC in *Occidental*. Unlike OEPC, which, as of the date of Ecuador’s treaty breaches, had relinquished control and beneficial ownership over 40% of its investment to AEC, the General Partner at all material times owned and controlled 100% of the Samsung Shares. Unlike AEC’s rights as the “beneficial owner and controller”<sup>778</sup> of the 40% interest transferred under the farmout agreement, the Limited Partner’s rights to a share of the economic benefits of the Samsung Shares were *contractual rights* deriving from the General Partner’s investment in the Samsung Shares. Specifically, under Cayman law, the General Partner was the only entity allowed to exercise any rights related to business and the assets and to engage in conduct of the business, including having the ultimate say over the Samsung Shares’ acquisition, exercising the power to vote at shareholder meetings, receiving dividends, and engaging in advocacy as a shareholder.<sup>779</sup> The Limited Partner, in contrast, was legally prohibited from any involvement in the decision-making process, and, under Cayman law, is not an entity and cannot own property.<sup>780</sup> The General Partner’s obligation to account to the Limited Partner for its economic interest deriving, in part, from the economic performance of the General Partner’s investment in the Samsung Shares was a matter arising out of, and governed by the Limited Partnership

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<sup>776</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 195.

<sup>777</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 258.

<sup>778</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 258.

<sup>779</sup> See Lindsay Report I, ¶¶ 17-18, 22-26; **CLA-22**, Cayman Islands: Exempted Limited Partnership Law, 2014 (“**ELP Law**”) ¶¶ 14, 16.

<sup>780</sup> See Lindsay Report I, ¶¶ 9(b), 19, CER-1; **CLA-22**, ELP Law § 16.

Agreement.<sup>781</sup> This is very different to AEC's rights as a "beneficial owner and controller"<sup>782</sup> over 40% of the investment in *Occidental*.

395. The *Occidental* Annulment Committee expressly recognized that international law would not have precluded Occidental's claim with respect to 100% of the damages had AEC's rights been merely contractual in nature. Specifically, the Committee distinguished between the rights of a third party owner of the investment on the one hand, and the rights of a party with a mere contractual entitlement to part of the benefit of the investment, such as a creditor, on the other. In the section titled "AEC is not a Creditor" of the Committee's Decision, the Committee reasoned as follows:

212. A corollary of the fact that AEC is a beneficial owner and controller of a 40% interest in the Farmout Property is that AEC cannot be considered as a creditor, holding a contractual right to claim from OEPC a share of the Block 15 oil production.

213. OEPC and AEC could have structured their relationship as a "cash against future oil transaction," as a simple sales agreement, where AEC agrees to pay an uncertain price (equivalent to a percentage of the expenditure in Block 15) and receives an uncertain quantity of oil in the future (the agreed percentage of whatever oil the Block produces).

214. The parties chose not to do so.

215. Instead, they agreed on the Farmout Agreements, which formalized a totally different transaction: a transaction where OEPC transferred to AEC beneficial ownership and control to a 40% interest in the Farmout Property, and AEC paid the agreed consideration for the ownership of such asset. As owner of an interest in the Farmout Property, AEC had the rights and obligations concomitant with its coownership status: AEC participated in the management of the Property, it was under an obligation to contribute to the expenditure of exploiting and developing Block 15 and it was entitled to collect its portion of the oil revenue generated.

396. Thus, the Committee considered it important to underline that had Occidental retained ownership and control over its investment by structuring its relationship as a contractual 'cash against future oil transaction,' Occidental would have been entitled to 100% of

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<sup>781</sup> See Lindsay Report I, ¶ 17.

<sup>782</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶ 258.

the compensation for Ecuador's expropriation. Because Occidental had chosen to divest 40% of its rights of ownership and control to AEC, the Annulment Committee considered that the tribunal lacked jurisdiction to award damages with respect to that 40% interest.

397. Unlike the claimant in *Occidental*, the General Partner did not divest part of its investment, and no third party became the "beneficial owner and controller" of Samsung Shares. Rather, the General Partner at all material times legally owned and controlled the investment in the Samsung Shares, and shared the risk and reward in the Samsung Shares.<sup>783</sup> As the Tribunal has already found, "[c]ontrary to a bare trustee, the General Partner is not disinterested in the Partnership's property but holds, in its own right, a beneficial interest in these assets which makes him a beneficial co-owner."<sup>784</sup> The rights of the Limited Partner arise under the Limited Partnership Agreement and are contractual rights to an economic interest equal to (i) the balance in the Capital Account of the Limited Partner divided by (ii) the aggregate balance in the Capital Accounts of all the Partners at any given time.<sup>785</sup> Because the balance in the Capital Accounts derives from the financial performance of the General Partner's investment in the Samsung Shares, among the General Partner's other investments, the Limited Partner's interest under the Limited Partnership Agreement derives in part from the financial performance and returns received by the General Partner from its investment in the Samsung Shares. Such rights of the Limited Partner are clearly akin to those of a creditor, or a contractual counter-party of the type of 'cash against future oil transaction' contemplated by the Annulment Committee in *Occidental*. They do not confer any right to control the Samsung Shares whatsoever, which at all times remained vested exclusively in the General Partner.

398. This critical distinction also underscores the reason why the General Partner's entitlement to damages for the loss in relation to the Samsung Shares would not offend against the policy underlying the Committee's decision to deny OEP's claim over the 40% interest it had sold to AEC, and the principle of international law derived from the

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<sup>783</sup> See *supra* ¶ 374.

<sup>784</sup> Decision on Respondent's Preliminary Objections, ¶ 186.

<sup>785</sup> **C-30**, Mason Capital Master Fund, L.P., Second Amended and Restated Limited Partnership Agreement (January 30, 2013), Article 2.12.

law of diplomatic protection on which the Committee’s decision was based. The Committee described that policy as follows:

263. Investors cannot expand the jurisdiction *ratione personae* of arbitral tribunals by executing private contracts with third parties.

264. Specifically, protected investors cannot transfer beneficial ownership and control in a protected investment to an unprotected third party, and expect that the arbitral tribunal retains jurisdiction to adjudicate the dispute between the third party and the host State. To hold the contrary would open the floodgates to an uncontrolled expansion of jurisdiction *ratione personae*, beyond the limits agreed by the States when executing the treaty.<sup>786</sup>

399. The General Partner’s claim does not offend against that policy for the simple reason that the General Partner never transferred beneficial ownership or control over its protected investment to a third party. Further, it is undisputed that the General Partner is the only party with a right to institute legal proceedings with respect to the Samsung Shares.<sup>787</sup> There is therefore no risk of double jeopardy or unjust enrichment here. To the contrary, if the General Partner’s claim were limited as Korea suggests, then Korea would unjustly escape its responsibility to effect full compensation.

400. The other decisions relied upon by Korea are similarly distinguishable and take Korea’s case no further. None of those cases even considered, still less provided any reasoned support for Korea’s proposed limitation on the General Partner’s right to full compensation:

- a. In *Blue Bank v Venezuela*, the tribunal found that the claimant, as a “bare trustee,” did not own or control the investment. Rather, the tribunal observed that “as a trustee holding the assets of the Qatar Trust for the ultimate benefit of third party interests, does not own the assets of the Qatar Trust, did not invest these assets for its own account and cannot, therefore, ground jurisdiction on

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<sup>786</sup> **RLA-21**, *Occidental Petroleum Corporation, et al. v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, November 2, 2015, ¶¶ 263-264.

<sup>787</sup> Both Cayman law experts agreed on this point, as noted in the Decision on Respondent’s Preliminary Objections, ¶ 174. See Lindsay Report I, ¶ 25; Legal Opinion of Rachael Reynolds, dated June 28, 2019, ¶ 33, **RER-1** (“**Reynolds, RER-1**”).

any investment made by it.”<sup>788</sup> In rejecting Korea’s reliance on *Blue Bank*, the Tribunal has already found that the General Partner owns and controls the Samsung Shares, and that “[c]ontrary to a bare trustee, the General Partner is not disinterested in the Partnership’s property.”<sup>789</sup>

- b. In *Impregilo v. Pakistan*, the tribunal decided issues of jurisdiction pertaining to a joint venture in which ownership (legal and beneficial), liability, and control were divided proportionally between joint venture members. The tribunal held that one of the joint venture parties did not satisfy the relevant jurisdictional requirements. In the present case, the General Partner’s legal and indivisible beneficial ownership extended to all of the Samsung Shares, as did the General Partner’s assumption of unlimited liability, and its exercise of complete and sole control over the investment.
- c. In *Mihaly v. Sri Lanka*, the tribunal found that: “[t]he existence of an international partnership, wherever and however formed, could neither add to nor subtract from, the capacity of the Claimant [ . . . ] to file a claim against the Respondent.”<sup>790</sup> Thus, far from supporting Korea’s case, the decision confirms that the entry into a partnership with respect to part of an asset does not subtract from an investor’s rights under a treaty or international law.
- d. *Zhinvali v Georgia* concerned a corporate entity seeking to bring the claims of its shareholders, who were not claimants,<sup>791</sup> and *PSEG v Turkey* concerned pre investment expenditure by non-claimants.<sup>792</sup> Neither case provides any support for the principle relied upon by Korea, and Korea conceded in its Reply on

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<sup>788</sup> **RLA-23**, *Blue Bank International & Trust (Barbados) Ltd. v. Venezuela*, ICSID Case No. ARB/12/20, Award, April 26, 2017, ¶ 172.

<sup>789</sup> Decision on Respondent’s Preliminary Objections, ¶ 186.

<sup>790</sup> **RLA-3**, *Mihaly International Corp. v. Sri Lanka*, ICSID Case No. ARB/00/2, Award, March 15, 2002, ¶¶ 22, 26.

<sup>791</sup> **RLA-4**, *Zhinvali Development Ltd. v. Republic of Georgia*, ICSID Case No. ARB/00/1, Award, January 24, 2003.

<sup>792</sup> **RLA-7**, *PSEG Global, Inc. and Konya Ingin Elektrik Uretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, January 19, 2007.

Preliminary Objections that the two cases do not even address the issue of beneficial ownership.<sup>793</sup>

- e. Finally, in *Khan Resources v. Mongolia*,<sup>794</sup> the tribunal rejected an attempt to claim 100% of the damages for an investment in which the claimant legally and beneficially owned a 75% interest. The tribunal did not consider the issue of split beneficial and legal ownership.

401. Korea's putative limitation should further be rejected because it would create a broad (and indeterminate) category of situations in which the State is free to expropriate or otherwise breach its undertakings to investors without the need to effect any reparation simply by reason of those investors' obligations to account for the benefit of the investment to third parties. This would include, for example, any secured lenders, any third party litigation funders, any partners under incorporated or unincorporated partnerships, or any parties with a contractual right to a return from the investment as the *Occidental Annulment Committee* contemplated.<sup>795</sup> Determining the scope of any such obligations and their impact on an investor's entitlement to relief would be unworkable and generate significant uncertainty for investors in their ability to rely on the treaty protections. It would also provide an unjustified and unfair basis for absolving a State from its responsibility under international law to effect full reparation for its injuries.

402. For these reasons, none of the authorities relied upon by Korea assist in supporting its plea for the recognition of the limitation on the General Partner's damages claim it seeks to put forward. In contrast, as explained above, there are myriad reasons of principle and policy why no such requirement applies. The Tribunal should reject Korea's attempt to reduce the damages claimable by the General Partner by reference

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<sup>793</sup> Reply on Preliminary Objections, ¶ 81.

<sup>794</sup> **RLA-50**, *Khan Resources Inc., Khan Resources B.V. and CAUC Holding Company Ltd. v. Government of Mongolia and Monatom Co., Ltd.*, PCA Case No. 2011-09, Award on the Merits, March 2, 2015, ¶¶ 50, 106, 384-400.

<sup>795</sup> See ¶ 395 above.

to a rule that does not exist under the FTA or international law, and that is unsupported by any sound reasons of principle or policy.

## **VII. REQUEST FOR RELIEF**

403. For the reasons set out in this Reply, without limitation and reserving Mason's right to supplement this request for relief in accordance with Rule 20 of the UNCITRAL Rules, Mason respectfully requests that the Tribunal render an award:

- a. DECLARING that Korea has breached the FTA in relation to Mason's investments;
- b. ORDERING that Korea pay damages and compensation to Mason for Korea's breaches of the FTA and international law in an amount of \$191,391,610.10;
- c. ORDERING that Korea pay compound interest on the compensation ordered as calculated in Section VI above at a rate of 5% per annum until the date of the award, compounded monthly, or at a rate and compounding period to be determined by the Tribunal;
- d. ORDERING that Korea pay compound interest on (b) and (c) from the date of the award until payment in full of the award at a rate of 5% per annum, compounded monthly, or at such rate and compounding period as the Tribunal determines will ensure full reparation;
- e. ORDERING further or alternatively to the General Partner's share of the relief requested under (b) to (d) that Korea pay damages and compensation to the General Partner for Korea's breaches of the FTA and international law in an amount of \$917,156 (alternatively, \$2,233,093), together with compound interest at a rate of 5% per annum as calculated in Section VI above, compounded monthly, or at a rate and compounding period to be determined by the Tribunal, until the date of the award, together with further compound interest calculated on the same basis until payment of the award or calculated at such rate and compounding period as the Tribunal determines will ensure full reparation;

- f. DECLARING that: i. the award of damages and interest is made net of applicable Korean taxes; and ii. Korea may not deduct taxes in respect of the payment of the award of damages and interest;
- g. ORDERING that Korea pay all of Mason's costs incurred in relation to the proceedings, including attorneys' fees and expenses, and the costs of the arbitration, and compound interest on all such costs; and
- h. ORDERING such other relief as the Tribunal may deem appropriate.

Respectfully submitted on April 23, 2021



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